No. _____

In The
Supreme Court of the United States

JAMES R. FISHER AND ODYSSEY RESIDENTIAL HOLDINGS, L.P.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Respondent.

UNITED STATES AND BRIAN POTASHNIK,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3771(d)(3), a crime victim seeking to enforce a right under the Crime Victims' Rights Act "may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith. . . ." Does this provision entitle crime victims to ordinary appellate review of their claims (as the Second, Third, Ninth, and Eleventh Circuits have held) instead of only limited mandamus review for "clear and indisputable error" (as the Fifth Circuit held below, joining the Sixth, Tenth, and D.C. Circuits)?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a criminal prosecution in the U.S. District Court for the Northern District of Texas.

Petitioners, who sought restitution in the courts below, are James R. Fisher and Odyssey Residential Holdings, L.P. Odyssey Residential Holdings, L.P., is a privately-held company with no parent corporation.

Because this is a mandamus action, the United States District Court for the Northern District of Texas is the nominal respondent.

The real parties in interest are the United States and Brian Potashnik, the defendant in the underlying criminal case from whom Fisher sought restitution.

The underlying criminal case involves multiple count indictments naming as defendants Brian and Cheryl Potashnik, Ronald W. Slovacek, former Dallas Mayor Pro Tem Don Hill, consultant Sheila Farrington, State Representative Terri Hodge, Black State Employees Association of Texas director Darren Reagan, James Fantroy, D'Angelo Lee, Jack Potashnik, Gladys Hodge, Allen McGill, Jibreel Rashad, Rickey Robertson, Andrea Spencer, Kevin Dean and John Lewis.

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PETITION FOR WRIT OF CERTIORARI

Petitioners James R. Fisher and Odyssey Residential Holdings, L.P. (hereinafter "Fisher" or "the victim") respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The unreported opinion of the Fifth Circuit for which review is sought is reprinted in App. 1-4.

The transcript of district court's sentencing hearing is found in App. 5-47, and the judgment ultimately entered is found in App. 48-59.

JURISDICTION

The decision of the Fifth Circuit denying Fisher's petition was entered on January 10, 2011. Fisher filed a timely petition for rehearing en banc on January 21, 2011. The Fifth Circuit called for a response, and then denied the petition on March 17, 2011. App. 60-62. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This petition involves provisions in the Crime Victims' Rights Act, codified in Title 18. Section 3771(a)(1) provides "[a] crime victim has the following rights: . . . (6) The right to full and timely restitution as provided in law."

Section 3771(b)(1) provides: "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)."

Section 3771(d)(3) provides:

> 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.

STATEMENT OF THE CASE

The Crime Victims' Right Act (CVRA), 18 U.S.C. § 3771, gives crime victims a series of enforceable rights in the federal criminal justice process, including "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). To guarantee enforcement of these rights, the CVRA provides that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. § 3771(b)(1). It further provides that victims can assert their rights in the district court. 18 U.S.C. § 3771(d)(3). If relief is denied, "the movant may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

This case presents the question whether the CVRA's appellate enforcement provision entitles crime victims to ordinary appellate review of district court decisions or merely deferential mandamus review of those decisions for clear and indisputable errors – an issue over which the courts of appeals are deeply divided.

This case arose when Fisher, a real estate developer in the Dallas, Texas, area, began to be extorted to provide favors to friends of Dallas City Council members. Rather than provide those favors to obtain City Council approvals, Fisher reported to the FBI what was happening. Thereafter, Fisher assisted the FBI as they uncovered a broad conspiracy to bribe Dallas City Council members to advance the business interests of a competitor of Fisher, Brian Potashnik.

Ultimately federal prosecutors filed a lengthy indictment for conspiracy to commit bribery and related charges. The indictment alleged that Dallas City Council Member Don Hill would provide assistance to affordable housing developer Potashnik, who was seeking City Council approval for tax credit projects. The payoff to Hill was made through cash payments and other means, including the award of construction contracts to one of Hill's associates. After filing the indictment, the prosecutors notified Fisher that he was a "crime victim" in the Potashnik case and that he had protected rights under the Crime Victims' Rights Act.

Shortly before he was to go to trial, Potashnik reached a plea agreement with the Government. He pled guilty to count 10 of the indictment, which charged conspiracy to bribe agents of a local government receiving federal benefits, in violation of 18 U.S.C. § 371 (and §§ 666(a)(1)(B) and 666(a)(2)). After Potashnik pled guilty, on October 14, 2010, Fisher filed a motion seeking to enforce his CVRA right "to full and timely restitution as provided in law." 18

U.S.C. § 3771. Fisher explained that under Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, an award of restitution was mandatory for a property offense, including an offense of fraud and deceit like that committed by Potashnik. Fisher also submitted a detailed victim impact statement and supporting financial documentation requesting $1,893,671.99 in restitution. App. 85-89. The losses included (for example) $200,000 in attorneys' fees for providing assistance to the Government during the lengthy investigation of the case, as well as sums Fisher expended to have housing projects competing with Potashnik's prepared for City Council review.

At the sentencing hearing on December 17, 2010, Fisher testified under oath to the losses caused by Potashnik's crime. Fisher first explained how he knew that reporting the crime to the FBI would subject him to serious negative publicity, but that he wanted to do the right thing and fully cooperate with law enforcement. As a result of his cooperation, Fisher suffered substantial costs, including attorneys' fees he incurred to collect information for the FBI. Fisher also invested substantial sums in pursuing projects that he would never have invested in had he been aware of the conspiracy. App. 11-30.

In response, the Government acknowledged that Fisher's cooperation with law enforcement was praiseworthy and that, in some broad sense, he had been victimized by the conspiracy. But the Government argued that the harm was not sufficiently direct to warrant restitution under the MVRA. App. 30-34.

Potashnik's counsel also argued that the losses suffered by Fisher were not sufficiently connected to the conspiracy to warrant restitution. App. 34-40.

The district court then denied Fisher's restitution request in an oral ruling from the bench. The court first ruled that the MVRA was not applicable to Potashnik's sentencing because "bribery is not a property crime as defined by the statute." App. 46. In the alternative, the district court also ruled that Fisher had not been directly and proximately harmed by the conspiracy. App. 47. The single sentence ruling from the bench did not provide any explanation for the court's decision. Nor did it contain any factual findings. Finally, the district court rejected Fisher's argument that the plea agreement entitled him to restitution. App. 47. The district court then sentenced Potashnik from the bench to fourteen months in prison, a $50,000 fine, and a forfeiture of $1,250,000.

On December 22, 2010, defendant Potashnik filed for reconsideration of the sentence.

On December 23, 2010, the district court denied the motion for reconsideration of the sentence. On that same day, the district court entered the final judgment in the case. App. 48.

Under the CVRA, a crime victim "may make a motion to re-open a plea or a sentence . . . if . . . the victim petitions the court of appeals for a writ of

mandamus within 14 days. . . ." 18 U.S.C. § 3771(d)(5).[1] Within 14 days, on January 6, 2011, Fisher filed a timely CVRA petition for review of the district court's sentencing judgment pursuant to 18 U.S.C. § 3771(d)(3). App. 92-142.

With regard to the standard of review for his petition, Fisher noted that the courts of appeals were divided. Fisher acknowledged it was the "settled law of the [Fifth] Circuit" that crime victims received only deferential mandamus review, based on *In re Dean*, 527 F.3d 391 (5th Cir. 2008). App. 131-32. Nonetheless, Fisher called for the Fifth Circuit to follow the approach of other circuits and give him ordinary appellate review. App. 130.

On the merits, Fisher challenged the district court's legal conclusion that the MVRA was inapplicable to Potashnik's bribery conviction. Fisher contended that conspiracy to commit bribery was an offense "committed by fraud or deceit" so as to fall

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[1] Whether this 14-day requirement applies to Fisher's challenge to district court's denial of restitution is not immediately clear, because 18 U.S.C. § 3771(d)(5) provides that "[t]his paragraph does not affect the victim's right to restitution. . . ." Out of an abundance of caution, Fisher simply complied with the 14-day requirement. Of course, the 14-day clock for filing for review of the sentence began ticking when the district court denied the defendant's motion for reconsideration and actually entered the final sentencing judgment in the case on December 23, 2010. *Cf.* Fed. R. App. P. 4(b)(1)(A) (defendant's notice of appeal due within 14 days after "the entry of either *the judgment* or the order being appealed").

within the MVRA's coverage under 18 U.S.C. § 3663A(c)(1)(A)(ii). App. 109-13. Fisher also challenged the district court's ultimate conclusion that he was not a "victim" of Potashnik's offense. Fisher argued that this was a legal issue subject to de novo review, App. 133, and that the district court had ignored compelling evidence of harm in summarily ruling that he was not a victim of the conspiracy. App. 105-09.

Without obtaining a response from the Government or Potashnik, on January 10, 2011, a panel of the Fifth Circuit (Judges Wiener, Prado, and Owen) denied Fisher's petition. The panel first cited the Circuit's earlier decision in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), holding that a crime victim proceeding under the CVRA must satisfy the common law requirements for mandamus relief, namely that "[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.'" App. 2 (*citing Dean*, 527 F.3d at 394).

The panel concluded that Fisher had satisfied both the first and third prongs of this three-part test – that is, that he had no other means to attain restitution and that it would be appropriate to give him relief if he was legally entitled to restitution. The panel also concluded, however, that Fisher had "failed to satisfy the *heavy* burden required by the second

requirement." *Id.* (emphasis added). The panel never decided whether the district court had erred in denying Fisher restitution. Rather, the panel said only that there was evidence presented at the sentencing hearing "that, when reasonably construed, *could* lead to the conclusion that the amount of restitution claims was too speculative to label [the victim] directly or proximately harmed by the actions of Potashnik." App. 3 (emphasis added). After tersely recounting the evidence, the panel explained that "[w]e will not reweigh these arguments in our *deferential review*, but rather note that these are permissible reasons for the district court to determine that [Fisher was] not [a] victim[ ] of Potashnik's crime because the harm is too speculative to be considered direct or proximate." *Id.* (emphasis added).

Based on the standard of review, the panel also rejected Fisher's argument that the district court had misconstrued the plea agreement as not requiring restitution. The panel would not say that the district court was correct, but only that "[w]e are satisfied that the district court's construction of the plea agreement *is permissible under our standard of review*." App. 3-4 (emphasis added).

On January 21, 2011, Fisher filed a timely petition for rehearing en banc, asking the full Fifth Circuit to reconsider *Dean* and the standard of review for CVRA petitions. App. 143-65. While the Court

called for a response, it ultimately denied the petition for rehearing en banc on March 17, 2011. App. 60-62.

This petition follows.

REASONS FOR GRANTING THE PETITION

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law involving the protection of crime victims' rights in the federal criminal justice system. This case presents an ideal vehicle both to resolve the issue and to clarify that the plain language of sections 3771(b)(1) and 3771(d)(3) requires courts of appeals to extend to crime victims the same appellate protections that other litigants receive.

I. The Courts of Appeals Are Deeply and Intractably Divided Over the Proper Standard of Review for Crime Victims' Petitions Under the Crime Victims' Rights Act.

In October 2004, Congress passed and the President signed into law the Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2251 (codified at 18 U.S.C. § 3771). Congress passed the CVRA to give crime victims a series of enforceable "rights" in the federal criminal justice process. 18 U.S.C. § 3771(a). Congress designed the CVRA to be "the most sweeping federal victims' rights law in the history of the nation." Hon. 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, 582 (2005). Among the rights that the Act extends to crime victims is the right that Fisher asserted below: "the right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).

The federal courts must enforce all of these rights. The CVRA directs that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1). And it further provides that if the district court denies an asserted right of a victim (or denies a movant's argument that he is a protected "crime victim"), then the victim (or the movant) can seek review in the courts of appeals: "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 *shall take up and decide* such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3) (emphasis added).

Congress designed the CVRA's appellate review provision to give crime victims broad protection in the court of appeals, 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." 150 CONG. REC. 7294, 7304 (Apr. 22, 2004) (statement of Sen. Kyl). Congress accordingly did not

intend for discretionary standards of mandamus review to apply under the CVRA, explaining: "[W]hile mandamus is generally discretionary, this provision means that court must review these cases. . . . This provision ensures review and encourages courts to broadly defend the victims' rights." *Id.* (statement of Sen. Feinstein).

Despite these clear statements – both in the statutory language that courts of appeals shall "take up and decide" crime victims' petitions and in the authoritative legislative history – the Courts of Appeals are deeply, increasingly, and intractably fractured over the proper construction of the appellate provision. As a majority of the circuits have specifically acknowledged, a clear split of authority has developed in the circuits over whether crime victims receive ordinary appellate review of their CVRA claims or merely deferential review of those claims.

A. Four Courts of Appeals Have Ruled that Crime Victims Receive Ordinary Appellate Review Under the CVRA.

The Second, Ninth, and Eleventh Circuits have all afforded crime victims ordinary appellate review of their claims under the CVRA in published opinions, and the Third Circuit has done the same in an unpublished opinion.

1. The Second Circuit.

In *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555 (2d Cir. 2005), the Second Circuit became the first circuit to apply the CVRA's appellate review provision. It concluded that under "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." The Circuit noted that ordinarily a writ of mandamus is an "extraordinary remedy," and accordingly, "mere error, even gross error in a particular case . . . does not suffice to support issuance of the writ." *Id.* at 562 (internal quotations omitted). In contrast to this standard, however, the Second Circuit observed that a provision in the CVRA, 18 U.S.C. § 3771(d)(5), allows a victim to "make a motion to reopen a plea or sentence . . . if . . . the victim petitions the court of appeals for a writ of mandamus within 14 days." In light of Congress' recognition that crime victims would routinely be seeking such review, "[i]t is clear, therefore, that a [crime victim] seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." 409 F.3d at 562.

Having concluded that "crime victims, as petitioners for mandamus, have a right to appellate review," the Second Circuit turned to "the appropriate standard for that review." *Id.* After reviewing various

possibilities, the Circuit concluded that an "abuse of discretion standard" was appropriate. *Id.* at 563. Applying that standard to the case before it, the Second Circuit determined that the district court had not abused its discretion in denying restitution to a crime victim.

The Second Circuit has since followed *In re Huff* in other recent cases, applying an abuse of discretion standard rather than traditional mandamus standards to crime victims' CVRA petitions. *See, e.g., In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85 (2d Cir. 2009); *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009).

2. The Ninth Circuit.

The Ninth Circuit has likewise held that rigorous mandamus standards do not apply to crime victims petitioning under the CVRA. In *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit noted that "[w]e normally apply strict standards in reviewing petitions for a writ of mandamus, in large part to ensure that they not become vehicles for interlocutory review in routine cases." *Id.* at 1017. In the Ninth Circuit, the standards for mandamus relief are set by *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977), and include consideration of such factors as whether the district court clearly erred, and whether the petitioner has any other means to vindicate his rights. The Ninth Circuit in

Kenna, however chose not to "balance the usual *Bauman* factors because the CVRA contemplates active review of orders denying victims' rights claims even in routine cases." *Id.* The Circuit explained:

> The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, . . . and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

Id. The Circuit went on to conclude that it must issue a CVRA writ "whenever we find that the district court's order reflects an abuse of discretion or legal error." *Id.* The Circuit ultimately concluded that the district court had committed an error of law in not allowing the crime victim to allocute during the defendant's sentencing and accordingly granted the writ.

In later cases, the Ninth Circuit has followed *Kenna* and given crime victims ordinary appellate review in CVRA cases rather than strict mandamus review. For example, in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), the Circuit granted a CVRA petition filed by the Government on behalf of family members of several murder victims seeking to attend a trial.[2]

[2] Under the CVRA, the Government is given standing to pursue claims on behalf of crime victims. *See* 18 U.S.C. § 3771(d)(1).

Id. at 1140. Likewise, in a follow-on case to the first *Kenna* decision, in *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006), the Circuit applied normal appellate standards, asking whether the district court abused its discretion or committed legal error. *Id.* at 1137 (*citing Kenna v. U.S. District Court*, 435 F.3d at 1017). The Circuit, however, ultimately found no abuse of discretion in a district court's decision to withhold a pre-sentence report from a victim. 453 F.3d at 1137.

3. The Eleventh Circuit.

The Eleventh Circuit has likewise given crime victims traditional appellate review through a CVRA mandamus petition. In *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), a number of investors who had lost money in a bank fraud filed a CVRA petition seeking review of a district court ruling that they were not protected "crime victims" under the CVRA. Ordinarily in the Eleventh Circuit, a mandamus petition can only be granted where "(1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available." *Cash v. Barnhart*, 3327 F.3d 1252, 1258 (11th Cir. 2003). While the Eleventh Circuit did not explicitly set out its standard of review, it treated the CVRA petition in *In re Stewart* quite differently than an ordinary mandamus petition. In granting the petition, the Circuit first noted that "[t]he [CVRA] mandamus proceeding before us is a free standing cause of action" brought by putative crime victims. *Id.*

at 1288. The Circuit specifically observed that "the proceeding is not an appeal of a district court judgment, nor is it an interlocutory appeal of an intermediate order." *Id.* The Circuit then proceeded to review the district court's determination without deference, concluding that the district court had simply drawn the wrong conclusion. *Id.* at 1288-89. The Circuit then granted the writ, directing the district court to recognize petitioners as "crime victims." The Circuit thus gave ordinary appellate review to the petitioners.[3]

In a recent CVRA case, the Circuit acknowledged that in *Stewart* it "did not explicitly indicate the standard we used in setting aside the district judge's ruling that petitioners were not CVRA victims." *In re Stewart*, ___ F.3d ___, No. 10-12344, 2011 WL 2023457 at *2 (11th Cir. May 25, 2011). The Circuit, however, found it unnecessary to revisit the issue, because under any standard of review the petitioners in that case were not entitled to relief. *Id.* at *4.

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[3] In their briefs in the case, both the Government and defendant argued for deferential mandamus review. Although the Eleventh Circuit did not directly discuss the standard of review it was applying, it is clear (as other courts have recognized) that the Circuit ultimately rejected those arguments and granted relief "without asking whether [the] victim[s] had a clear and indisputable right to relief" as is ordinarily required for mandamus. *United States v. Monzel*, No. 11-3008, ___ F.3d ___, 2011 WL 1466365 at *3 (D.C. Cir. Apr. 19, 2011).

4. The Third Circuit.

In an unpublished decision, the Third Circuit has concluded that victims petitioning under the CVRA are not required to satisfy demanding mandamus standards. Instead, the Circuit has held that for CVRA petitions, "mandamus relief is available under a different, less demanding, standard under 18 U.S.C. § 3771 in appropriate circumstances." *In re Walsh*, 229 Fed. Appx. 58, 61, 2007 WL 1156999 at *2 (3rd Cir. 2007) (*citing* Second and Ninth Circuit opinions). In a more recent unpublished decision, the Circuit found no need to address the issue because even under the "more expansive" standard, the victim was not entitled to relief. *In re Zackey*, 2010 WL 3766474 at *1 (3rd Cir. 2010).

B. Four Courts of Appeals Have Ruled that Crime Victims Receive only Limited Mandamus Review Under the CVRA.

In conflict with the Second, Ninth, and Eleventh Circuits' published decisions (and the Third Circuit's unpublished decision), the Fifth, Sixth, Tenth, and D.C. Circuits have held that crime victims are not entitled to ordinary appellate protection of their rights, but instead receive only deferential review of district court decisions for "clear and indisputable" error.

1. The Tenth Circuit.

In *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), two parents whose daughter was murdered sought review through a CVRA mandamus petition of a district court decision that their daughter was not a "victim" of a defendant's illegal sale of the murder weapon. The district court found that even though the defendant had illegally sold the weapon to the murderer, the daughter was not "directly and proximately" harmed by that crime. The parents filed a petition for review under the CVRA and cited Second and Ninth Circuit decisions as precedents for giving them ordinary appellate review of their claims. The Tenth Circuit rejected those decisions: "We respectfully disagree, however, with the decisions of our sister circuit courts." *Id.* at 1124 (*disagreeing with In re W.R. Huff Asset Mgmt Co., LLC*, 409 F.3d 555, 562-63 (2d Cir. 2005); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006)).

Instead of following the Second and Ninth Circuits, the Tenth Circuit focused on the term "mandamus" in the CVRA. The Circuit believed that where "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. . . ." *Antrobus*, 519 F.3d at 1124 (internal quotation omitted). The Circuit accordingly proceeded to review the parents' claim "under traditional mandamus standards." *Id.* Under these standards, the parents were required to show that their right to a

writ was "clear and indisputable." *Id.* (*citing Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)). The Circuit then acknowledged that, even under that demanding standard, "[t]his is a difficult case. . . . [B]ut we cannot say that the district court was clear wrong in its conclusion." *Id.* Because the parents had failed to show that their right to a writ was "clear and indisputable," *id.* at 1126, the Circuit denied relief. One judge concurred to express his view that evidence proving the parents' arguments "may well be contained in the government's files," but "sadly, the Antrobuses were not allowed a reasonable opportunity to make a better case." *Id.* at 1127 (Tymkovich, J., concurring).

The Tenth Circuit has since applied the strict mandamus standard of review in other CVRA cases. For example, in *In re Antrobus*, 563 F.3d 1092 (10th Cir. 2009), the Circuit explained that its earlier decision "held that a CVRA mandamus petition is subject to the traditional standard for seeking mandamus relief; that is, that the petition must show a 'clear and indisputable' right to relief." *Id.*[4]

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[4] The entire saga of the *Antrobus* case is reviewed in 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, 601-14 (2010) ("the Supreme Court should review the circuit split that the Tenth Circuit's decision created, and side with those circuits that have given crime victims the full measure of protection that Congress intended").

2. The Fifth Circuit.

Shortly after the Tenth Circuit's initial ruling in *Antrobus*, the Fifth Circuit addressed the same issue. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), numerous victims of a horrific oil refinery explosion sought review of a district court's CVRA decision. The district court had concluded that the Government had not violated the victims' "right to confer" with prosecutors, 18 U.S.C. § 3771(a)(5), when it reached a secret plea agreement with the defendant company. The victims petitioned under the CVRA, arguing for ordinary appellate review. The Fifth Circuit acknowledged "[t]wo circuits agree with the victims." *Id.* at 394 (*citing Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005)). The Fifth Circuit recognized, however, that the Tenth Circuit had taken the opposite position that mandamus standards apply. The Fifth Circuit concluded: "We are in accord with the Tenth Circuit [rather than the Second and Ninth Circuits] for the reasons stated in [the Tenth Circuit's] opinion." 409 F.3d at 394.

Applying the discretionary mandamus standard of review, the Fifth Circuit then went on to find that the victims' rights under the CVRA had been violated in the case when the district court had used *ex parte* proceedings to conceal the existence of the plea agreement from the victims. Because of deferential mandamus standards, however, the Circuit refused to grant any relief. Instead, the Circuit noted that it could withhold discretionary mandamus relief if a

writ is not "appropriate under the circumstances." *Id.* at 395. "The decision whether to grant mandamus is largely prudential," explained the Circuit. *Id.* The Circuit remanded the case to the district court for further proceedings.[5]

The Fifth Circuit has since applied its restrictive decision in *Dean* in other cases. For example, in *In re Amy Unknown*, 591 F.3d 792 (5th Cir. 2009), the Circuit considered a CVRA petition from a victim of child pornography seeking restitution for psychiatric expenses and other losses. Applying strict mandamus standards, the Circuit concluded that "it is neither clear nor indisputable that [the victim's] contentions regarding the [restitution] statute are correct." *Id.* at 794-95. Accordingly, the Circuit denied relief. One judge dissented, concluding that the district court's failure to award restitution under a mandatory child pornography restitution statute "amounted to a clear and indisputable error that should be corrected by a writ of mandamus." *Id.* at 795 (Dennis, J., dissenting).

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[5] The correctness of the Fifth Circuit's decision to apply the traditional mandamus standard of review has been the subject of scholarly debate. *Compare* Danielle Levine, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U.L. REV. 335, 356 (2010) (defending *Dean*, but noting that if the Circuit had applied a different standard of review the victims might have prevailed) *with* 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, 168-75 (2011) (criticizing *Dean*).

On the victim's petition for rehearing, the Fifth Circuit later reversed itself. The Circuit began by

> paus[ing] to note, as part of the jurisdictional conundrum, that our sister circuits are far from united in the standard to be applied. At least two circuits have applied lower standards of review when faced with a mandamus petition under the CVRA. *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006) ("we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error"), *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562-63 (2d Cir.2005) (invoking § 3771(d)(3), the mandamus review provision, but concluding that "the district court's determination under the CVRA should be reviewed for abuse of discretion."). These standards appear to be more amenable to reversing the district court than the general mandamus standard. *Cf. In re the City of New York*, 607 F.3d 923, 928-29 (2d Cir.2010) (applying *Cheney*'s three-part test), *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir.2010) (*citing Cheney* and applying an equivalent five-part test from Ninth Circuit precedent).

In re Amy Unknown, 636 F.3d 190, 197 (5th Cir. 2011). The Court went on to conclude, however, that the district court had committed clear and indisputable error in denying the victim restitution, and accordingly it granted relief using traditional mandamus standards. *Id.* at 201-02. In the course of that

ruling, one judge stated specifically that the standard of review issue had important consequences, because "given the traditionally narrow scope of mandamus relief," limiting the CVRA to such review might turn the statute into a "mere formality." *Id.* at 197 (Jones, J., concurring).[6]

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[6] Judge Jones also discussed the complex issues swirling around the question of whether a crime victim could avoid the limitations inherent in the strict mandamus standard of review by instead filing a direct appeal. Judge Jones noted that the circuits were deeply divided on this issue as well. *See* 636 F.3d at 194-95 (Jones, J., concurring). *Compare United States v. Monzel*, ___ F.3d ___, 2011 WL 1466365 (D.C. Cir. 2011) (no victim right to appeal sentence under CVRA); *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008) (same); *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010) (same) *with United States v. Perry*, 360 F.3d 519 (6th Cir. 2004) (allowing victim appeal of order concerning restitution lien); *United States v. Kones*, 77 F.3d 66, 68 (3rd Cir. 1996) (allowing victim to appeal order denying restitution); *In re Siler*, 571 F.3d 604 (6th Cir. 2009) (allowing victim to take direct appeal under CVRA); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (allowing rape victim to appeal adverse "rape shield" ruling).

In this case, Fisher did not file a direct appeal along with his CVRA petition because he believed he was entitled to relief under the mandamus standard of review and that, in any event, the Fifth Circuit should give him ordinary appellate review of his CVRA petition. Accordingly, before this Court, he offers as the single "question presented" only the issue of the proper standard of review for a CVRA mandamus petition. This question is, standing alone, an important one on which the Courts of Appeals are badly divided. The Court might conclude, however, that it would like to consider, in addition, the issue of whether a crime victim can take an ordinary appeal. This question is available for review in this case, as the Court below concluded that Fisher "had no other adequate means to attain the desired

(Continued on following page)

The Fifth Circuit has also obviously applied the narrow mandamus standard of review set out by *Dean* in this case – prompting this petition for review. And after the ruling in this case, the Fifth Circuit once again applied *Dean* to deny another restitution request by Fisher in a case involving another defendant. *See In re Fisher*, ___ F.3d ___, No. 11-10452, 2011 WL 1744189 (5th Cir. May 9, 2011) (denying restitution from defendant Ronald W. Slovacek), *petn. for panel rehearing and for reconsideration pending.*

3. The Sixth Circuit.

In re Simons, 567 F.3d 800 (6th Cir. 2009), the Sixth Circuit acknowledged the circuit split on the standard of review for CVRA petitions. *Id.* at 801. The Circuit found it unnecessary to resolve the issue in that case, however, because the victim was entitled to relief for the district court's improper interference with his right to restitution even under the "stricter" mandamus standard. *Id.*

The next year, the Sixth Circuit determined to side with those circuits that had adopted the narrow traditional mandamus standard of review. *In re Acker*, 596 F.3d 370 (6th Cir. 2010), the Sixth Circuit

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relief," App. 2, because he apparently could not appeal. If the Court would like to consider the direct appeal issue along with the mandamus issue, it is of course free to enlarge the questions presented. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

said that it found the reasoning of the Tenth Circuit's decision in *In re Antrobus* to be "persuasive." *Id.* at 372. Accordingly, the Sixth Circuit said it would grant a crime victim relief only for a "compelling justification." *Id.* It denied relief to victims who argued that they had been denied an opportunity to confer with prosecutors about plea negotiations because the claim was "uncertain." *Id.* at 373.

The Sixth Circuit applied its strict mandamus standard in *In re McNulty*, 597 F.3d 344 (6th Cir. 2010). The Circuit explained that: "because mandamus is a discretionary remedy, a Court may decline to issue the writ if it finds that it would not be appropriate under the circumstances even if the petitioner has shown he is clearly and indisputably entitled to it." *Id.* at 348. The Circuit concluded that the putative "victim" had not shown a sufficient basis for overturning the district court's finding that he was not a "victim" of the defendant's crime.

4. The D.C. Circuit.

The most recent decision to analyze the circuit split is *United States v. Monzel*, ___ F.3d ___, 2011 WL 1466365 (D.C. Cir. Apr. 19, 2011). The D.C. Circuit acknowledged that "[t]here is a circuit split on the standard of review for mandamus petitions brought under the CVRA. Three circuits apply the traditional mandamus standard urged by Monzel and the government. Four do not." *Id.* at *2 (*citing* cases discussed in this petition). The D.C. Circuit decided to

make the circuit split four-to-four, siding with those circuits that apply the deferential mandamus standard of review. The Circuit ruled that "[w]e think the best reading of the statute favors applying the traditional mandamus standard." *Id.* at *4.

C. Two Courts of Appeals Have Acknowledged the Competing Positions on the Standard of Review Without Taking a Position.

In *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010), the First Circuit acknowledged the circuit split on the CVRA's standard of appellate review. The Circuit concluded in that case, however, that the victims "would not be entitled to mandamus relief regardless of whether we applied the exacting standard of review governing traditional petitions for the writ or the more lenient abuse of discretion standard which some courts have found appropriate when considering crime victims' petitions under the CVRA." *Id.* at 56 (internal citations omitted).

In two cases, the Fourth Circuit acknowledged the difference between the traditional mandamus standard of review and the approach taken by the Second and Ninth Circuits. The Court, however, found it unnecessary to resolve the issue because even applying "the more relaxed abuse of discretion standard" the victims were not entitled to any relief. *In re Brock*, 262 F. App'x 510, 512 (4th Cir. 2008); *see also In re Doe*, 264 F. App'x 260, 262 (4th Cir. 2007).

D. The Courts of Appeals Are Incapable of Resolving This Conflict on a Frequently Recurring and Important Issue of Law.

The decisions just discussed show that courts of appeals have repeatedly had to address the question of the standard of review for a crime victim's CVRA petition. That is hardly surprising. As crime victims attempt to assert their protected rights in the federal criminal justice system, they have naturally sought review of adverse district court decisions in the nation's appellate courts. The first issue that courts of appeals must address in reviewing those petitions is the proper standard of review.

Beyond the existence of a broad circuit split, what the courts of appeals' decisions also reveal is that the decisions are not converging on a consistent approach. To the contrary, the circuits readily acknowledge the split in authority, but simply take different views. Most recently, for example, the D.C. Circuit chose to make the split (by its own count) four-to-four. 2011 WL 1466365 at *3.

There is also no need for further percolation of the issues. The Courts of Appeals have distilled two clearly competing approaches. In the Second, Third, Ninth, and Eleventh Circuits, crime victims receive ordinary appellate review – i.e., review for "abuse of discretion." *See In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009) (discussing application of the abuse of discretion standard to a CVRA petition). In the

Fifth, Sixth, Tenth, and D.C. Circuits, crime victims receive only limited mandamus review – i.e., review for only "clear and indisputable" error. 2011 WL 1466365 at *5. All that remains is for this Court to determine which of the two competing interpretations of the CVRA is correct.

Finally, the standard of review issue is extremely important. Appellate protection of crime victims' rights is a vital part of the congressional scheme. In passing the CVRA, Congress intended to give crime victims expansive rights throughout the criminal justice process including rights in the nation's appellate courts. *See infra* 37-38. The widespread, acknowledged conflict among the circuits on the threshold issue of the standard for appellate review of crime victims' claims is thwarting effective implementation of the CVRA. In the four circuits that refuse to give crime victims ordinary appellate protection of their rights, the CVRA has become largely unenforceable. In the new and evolving field of crime victims' rights, it will be the rare crime victim who can establish "clearly and indisputably" that a district court has erred in handling a crime victim's issue. As one judge has explained, "given the traditionally narrow scope of mandamus relief," limiting the CVRA to such review has the effect of turning the important appellate remedy into a "mere formality." *In re Amy Unknown*, 636 F.3d at 197 (Jones, J., concurring).

In sum, "[t]his conflict among the circuit courts on such an important issue merits consideration . . . by the U.S. Supreme Court. . . ." David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 672 (2008).

E. This Case Presents the Right Opportunity for Resolving the Conflict.

This case presents a good vehicle for addressing the standard of review question, because the Fifth Circuit specifically and repeatedly relied upon the narrow standard of review as the basis for its decision.

The Fifth Circuit began by explaining it was denying relief "[b]ecause our precedent requires us to apply a *highly deferential standard* when reviewing petitions for writs of mandamus, even under the statutes at issue here." App. 1 (emphasis added); *see also id.* at 2 (noting "heavy burden" to obtain mandamus relief; "we perceive no clear and indisputable error" in district court decision). The Circuit only half-heartedly defended the district court's conclusion that Fisher was not a "victim"; thus, the Circuit ventured only the tepid assertion that there was evidence that "could lead" to the conclusion reached by the district court. App. 3. The Circuit stated "[w]e will not reweigh these arguments in our *deferential review*, but rather note that these are permissible reasons for the district court to determine that [Fisher]

[was] not [a] victim[ ] of Potashnik's crime. . . . *Again, we stress that this result is compelled by our deferential review of writs of mandamus*." App. 3 (emphases added). Turning finally to Fisher's argument that the plea agreement required restitution, the Circuit stated "[w]e are satisfied that the district court's construction of the plea agreement is permissible under our standard of review." App. 4.

The reason that the Fifth Circuit relied on the standard of review becomes apparent on review of the record: the district court's summary denial of restitution was unsupportable on ordinary appellate review. Fisher presented the Fifth Circuit with direct challenges to the district court's conclusions that the MVRA did not apply, that any losses he suffered were unduly speculative, and that the plea agreement did not authorize restitution – all of which should have lead to reversal under conventional appellate standards.

The *Mandatory* Victims' Restitution Act *requires* a district court to enter a restitution award for victims of certain kinds of federal crimes, "including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1) (emphasis added). Potashnik pled guilty to Count 10 of the indictment, which charged that he and others had conspired to "corruptly offer, give, and agree to give something of value of $5,000 or more to a person" in connection with federal programs run by the City of Dallas. *See* Indictment, U.S. v. Hill, No. 3:07-CR-289 (N.D. Tex. 2007) (doc. #1, 991) at 48. The means for doing this included such deceitful acts as

concealing the bribes "through the preparation of sham written agreements, the use of nominee companies, and the omission of material facts concerning the financial benefits that were sought on behalf of, and received by" the bribed government officials. *See id*. at 49-88 (detailing sham gifts, fraudulent reporting, concealed kickbacks, structured bank withdrawals, "front" companies, hidden bribery payments, and other overt acts in furtherance of the conspiracy). It is hard to imagine a crime that more clearly involved fraud and deceit than Potashnik's. Yet the district court summarily denied Fisher's legal argument that Potashnik's crime was such a crime covered by the MVRA in a single sentence, without any explanation, factual findings, or legal conclusions. App. 46.[7] The Fifth Circuit was able to affirm the district court's erroneous decision on this point only by resorting to "a highly deferential standard" of review. App. 2.

The Circuit also ruled that the district court received evidence that "could lead" to the conclusion that the losses suffered by Fisher were too speculative to justify restitution. In affirming the district court, the Circuit "stress[ed]" that the affirmance was "compelled by our deferential review of writs of mandamus." App. 3. By employing deferential review, the Fifth Circuit averted any need to carefully review

[7] In failing to provide a basis for its decision, the district court violated a provision in the CVRA requiring that "[t]he reasons for any decision denying relief under [the CVRA] shall be clearly stated on the record." 18 U.S.C. § 3771(b)(1).

Fisher's victim impact statement, App. 85-89, and his sworn testimony at the sentencing hearing, App. 10-23, which proved he was directly harmed. As one straightforward example, Fisher incurred substantial attorneys' fees as the result of assisting the FBI in its investigation. App. 39, 88. Under the MVRA, he was entitled to reimbursement for those expenses. 18 U.S.C. § 3663A(b)(4). Yet the district court did not address this issue, and the Fifth Circuit used the mandamus standard of review to simply duck the question.

Fisher was not only entitled to restitution under the MVRA, but also under Potashnik's plea agreement. The agreement provided that the court could impose penalties including "restitution to victims or to the community, . . . and which Potashnik agrees may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone." The district court summarily denied the victims' request for restitution under this provision, finding in a single, unelaborated sentence that it did not expand the scope of restitution beyond the MVRA. App. 47. But the plea provision plainly is broader than the relevant text of the MVRA, 18 U.S.C. § 3663A(b). *See* App. 116, 162-63 (developing this argument). Here again, the most the Fifth Circuit could say was "[w]e are satisfied that the district court's construction of the plea agreement is permissible under our standard of review." App. 4.

Of course, this Court does not need to determine whether Fisher would ultimately prevail on his

restitution claim in deciding whether to grant review on the standard of review question. But the fact that Fisher has powerful claims that the Circuit ducked through a deferential standard of review makes this an appropriate vehicle for addressing the issue.

In sum, the standard of review issue that has divided the circuits is squarely presented by this case. The Court should therefore use this opportunity to review this important and recurring issue.

II. The Court Below Erred in Refusing to Give Fisher Ordinary Appellate Review of his CVRA Petition Asserting a Right to Restitution.

In its decision below refusing to give ordinary appellate review to Fisher's CVRA petition, the Fifth Circuit violated the CVRA's plain language. The CVRA flatly provides that "[t]he court of appeals *shall take up and decide* such application forthwith. . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). The Fifth Circuit did not "take up and decide" Fisher's claim that the district court had incorrectly denied him restitution, holding instead only that the district court had not acted so far outside of its authority as to have clearly and indisputably erred. This discretionary approach to appellate review contravenes the CVRA, as one leading authority on crime victims' rights has explained:

> the problem in review of victims' rights is not the unavailability of writ review, but rather

> the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations. . . . One could not credibly suggest that criminal defendants' constitutional rights are to be reviewed only in the discretion of the court. . . . The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.

Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 347; *accord* 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, 621-25 (2010) (discretionary mandamus review is flatly at odds with the language of the CVRA).

The Fifth Circuit and other circuits have mistakenly relied on a rule of statutory construction involving "borrow[ed] terms of art." *See Dean*, 527 F.3d at 393 (*citing In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008)). The CVRA, however, expressly altered the common law principles that otherwise might apply to review of other mandamus petitions. In the CVRA, Congress certainly chose a "writ of mandamus," 18 U.S.C. § 3771(d)(3), as the procedural tool for crime victims to obtain quick review of trial court actions. But Congress obviously sought to forge that typically discretionary tool into a powerful new, nondiscretionary remedy that would fully protect crime victims. Congress flatly required courts of appeals to

"take up and decide" such applications. 18 U.S.C. § 3771(d)(3). In requiring appellate courts to "decide" victims' applications, Congress plainly wanted the courts of appeals to "make a final choice or judgment about" them. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006). The Fifth Circuit here never made a final choice or judgment about whether Fisher's claim for restitution was valid.

The circuits that have given crime victims only discretionary mandamus review ignore a cardinal rule of statutory construction that courts "should not interpret a statute in a manner that makes some of its language superfluous." *Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1892 (2009). These circuits interpret the CVRA's language that "the movant may petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), to mean only that the movant may petition for an ordinary writ of mandamus. But before the CVRA, a crime victim could (like anyone else) seek mandamus under the All Writs Act. *See* 28 U.S.C. § 1651. Thus, under these circuits' interpretations, the CVRA mandamus provision is rendered superfluous.

Another provision in the CVRA also indicates that the statute provides ordinary appellate review. The CVRA directs that "[i]n *any* court proceeding" – which would of course include appellate court proceedings – "the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). The congressional requirement that appellate courts "ensure"

that crime victims are "afforded" their rights would be fatally compromised if those courts could only examine lower court proceedings for clear and indisputable errors. In this case, for example, the Fifth Circuit did not "ensure" that Fisher had been afforded his right to restitution by the district court.

If any doubt remains about the victims' right to relief under the plain language of the CVRA, the CVRA's legislative history unequivocally demonstrates that Congress wanted crime victims generously protected through traditional appellate review. The definitive legislative history[8] states directly that the law "require[s]" appellate courts to "broadly defend" crime victims and "remedy errors of lower courts":

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] 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. . . . 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*.

150 CONG. REC. 7304 (statement of Sen. Kyl) (emphases added). Contradicting the conclusion that the

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[8] *See Kenna v. U.S. Dist. Court for C.D. of Calif.*, 435 F.3d 1011, 1016 (9th Cir. 2006) (discussing the CVRA's legislative history).

CVRA simply imports a "common law tradition," *Dean*, 527 F.3d at 393, Senator Feinstein stated directly that the Act would create "*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." 150 CONG. REC. 7295 (statement of Sen. Feinstein) (emphases added); *see also id* (crime victims must "be able to have . . . the appellate courts *take the appeal and order relief*") (statement of Sen. Kyl). Clearly, the drafters of the CVRA intended broad appellate protection of crime victims' rights. To give crime victims only limited mandamus review defies the basic architecture of the CVRA, for "without the ability to enforce [victims'] rights in the criminal trial and *appellate* courts of this country, any rights afforded are, at best, rhetoric." 150 CONG. REC. 7303 (statement of Sen. Kyl) (emphasis added).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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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

(Filed Jan. 10, 2011)

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.

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

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 "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.

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[2] 18 U.S.C. § 3771.

[3] 18 U.S.C. § 3663A.

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

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

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 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

[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."

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 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.

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[7] 18 U.S.C. § 3664(h).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA Government,	(	3:07-CR-289-M
VERSUS	(	DALLAS, TEXAS
BRIAN L. POTASHNIK and CH	(	December 17, 2010

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE
HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

(Filed Jan. 6, 2011)

APPEARANCES:

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ingproceedings Reported by mechanical stenography, transcript produced by computer.

[3] **PROCEEDINGS**
December 17, 2010
9:00 a.m.
SENTENCING HEARING

– – – ooOoo – – –

THE COURT: We'll go back on the record.

The Court is satisfied from my off-the-public-record discussion with counsel that the Court has an understanding of the financial issue that I had inquired about that there is a reduction in the balance sheet number for the defendants that is not insubstantial, but that there is still a substantial amount of assets that are available if the Court were to enter a monetary award.

All right. I guess that the best way to proceed with, Mr. Lowell, you and Ms. Madubuko and Mr. Potashnik should COME up to be seated.

Mr. Carney, you might relocate, why don't you either sit in the – well, I'm going to call you up shortly.

Despite your winning personality, I kind of think they don't want you sitting right next to them.

MR. CARNEY: I'll have a seat in the back, Judge.

THE COURT: Mr. Carney, you can make yourself comfortable. You can sit over here, if you like, or you can sit in the jury box.

It would seem to me that, again, the issue of Mr. Fisher's claim should probably come up now.

[4] Do you agree with that?

MR. LOWELL: Yes, ma'am.

THE COURT: Now, let me cut some of the chaff out of this. I don't really care about what went on in the state court, and the conversation between Mr. Carney and Ms. McCall. don't really care about the fact that the state court entered a judgment in favor of Mr. Potashnik and Ms. Potashnik and others on limitations.

If the defendant otherwise had a right to restitution under the applicable – excuse me – if Mr. Fisher – and I'm using Mr. Fisher, but I mean Fisher and Odyssey. If Mr. Fisher had a right to restitution under the statute I don't believe there would be a limitations issue that would apply here, and I don't think that the state court decision in the civil case would have any res judicata or collateral estoppel impact.

If anyone disagrees with me, you can tell me so now.

So the issues on which I am focused relate exclusively to the claim for restitution on its merits.

Does anyone want to be heard on the issues that I have swept away?

MR. LOWELL: I don't disagree with what you said, but for at the end of the process of considering a claim that requires the Court to exercise its equitable powers, some of the issues you raised arise to whether or not a person is [5] eligible for equity, and that's why we raised some of the other issues to the issues of good or bad faith.

As to the statute of limitations, no disagreement as to whether there is a statutory claim. No disagreement as to other issues that could or could not come up depending on where we go.

THE COURT: Well, the issues that I have swept away are unlikely to be persuasive to me, so I wouldn't waste a lot of time on those.

Now, Mr. Carney, the same question that I asked you – I'm not getting to the end. This is going to be a much more extensive hearing, but we are – I think, again, the question that I asked you, but so that it's clear, it's in this transcript as well, is whether – Mr. Fisher, you're okay with me for shorthand saying Mr. Fisher when I mean Odyssey?

MR. FISHER: Yes, ma'am.

THE COURT: That Mr. Fisher's claim is under – is mandatory only if I were to hold that bribery, which is the subject of count 10 of the indictment, triggers the Mandatory Victim Restitution Act, and there are no cases that hold that The Eleventh Circuit recognizes the issue, and then doesn't answer the question.

Correct?

MR. CARNEY: Yes, your Honor, that's correct.

THE COURT: So I am holding that the Mandatory [6] victim Restitution Act does not apply here, that it is the victim Restitution Act as to which the Court has discretion. I'm not resolving that.

I will address the issue alternatively as if it were mandatory when I get to the end of the proceeding however go, but I want us to proceed now as if it is not mandatory because that is my conclusion.

MR. CARNEY: Your Honor, Mr. Fisher has individually – on behalf of Odyssey has the right of allocution, and I would like to invoke that right now, then reserve my arguments until after.

THE COURT: Thank you.

Mr. Carney, let me make sure that – do you feel that I did not – I had thought that in connection with Ms. Potashnik that what you wanted to get before me were the calculations, that you were not asking me to allow Mr. Fisher to testify separately.

Did I misunderstand you?

MR. CARNEY: Your Honor, the ruling the Court made that the plea agreement to which Cheryl Potashnik agreed to pay restitution for all relevant conduct and to others and victims, the Court's ruling on that point closed the relevant conduct arguments, and I believe that then rendered moot Mr. Fisher's testimony and allocution.

THE COURT: That's fine. That's what I thought you [7] had said, but I did not mean not to give you the right to make such presentation as you wish for the record.

Okay. Would you raise your right hand, Mr. Fisher.

(Witness sworn by the Court at 10:41 AM)

THE COURT: Take the stand, please.

MR. LOWELL: Your Honor, just while he's reaching the stand, maybe I'm just the only one in the courtroom at a loss.

I know Mr. Fisher wants to address the Court. I don't know what he is addressing the Court about.

THE COURT: Neither do I.

MR. LOWELL: Is he making the legal argument that he stands in the position of a victim?

THE COURT: why don't we just see.

MR. LOWELL: Okay.

THE COURT: Are you planning to ask questions, or he's just going to make a statement?

MR. CARNEY: He was going to testify in the narrative form.

THE COURT: You may make objections as you hear it. I would suggest that we hear it, and then if you think it should be stricken, you ask me to strike it.

All right. Thank you, Mr. Fisher, you may begin.

MR. FISHER: Thank you, your Honor. I appreciate the opportunity to address you today.

[8] I want to thank the government and the FBI for all the time and effort that they put into this case to reveal the evil that went on down at the city hall involving the defendant Brian Potashnik and the others. I know they put in countless hours.

I want to thank the FBI, particularly Allen Wilson and Don Sherman for all their efforts to root it out and show the light of day on it.

I appreciate your efforts, Ms. Saldana, Mr. Meacham and Marcus Busch for making sure that this wrong was somehow righted.

THE COURT: Sue, you might type that up for Mr. Busch since he's not going to be able to hear it directly.

MR. FISHER: Doing the right thing, the one thing I would like the Court to know is that we

have made every effort at Odyssey to do the right thing.

The opportunity came for us, as it did for Brian Potashnik, to succumb to the efforts of corrupt officials, or to do the right thing and report it to the police, report it to the authorities. We tried to do that.

After we reported the wrongdoing to the FBI, frankly felt like we had done the right thing, and that was it.

They came to us and said, will you help, you have been harmed by this, the City has been harmed by these activities, we have suspected they have gone on for a long time, and this [9] is a real opportunity for the first time for us to prove that wrongdoing exists and hopefully root it out.

We didn't agree immediately. The principals of our company were warned that it would take a significant amount of time and effort. There would likely be the negative publicity that would affect our business negatively at the outset until all the truth came out, because that would not happen right away, and to every person, from Saleem Jafar, who is our principal, to Dewey Stevens, who runs our construction group, everybody wanted to do the right thing, and felt just reporting it and not helping the authorities was not the right thing.

So we set out on a journey as a company, and our employees participated in cooperating with the FBI

and the government to bring some resolve to the corrupt activity down at city hall.

We're here today to ask for restitution, and I want to make sure that I'm clear on behalf of Odyssey.

We do not want to profit from these crimes. NO one should profit from these crimes.

I had understood in our filing that it was clear that we have a $1.8 million hole of money that the company invested it good faith in these projects not knowing that there was corruption involving Mr. Potashnik and Don Hill that rendered that investment an absolutely waste of time and money.

[10] They both knew when they entered and agreed to their bribery scheme of the rules and the fact that our investment directly would be rendered worthless as a result of that corruption.

We are not asking for any money associated with what they made in the project. We felt it was important in that filing to call to everyone's attention the fact that the plea agreement as was currently structured was in essence allowing the perpetrator to profit from the crime.

So I hope the Court understands Odyssey's position that we're asking restitution to fill the hole, the damage that was done to us directly.

We don't want any of the Potashnik's money that they made from the projects.

We don't want any of that money. We don't think anyone should get any of that money except perhaps the City of Dallas and the taxpayers who were defrauded through the tax exemption portion of this scheme.

There is speculation that somehow we're not a victim, that – you know, that we're just collateral damage perhaps. The rock that was thrown into this water was thrown at our head. No one else's. It was intended to harm our company. It was done on a basis of the testimony you heard, the one mile/three-year rule, and that rule was clear to everyone involved in this conspiracy that one project over the other [11] rendered the other one absolutely not legally viable, and as a result our investment had no value.

I don't think anyone is going to argue that had we known that we would have invested money in those two projects.

The idea that the government's suggestion –

THE COURT: Let me interrupt you for just a moment. I'm going to let you make your full proffer, but I want to understand something.

Is it your position, Mr. Fisher, that the city council had to approve either the Potashnik project or your project as opposed to the city council could have approved neither project?

THE WITNESS: No, ma'am, none whatsoever.

THE COURT: You're suggesting that if the Potashnik's project was approved, yours couldn't be. So you're not suggesting that if the city council had not approved the Potashnik project that it necessarily would have approved yours?

MR. FISHER: No, ma'am, I'm not.

That's where I'm headed. All that is speculation. Would they have approved our projects?

Would they have approved any projects in the corrupt environment?

My suggestion to you today is that it's speculation. We'll never know.

[12] The crossroad came for the Potashniks to step forward like we did and not participate.

Then there was the possibility that our investment would have been treated on a level playing field vis-a-vis the Potashnik's project.

Do we know today whether they would have approved either project?

We'll never know that.

For us to suffer the loss for never knowing whether we would have been successful on a level playing field, I would ask the Court to consider that to be unfair.

I also think Ms. Miller and some of the others were very specific about evaluating our project versus the Potashniks.

The corrupt presentation of the developments is equal when the Potashniks did not intend to pay hundreds of thousands of dollars of year-end property taxes, I believe there was testimony that that was – that they would never have voted for the Potashnik project at least on the record had they known of that disparity. But the fact that we don't know that outcome because of the corruption, I would hope that you would not construe to our detriment.

The current proffer from the defendant is that he paid $500,000 in bribe money for good will.

I suggest that that is untrue. I think the record shows it to be untrue.

[13] The contracts and payments to the councilman's girlfriend, now wife, are within days of the votes on these projects.

The checks don't note good will or community service. They specifically name the Potashnik projects. So they were paying the money they paid to get their projects. so that payment intended to harm us, because our projects had no valid legal opportunity as a result of the corrupt act.

Can you imagine just, going back to the fall of 2004, had Brian called somebody who worked for him for six years, we were family friends, and said, Bill, are people shaking you down, I'm getting the squeeze,

and what the outcome would have been had we both done the right thing.

I suggest to you that a lot of good could have come out of that for both the Potashniks and for Odyssey.

Instead, we have their personal tragedy and participation in this evil series of deeds, and Odyssey who, you know, frankly, was on the verge of going out of business as a result of the loss we incurred at the time.

You know, we're here today – Brian is supposed to be accepting responsibility for what he did, and I don't believe he's doing that. I believe this is his third strike. He's had three chances to do the right thing.

He had his chance when he should have turned Don Hill down and D'Angelo Lee for all their improper solicitations.

[14] He had his chance when the indictment came out to say, look, I did it, I made a mistake, I participated with these guys, I signed the contracts, I did that, and have come forth immediately on it.

Instead he sat up in front of the press for quite some time and said, no, I'm not guilty, it's all unjust, I didn't do it. Of course, here we are today knowing that that's not true.

Now we're here today, and what they were trying to do, had we not really intervened on rights I wasn't aware until Mr. Carney pointed them out, that he

needs to accept responsibility and make it right. And he needs to say that he did it and that he did it to get the projects.

You know, the company has 60 developments. We're talking about two developments here. Our two developments would have doubled our project total at the time.

So a fledgling company with virtually no development projects, and a 60-project development company, for these two projects, I suggest to you, that that shows that intention to harm us.

If they wanted to accept responsibility they should have said, look, we have cheated the taxpayer out by fraudulently misrepresenting the projects for property taxes, and we need to make that right. And we did direct harm to Mr. Fisher, a former employee and competitor, for the money he invested in [15] the projects. That is acceptance of responsibility.

And I would have come forward today and asked you to downward depart for Mr. Potashnik for taking responsibility and trying to right the wrong.

Unfortunately, we're here, and I guess really fortunately for me we're here, and you have the opportunity to at least make us whole.

Without belaboring the point, $500,000 of payments to the councilman and his associates for general good will, that's what they're trying to get you to accept, your Honor. I don't think the record supports that in any way.

THE COURT: Excuse me one minute, Mr. Fisher. Go ahead.

MR. FISHER: I don't know if it changed as a result of the plea, but I'm referring specifically to the factual resume that I was shown here a couple of weeks ago. 250 odd thousand dollars to Ms. Farrington and to benefit the councilman, and the $250,000 markup on the Slovacek contract.

I don't know if there was testimony to it, because as a witness I wasn't privy to a lot of the testimony, but the Slovacek contract had to be – the $250,000 markup wasn't some little small add-on. It would have been some significant percentage of the contract. So there couldn't be any misunderstanding with the Potashnik – Brian Potashnik and construction experience that taking a million dollar contract [16] and adding 250 or adding – taking a million five contract wasn't an enormous sum of money that likely had an improper purpose.

The Potashniks have sold their business for $40 million, so they had a significant business that they built up, and they have harmed us greatly as a result of these activities.

When I left they had $10 million in a Cook Island's offshore trust. They had – lived in multi-million dollar houses that were in most cases substantially paid for, and the company was on very sound financial footing.

So in determining whether they intended to harm us, I think I would ask you, your Honor, to consider that, that there just any rationale for them to pay those large amounts of money, much of which was initiated before these votes, without intending to steal these projects from us.

As you pointed out in Ms. Potashnik's, they had a great track record. They were a much larger company than us. We were certainly up against a fierce competitor and we were prepared to do battle and have our opportunities and applications considered on their merits in a level playing field in competition with the Potashniks.

We were not given that opportunity.

So you have sent messages to this community, and they have been important in how you have handled everyone in this matter. I applaud you for it. I have absolute confidence [17] that whatever decision you make will be the right one under the law and for everyone involved.

But right now what we have – what they have before you is actually fairly simple.

Do the right thing, and end up net down your $1.8 million investment. Participate in the corrupt activity and bribe the councilman and keep your $7 million.

Now, I don't think that's the right message. I cannot imagine that you think that that's the right message. Ultimately whether you make a decision to

disgorge them of an money and where it goes is completely up to your Honor.

Again, we don't want any money that they made on any of those projects. We wouldn't take it. It's tainted. It's part of a corruption that is a pain not only for this city, but I hope you know the harm that it's done to the affordable housing industry.

I mean, these are prominent national players in our industry that all of us try and do good deed and build good projects and support our residents. That's what we do as an industry.

You can imagine the harm of what one of the top developers in our business has done participating in these evil deeds.

So Odyssey's a victim, the taxpayers of DISD and the City of Dallas and the county are victims. The affordable housing [18] industry is a victim.

All I would ask you, your Honor, is don't leave us net down. Fill the hole for the money we invested in good faith. Take whatever they made in the project and put it to good work somewhere else. That's what we would ask you to do.

THE COURT: Thank you.

All right. Thank you very much.

Do you have some objection, Mr. Lowell?

MR. LOWELL: I'm sorry, your Honor. That's not much of an objection. I don't know whether

– I'm at a loss. I don't know if I'm suppose to be able to ask questions.

THE COURT: No, you're not.

MR. LOWELL: He's made statements that are not factually correct.

THE COURT: Mr. Fisher is claiming to be a victim. The Court has not determined that issue yet, but as a victim he would have the right to address the Court. If someone shows up here and claims to be a victim, I would hear their testimony. If I didn't think that it was appropriate for me to consider it, then I wouldn't, but I would never prohibit someone who claimed to be a victim as Mr. Fisher has been testifying. I don't think by doing so he subjects himself to cross-examination.

You may respond with argument and evidence as you wish.

MR. LOWELL: With that, I don't object to his making [19] his best statement as to why he would fit into parts of the law as a matter of law precedent that he believes. I don't think he does, which I will address.

THE COURT: Thank you very much, Mr. Fisher. All right. Mr. Carney.

Mr. Fisher, before you sit down I do want to say something to you directly.

Whatever I do in connection with your request for restitution, I thank you for your courage in reporting the issue to the FBI.

You have not been treated always kindly by the press in connection with this. I have no interest in, and will not hear any argument about some alleged wrongdoing on your part relating to other transactions.

I suppose that counsel will invoke that in connection with my equitable powers here. I'm not really interested in hearing that. I'll hear that as a proffer if counsel thinks it's necessary, but I don't find it to be relevant.

You exercised courage that had others exercised, the whole thing would have come out differently, and I thank you for it.

MR. FISHER: Thank you, your Honor. That means a lot.

MR. CARNEY: Your Honor, under 18 U.S.C. 3664(h), again, discretion to the Court, whether joint and several [20] liability, or whether – on account, or whether liability should be apportioned among the defendants based upon their economic circumstances and their respective contributions to the victims' loss, count 10, the count of Mr. Potashnik's plea, is a conspiracy count, and in that conspiracy count Don Hill, D'Angelo Lee, Sheila Farrington, Brian Potashnik, Cheryl Potashnik, Rickey Robertson, Andrea Spencer and Ron Slovacek are the other named defendants.

The Court has found – or the jury has found each of these other defendants guilty. The evidence is there, the preponderance of the evidence is there, to show that Brian Potashnik participated, and his plea agreement concedes he participated in the conduct alleged in count 10.

Just for the record I need to make the same argument that we did on Cheryl Potashnik, which is that Mr. Potashnik's plea agreement as amended expressly provides restitution to victims or to the community which may be mandatory under the law, and which Potashnik agrees may include restitution arising from all relevant conduct not limited to that arising from the offense of conviction alone.

Your Honor, this language tracks what the Mandatory victim Right Act and the VM – the MVRA, the VWPA and Mandatory victim Restitution Act. This is what triggers the relevant conduct restitution award.

If what – to which Mr. Potashnik agrees could not be [21] anymore clear. I don't know how else the Court would expect to find the defendant to agree to language, which is basically in every plea agreement, it is the standard promulgated plea agreement form.

THE COURT: Well, I could think of a lot of ways I could find it if it said it. I just don't agree with your interpretation of it.

In hindsight, and perhaps the government will take a lesson from the argument, it would be worded differently. But I have seen these in every case. This

is the standard – this is the most it could be. Not this is what we agree to.

The agreement says, as amended, no restitution is owed.

Now, if restitution is owed, then restitution – and it's mandatory, then restitution is owed whether they say so or not. They can't trump the law by their agreement. If I'm obligated to make an award, then I'm obligated to make an award. I don't think the government and the defendant can agree against the rights of some victim who has statutory rights to mandatory victim restitution.

But you're not him, because I have already found you don't have mandatory restitution here.

I read this agreement in paragraph 3 just to say that if there is restitution, that the maximum penalty would include restitution, and Mr. Potashnik agrees that it may – not that it will – include restitution from all relevant conduct.

[22] That's the most that it could possibly be under the statute. I just don't read it the way you do. But even if I did read it the way you do, it's still discretionary.

MR. CARNEY: I didn't think you would change your mind from half an hour ago. I just want for the record to make the argument.

Under count 10, your Honor, you in essence have the discretion to award joint and several liability as to the harm caused by count 10.

You have the ability to impose upon Mr. Potashnik the harm caused by his co-defendants in count 10.

Mr. Fisher touched on it briefly. If you refer to the overt acts beginning at page 53, meeting with Hill and Lee where Brian Potashnik – Southwest tax credit projects in District 5 that needed approval.

It goes on and on. Specific references to District 5, to his two specific projects, to allocating the Farrington checks 50 percent to the Rosemont at Laureland and 50 percent to Rosemont at Scyene, allocating the payments directly out of the accounts of the prospective projects for their specific approval, for the waiver of the consent decree, limitations for modification for tax-exempt status as to ad valorem property taxes. And there is specific linkage in each of these payments, or in most of these payments – I'm sorry – to the particular projects which we complain are the basis and [23] the reason for the payments. Not to get a project that would otherwise not be approvable approved, but to preempt and preclude Bill Fisher's Odyssey projects from being done. It makes no other sense.

Now, Mr. Potashnik's factual resume is disingenuous at best. I would cite to the section where claiming general support for Hill and Lee.

In agreeing to Hill and Lee's demands, in doing so Potashnik consciously avoided actual knowledge or inquiry that Hill or Lee would share financially in the consulting subcontracting agreements they were requiring him to enter.

I'm leaving a bag of money out back, I'm not sure where it's going to go, I don't believe the evidence the Court heard confirms that Mr. Potashnik was unaware that he was funneling money for Hill and Lee, and for the specific purposes of influencing city hall.

Now, this Court has awarded restitution. The way I read the sentences it is not – the defendants convicted under multiple counts, the restitution is not an account specific award.

THE COURT: No. But it didn't come out of count 10.

MR. CARNEY: Well, they were found guilty of count 10, and there is a general restitution award.

THE COURT: But I was there and –

MR. CARNEY: The judgment doesn't reflect –

[24] THE COURT: Well, that may be so, but I don't have to ignore what actually occurred. It would not be customary for me to say in a judgment that this is specifically from count 10, but it didn't come from count 10.

Does the government disagree with that?

MR. MEACHAM: No, your Honor, that's absolutely correct.

THE COURT: It didn't. This is not some private little tete-a-tete between me and the government. This was all on the record.

I'm not being critical of you, Mr. Carney. I wouldn't have expected you to participate in that, but I'm telling you it was not out of count 10. I know that to be the case, because, A, I was here; and B, I did it.

MR. CARNEY: Your Honor, there is no questioning of the Court –

THE COURT: Exactly, Mr. Carney. I have sort of left you without the ability to respond to my now rhetorical question.

MR. CARNEY: Thank you, your Honor.

As I raised before, I think it's meaningful that this case – it's the government's position that there are no victims.

I find that premise untenable. These conspiracies, these acts, those overt acts, means and manner was done with a [25] purpose, with a purpose to accomplish something, to corrupt the system, to accomplish a result, and they were effective at doing it.

Who was the victim?

The victims are the people that played honestly, they are the taxpayers, they are the city.

How is it that the government has fulfilled its obligations under the victim witness Protection Act, the Mandatory victim Restitution Act and the Crime victim Rights Act?

This trilogy of congressional mandates requires the Justice Department and your agent in the presentence report reporting department to fully develop the victim rights, restitution.

And to have a case like this where there are no victims, where there is no restitution at all is inconsistent with the facts as I know them. And I don't know them as well as you, but I have made an effort to try to understand them.

The government did not pursue what congress mandated they pursue. We're asking this court to fix that. The Court has the discretion to do so.

The question there is no limitations, the Court has the authority to award prejudgment interest on restitution where there is an economic benefit.

This Court has authority to award attorney's fees, [26] accounting costs and the like in order to make a victim whole.

When there is a victim and the restitution is appropriate the statute mandates that the Court shall make the victim whole.

It doesn't say they shall make them sort of whole. It says that it shall make them whole.

We ask the Court to exercise its discretion to at least allow Odyssey to have recovered what it lost doing the right thing.

If that caused Mr. Potashnik to make $7 million while Mr. Fisher lost a million eight, if that's what equity is, then I'm sadly disappointed.

Thank you, your Honor.

THE COURT: All right. I'll hear from the government.

MR. MEACHAM: I'll be brief.

I first want to make sure that nothing I say can be construed by the Court as backing away from our plea agreement that we have reached with Mr. Potashnik in this deal as amended.

I want to take this opportunity, as the Court did, to once again express my deep heart felt thanks to Mr. Fisher and his company, Odyssey Residential Holdings, for doing what they did in this case.

As I have said to a jury in one of the trials, this case [27] is largely a tale of two developers and the actions they took and didn't take that brought us all here today in one way or another.

I also want to respond to the fact – or to the statement that Mr. Carney just made that the government claims there are no victims here.

I guess that's true in a legal sense, but there are victims of this case and they are in this courtroom today and they stretch out ad infinitum, forever.

Bill Fisher, Odyssey Residential Holdings, Brian and Cheryl Potashnik, all the employees of southwest Housing, the citizen and residents of this community, everybody that thinks the American flag stands for something, that public officials ought to treat their votes as they treat their own children. There are victims as far as you can see.

What there is no way to do, in the government's position, is how to quantify all the what ifs, ands or buts in how this would have played out.

You also have to think, I think, for a second that at the end result of this 500 families, or just south of that, 498, 496, families got to move into and live for years now at the Laureland and Scyene developments.

Those are families that had clean carpet, no holes in their walls, after-school programs, computer labs, swimming pools, gated community, poor families that couldn't get that [28] anywhere else.

No drug dealers in the parking lot. No prostitutes in the parking lot. No gang bangers in the parking lot. A chance to get those families, and every generation after them, out of the circumstances they were in.

That's probably worth all the money in the world at some level.

Thank you.

THE COURT: Just a moment, please, Mr. Meacham.

Mr. Fisher's claim is broken down into two parts.

There are comments to make about the various components of each part, but I want to make sure I understand the government's position.

The first part generally speaking, which is roughly a million eight, is expenses – one can quibble with some of these numbers, but my question doesn't call for you to do that. 1.8 million is essentially, look, here's what we put into the deal that we would not have put into the deal had we known it was a corrupt arrangement, and we never had a chance from the get-go.

That is less subject to the claim of being speculative.

The second hunk, which is about $7 million is here's what we would have made on the project.

The here's what we would have made on the project, I understand fully the speculative argument, because not only is [29] what they would have made on the project speculative, but whether they would have been approved is highly speculative.

So I would like you to address the first hunk of money. Again, not taking each piece by piece, but the investment in the deal which Mr. Fisher's statement says had there been a big sign up, city officials are being bribed to favor the Potashnik projects, they would have done it.

MR. MEACHAM: I understand that, that that' s the claim he' s making, but you have to assume in that claim that Mr. Potashnik paid the bribes to harm Mr. Fisher before he would be entitled to restitution under the law.

I would just ask a rhetorical question of where is the evidence of that?

Mr. Potashnik is paying the monies to get his own deals approved.

I think if you look at it even closer – and, again, I think the world of Mr. Fisher, and he did a great thing here across the board day in and day out for years, but I think if you look closer at the facts, I think he' s got his pieces of property under contract for sale when Mr. Potashnik already owns his. So that would be some indication as to who was there first.

Again, if Mr. Potashnik had been denied, no idea what would have happened to Mr. Fisher's project. There was also the possibility out there, it didn't happen here at all, for [30] both projects to be approved. You can get a waiver for the one-mile/three-year rule from the council. Nobody ever got one out of the City here, but there are just all sorts of what ifs.

As to the second chunk of all that money –

THE COURT: I don't need to hear that.

MR. MEACHAM: – I don't think the law allows for that.

THE COURT: Thank you.

Mr. Lowell.

Mr. Lowell, let me cut to the chase on this.

I am not even entertaining the idea of awarding what is called unliquidated damages here. That's not a prediction that I'm considering awarding liquidated either, but I don't need you to speak about the unliquidated being premised on the notion that this would have been a highly profitable deal. I conclude that that is so innately speculative that I should not have even considered it, and I'm not going to.

Without quibbling with the – at this point with the particular elements, I would like you to focus your comments on the general subject of whether the Court should award restitution, and the liquidated damage claim in particular.

MR. LOWELL: I understand, Judge.

This is a hard enough day for you and for my client and even for me, although I'm the least significant in the group. [31] To have to deal with the things that we have to deal with to try to even begin to understand how to defend against things that are just said with no basis.

So with your warning in mind, let me focus in.

First, I'm going to spend just a brief moment on the standard of what makes somebody eligible for any restitution before I get to the issue of whether the 1.8 would fit into which category, because that seems that is the horse before the cart.

In our system you can't self-declare victim restitution status. You have to find a way to put yourself where congress and the Courts have interpreted that to be.

It's not enough to take the stand and lament that there was a terrible event in city hall that ended up costing somebody something.

Yes, it was. People are paying the price for it. They have paid the price for it for the last however many years, and certainly since June of '09 Mr. Potashnik has been paying it, and will again today.

So with that in mind, the law is very, very straight that you have to show that you are the direct and proximate injured party from the action that somebody has pled guilty to. That your damages are actually caused by the defendant.

This is the words of the statute, and it's the words of the case law.

[32] While Mr. Fisher and Mr. Carney would like to have an oatmeal bowl full with things that don't distinguish, it's my job to distinguish.

The scheme that Mr. Potashnik found himself in, and to which he pled, was not and never was anybody in the government saying we are going to do something for Odyssey. If you pay us, we will undo our approval for Odyssey, and we will now give it to you.

Had that been the case, then somebody might have made a better claim that there was a victim for a specific act of wrongdoing that was committed for which they are the caused defendant from the – the caused victim from the defendants' conduct.

But let's be clear about what did happen.

What happened was that city officials started suggesting – and I'll come back to that later – that southwest Housing and Mr. Potashnik give them the financial benefit for what they saw as the benefits that Mr. Potashnik and southwest Housing were getting by their business.

It was never as against Mr. Fisher or Odyssey. It was if you want to continue acting and surviving and thriving in the City of Dallas, this is how you will do it. That is what he succumbed to and did.

You have sat through three trials, God knows how much evidence, and you know that there is not a single conversation [33] that would fashion it the way that could make Odyssey or Mr. Fisher into the victim they would like to be in retrospect.

There was not a project that Mr. Potashnik was told was subject to his request to hire Sheila Farrington per se.

There was down the road a request that an approval occur for a clubhouse in a project that had been previously approved, but that had been previously approved.

So in order to qualify as a victim you need to put yourself in the position of the defendants' action causing the harm.

That's not the same as saying that the system is skewed toward one or another person, but that the defendant did that.

This case and the evidence and the tapes and the e-mails and all the witness' testimony belie that, and belie it very clearly.

The good will that Mr. Fisher's and Odyssey's attorney agree that was being sought is the kind of general good that succumbed and made Mr. Potashnik do the wrong thing, but it was never in the nature of what was just said.

Second, the city council people involved and the commissioners involved never said to either Mr. Potashnik or to anybody else that the conversations were that they were favoring Mr. Potashnik in exchange for disfavoring Odyssey.

Indeed, the evidence is pretty clear the opposite.

[34] The evidence is pretty clear that in the extortion that the individuals that were convicted made, they basically were saying to Mr. Fisher, both before he was working with the government, and

after he was working with the government, that Brian is doing this or Brian will do this or Brian might do this and you better do it too.

That connection was made as a way of inducing Mr. Fisher. Not as a way of inducing Mr. Potashnik.

Because the facts – and I need to have evidence on the facts, depending on which way the Court is going to go. Let's talk about, for example, the 1.8 million.

As Mr. Meacham just pointed out, Southwest Housing already had bought and owned the land that was in an area one mile of which might be subject to a ban of further development that Mr. Fisher and Odyssey decided to buy a piece of land one mile within afterwards.

Now, why did they do that?

That accounts for a good chunk of money that is in the non-speculative amounts, for example, and the legal fees and technical fees and professional fees involved. That was their investment decision.

Why did they do it?

That expenditure of funds predated whatever happened later to reveal that there was some scheme.

So how can that be gain said to have been the direct [35] result of what Mr. Potashnik has ever done?

Now, Mr. Fisher and Odyssey ended up calling the FBI and going over. And Mr. Carney said some moments ago that had – and Mr. Fisher said under oath – that had they known whatever it is they found out later, they wouldn't have made the expenditures.

Judge, you're the one who has been in this courtroom every day for however many trials, and you know the evidence. And you know that Odyssey and Mr. Fisher were involved in security companies that had relationships with public officials before they went to see the government, and were feeling the brunt of this pay-for-play scheme.

That said –

THE COURT: Have a seat, Mr. Carney.

MR. LOWELL: That said, if they decided to participate and buy land and make expenditures, they were as much of on a warning side that the system might be skewed as anybody was in the further months down the line.

Next –

THE COURT: Mr. Carney, for the record, I assume you were about to object to this discussion about the security contracts based on my comment, but I suggested that you sit down because the argument that counsel just made was different from the one that I was foreclosing, which is his argument – and it's just argument, so it really doesn't call for [36] objection – is that Mr. Fisher was on notice of corruption at city hall because of that contract.

That's the argument he's making, which isn't the argument that I foreclosed. That's why I cut you off.

Go ahead, Mr. Lowell.

MR. LOWELL: Thank you, Judge. That's exactly the point. I wouldn't have even said that if it wasn't for the manifestations and the argument that Mr. Fisher decided to make, and then Mr. Carney made as a way to support it, if we had known, we would not have done, and that's what I had to address, because they did know.

THE COURT: Okay. Let me try to summarize, and have you add to what you need to conclude your argument, because as far as your client is concerned, although this is an important potential award of money, in the scheme of this, it is the least important to him, I believe.

So let me sort of summarize what I think you are saying, which is that Mr. Fisher is not directly and proximately harmed as a result of the commission of the offense in count 10, and that the expenditures in the first category of $1.8 million cannot reasonably be traced to the action of Mr. Potashnik as reflected in count 10, or any other count, and that these were expenditures that could have been recouped, because it is possible that during that year, or some other, this project could have been approved, and that [37] these expenses, given the timing of them, were incurred voluntarily with sufficient knowledge to foreclose the possibility that they are connected to Mr. Potashnik's comments.

MR. LOWELL: We set out this in our papers, and we didn't want to repeat all that. I want to say three more things on the subject, if you let me, please.

THE COURT: Yes.

MR. LOWELL: The first is that U.S. Attorney's Office isn't shy. They go after wrongdoing. They vindicate the rights of victims. They try to make the system work, and they make it whole.

It wasn't for no good reason that when they were contemplating count 10 as to Mr. Potashnik they say as a legal matter there are no victims. It doesn't mean that there are no victims in the sense of language. It means that the law dictates there aren't.

That is the rhetoric of standing up in court and saying, of course, there are victims, but they are mandatory, or even in this case discretionary restitution victims is what they are saying.

The probation office hasn't been known to agree with everything the prosecutor says or everything the defense says and has a mind, as it's supposed to, of its own. It comes to its own decisions, and has made the decision that in count 10 [38] there are no victims in the way restitution is supposed to apply.

This Court has heard all the evidence it's heard, and it has taken count 10 as sentencing grounds for a number of other defendants and ruled no restitution.

No restitution, by the way, your Honor, even for Sheila Farrington or Mr. Hill, who seem to now, according to the jury's verdict, have gotten money that they should not have gotten above the work that she actually had done, there was no restitution from them back to Southwest Housing for that extra amount.

And when Mr. Carney says about the Slovacek contract that was, by the way, never awarded, whether or not southwest Housing paid more for a contract on cement after the fact of their project being approved has no bearing on whether or not they have any damages.

So consequently that's what I meant by the oatmeal bowl. So I wanted to separate those out so we get back to the law.

It doesn't mean there are no victims. It means there is no restitution legal victims on which this court has the legal basis to award what Mr. Carney is asking it to award. That's all it means.

Having said all that in responding in our papers to the probation office, the U.S. Attorney's office, they don't come to that decision easily.

[39] As to the other thing, I want to just make sure that Mr. Carney and Mr. Fisher understand, at least from my ability to explain it, is that in our papers, which I'm sure they have read, we pointed out things like the Griffin case on page 13, which courts have addressed the very issue of whether or

not the land investment and related costs in a situation like this would be the kind of things that would create damages for that.

Finally, even as to what would happen to the initial funds and the second funds, remember, as your Honor asked the question, it was not a zero sum of money. It's not like it's either going to be Fisher wins or Potashnik wins, neither of them might have won. And what would have caused Mr. Fisher's company to win would have still had to show that he had the financial backing that merited it, that he had the zoning, that he had the density, that all the other criteria that Southwest Housing had shown was going to win on the merits, which is the kind of thing we could do a mini trial about, but I hope we don't even get there.

So I wanted to summarize that as well to make sure that when we use the word "victims," we are not using the rhetoric, but we are using the law.

That's what I would like to say.

THE COURT: All right. Mr. Carney, I'll hear from you in just a minute.

[40] All right.

MR. CARNEY: Your Honor, I have one brief response.

Mr. Lowell's application of the law is incorrect. under the Mandatory victim Restitution Act, Section 1343 and 3663(a)(2) part 2.

THE COURT: Are we going to for the moment ignore the fact that I found that statute inapplicable here?

MR. CARNEY: The definition of a victim under the statute – under the mandatory victim Restitution Act the Court has discretion that – the three statutes are tied together. it is not solely just a statute – if the statute – the mandatory provisions of the statutes are not the only applicable portions of the statute.

THE COURT: Okay.

MR. CARNEY: The definition of victim under the Mandatory victim Restitution Act specifically says the term "victim" means a person directly and proximately harmed, traditional tort analysis, as a result of a commission of an offense for which restitution may be ordered.

It goes on to say in the case of an offense that involves an element of scheme, conspiracy or pattern of criminal conduct, any person directly harmed by the defendant's criminal conduct during the course of scheme, conspiracy or pattern.

So Mr. Lowell's recitation that the direct and proximate [41] standard applies, we respectfully suggest that he's wrong, and that the standard that applies is that of direct harm.

Now, I don't know how it's different, but the Congress clearly created a distinction. Directly harmed by the defendant's criminal conduct.

THE COURT: well, I'm not sure the consequence of it, but that can't be true. It can't be that – to say it's a person directly and proximately harmed, including any person directly harmed means something more.

MR. CARNEY: I'm suggesting it means something less.

THE COURT: Well, okay. It depends on which side of the fence you're on, but I'll take your phrasing.

It can't expand the victim when it is preceded by the word "including." It's not logical grammar.

What it means is including – you can't just stop after directly harmed. You have to read the rest of the sentence.

Any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern. But it has to be a person directly and proximately harmed.

That's the way I interpret it.

But now that I have the floor, I need you to explain to me what you mean.

This statute is the mandatory Restitution Act. If this applies, I shall order blah, blah, blah.

If I conclude restitution is not mandatory, then I go to [42] Section 3663, which has the same definition of victim, but I'm under that statute.

Is there some way that the Mandatory victim Restitution Act applies when restitution is not mandatory?

MR. CARNEY: Your Honor, I would suggest that the definition of victim is applicable.

THE COURT: Well, it's the same definition, isn't it?

MR. CARNEY: I'm simply making an argument – I'm reading directly from the statute, directly harmed seems to create a – create the test under which the Court should evaluate the award of restitution.

THE COURT: All right.

MR. CARNEY: Thank you.

THE COURT: All right. Does anyone else want to be heard before the Court rules on Mr. Fisher's claims under the victim's rights statute?

(No response.)

THE COURT: The Court concludes that this is not a Mandatory victim Restitution Act case, because the Court concludes that this is not a property crime, that bribery is not a property crime as defined by the statute.

In the alternative, if the Mandatory victim Restitution Act applies, the Court concludes that Mr. Fisher and Odyssey are not persons directly and proximately harmed as a result of [43] the

commission of the offense for which restitution may be ordered, that being count 10 of the indictment.

I do not agree with the interpretation that the later phrase of that sentence expands the scope of who is defined as a victim.

The Court's ruling would be the same under 18 United States Code, Section 3663.

The Court further finds that the amounts claimed are not amounts for which restitution should be awarded in the exercise of the Court's discretion. So the request for restitution award is denied.

None of that is in any way to detract from the sincerity of the views I expressed to you, Mr. Fisher. I know that you and your good counsel, Mr. Carney and Mr. Ravkind, disagree with the Court's decision, but I nevertheless applaud your efforts and commitment and the many hours qualitatively and qualitatively that you have spent in bringing justice to those who deserved it.

Thank you.

[Certificate Omitted In Printing]

UNITED STATES DISTRICT COURT

Northern District of **Texas – Dallas Division**

UNITED STATES OF AMERICA

V.

BRIAN L. POTASHNIK

JUDGMENT IN A CRIMINAL CASE

(Filed Dec. 23, 2010)

Case Number: **3:07-CR-289-M (4)**

USM Number: **37117-177**

Abbe D. Lowell
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) **Count 10 of the Indictment, filed on September 27, 2010**

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371 (18 U.S.C. § 371 (18 U.S.C. § 666(a)(1)(B) & (a)(2))	Conspiracy To Commit Bribery Concerning a Local Government Receiving Federal Benefits	June 20, 2005	10

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ **Count(s) remaining of the original Indictment, filed September 27, 2007, except for Count 10, as to this defendant only,** ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 17, 2010
Date of Imposition of Judgment

[Illegible]
Signature of Judge

BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
Name and Title of Judge

December 23, 2010
Date

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **FOURTEEN (14) MONTHS**.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends to the Bureau of Prisons that the Defendant be incarcerated at the camp of FCI Seagoville, or in the Dallas, Fort Worth, Texas area, if appropriate.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at [FCI Seagoville, Seagoville, Texas]

☑ before 2:00 p.m. on **Tuesday, December 28, 2010.**

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **TWO (2) YEARS**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is ordered to pay a fine to the United States in the amount of $50,000, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242, on or before January 18, 2011.

The defendant is ordered to forfeit to the City of Dallas $1,250,000, representing profits earned by the defendant in the transactions which are the subject of this case. Such payment is to be made with a certified

check payable to "City of Dallas" to be hand-delivered to Karen Mitchell, Clerk of Court, United States District Court, on or before January 18, 2011.

The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Fine**	**Restitution**
TOTALS	**$** 100.00	**$** 50,000	**$** [**Forfeiture** **$** 1,250,000]

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount(s) listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Restitution Ordered	Priority or Percentage

TOTALS $ _____

☐ Restitution amount ordered pursuant to plea agreement
$ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☑ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment of $100, for Count 10, which shall be due on or before January 18, 2011. The fine of $50,000 shall be paid on or before January 18, 2011. Both payments shall be paid to the U.S. District Clerk. The third payment of the forfeiture of $1,250,000 is to be made with a certified check payable to "City of Dallas" to be hand-delivered to Karen

Mitchell, Clerk of Court, United States District Court, on or before January 18, 2011.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community

restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-10006

In re: JAMES R FISHER; ODYSSEY RESIDENTIAL HOLDINGS, L.P.,

Petitioners

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion January 10, 2011, 5 Cir., ___, ___, F.3d ___)

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc treated as a Motion for Reconsideration is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members

of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc treated as a motion for reconsideration is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG6A

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 17, 2011

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 11-10006 In re: James Fisher, et al
USDC No. 3:07-CR-289-4

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Christina Gardner
Christina A. Gardner,
Deputy Clerk 504-310-7684

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,	§	
***Plaintiff*,**	§	**NO.: 3:07CR289-M**
BRIAN L. POTASHNIK AND CHERYL POTASHNIK et al.,	§	
***Defendants*.**	§	

MOTION AND BRIEF TO SET A SENTENCING DATE AND RESTITUTION HEARING PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT (18 U.S.C. SECTION 3771), VICTIM AND WITNESS PROTECTION ACT (VWPA), AND THE MANDATORY VICTIMS RESTITUTION ACT (MVRA)

(Filed Oct. 14, 2010)

COME NOW, James R. (Bill) Fisher and Odyssey Residential Holdings, LP (collectively herein referred to as "Crime Victims") by and through counsel William C. Ravkind and John H. Carney and moves this court for a restitution hearing and sentencing date, gives notice to the defendants Brian L. Potashnik and Cheryl Potashnik of its request for hearing under Crime Victims' Rights Act (CVRA)[1],

[1] The formal name of the CVRA is the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub.L.No. 108-405, §§ 101-104, 118

(Continued on following page)

Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA).

It is the right of crime victims to proceedings free from unreasonable delay as mandated by the Crime Victims' Rights Act. See 18 U.S.C. § 3771(a)(7). It is clear from the Act that its terms apply during the sentencing phase of the court proceedings. See, e.g., 18 U.S.C. § 3771(a)(4). The district court shall take up and decide such motion forthwith. 18 U.S.C. § 3771(d)(3).

I.

INTRODUCTION

1. James R. (Bill) Fisher and Odyssey Residential Holdings, LP victims of the Potashnik's scheme move this Court for an award of restitution against Brian and Cheryl Potashnik. Movants ask this Court to enter restitution orders under the authority of the MVRA, which requires the district court to order restitution for (1) those who are "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" and (2) "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

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Stat. 2260, 2261-65 (2004) (codified at 18 U.S.C. § 3771), effective Oct. 30, 2004.

pattern." 18 U.S.C.A. § 3663A(a)(2). The Court's authority to impose restitution further arises from the Plea Agreements entered into by both Brian and Cheryl Potashnik.

2. Movants ask this Court to enter a restitution orders in favor of Movants, as crime victims under the Plea Agreements of Brian and Cheryl Potashnik, as the Courts must order, in addition to any restitution generally mandated under the MVRA, "all other restitution included in the plea bargain and supported by fact. . . ." *Id.* This additional restitution may include, "if agreed to by the parties in a plea agreement, restitution to persons other than victims of the offense." 18 U.S.C. § 3663A(a)(1)(3).

3. Movants ask this Court to enter restitution orders in favor of Movants, as crime victims under the Victim and Witness Protection Act (VWPA) and to make the required findings by the court on (1) the amount of loss, (2) the defendant's ability to pay and the financial needs of the defendant and the defendant's dependents, and (3) how the amount of restitution imposed relates to any loss caused by the conduct underlying the offenses for which defendant was convicted, and, if restitution is ordered, the court must also designate the timing and amount of the restitution payments. For the purposes of restitution, Movants are victims of defendant's criminal conduct,

including the "relevant conduct"[2] that of offenses that involve as an element – a scheme, a conspiracy, or a pattern of criminal activity means any persons directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern.

4. Movants ask this Court to enter restitution orders compliant with the CVRA enforcing the eight statutory rights of CVRA crime victims. As summarized in the House Committee Report, are: "the right to be reasonably protected from the accused; the right to be notified of, and not excluded from, public proceedings involving their case; the right to be heard at release, plea, or sentencing; the right to confer with the government attorney; the right to full and timely restitution; the right to be free from unreasonable delays in proceedings; and the right to respect. . . . [CVRA] makes no changes in the law with respect to victims' ability to get restitution."[3] We discuss those enumerated CVRA rights below, insofar as they pertain to the instant motion.

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[2] Relevant conduct" under the Sentencing Guidelines is criminal conduct and includes offenses that are part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a), 18 U.S.C.A.

[3] These eight rights, applicable in every federal criminal prosecution, are codified in the CVRA, 18 U.S.C. § 3771(a)(1)-(8)

II.

STANDING

5. Movant's have standing to assert the rights contained in the Crime Victims' Rights Act (18 U.S.C. SECTION 3771) and have received a victims' notification letter as it relates to both Brian and Cheryl Potashnik. Movants are "crime victims" under the CVRA is defined as a person directly and proximately harmed as a result of the commission of a Federal offense. 18 U.S.C. § 3771(e).[4] James R. (Bill) Fisher ("Fisher") is an individual victim and Odyssey Residential Holdings LP is a Texas Limited Partnership of which Fisher is a partner. Restitution awards to entities are proper under the MVRA[5] also see *U.S. v. Oslund* 453 F.3d 1048 C.A.8, 2006 (Minn. Awarding Brinks restitution for monies stolen). Movants are "victims" under both the VWPA and MVRA as persons directly and proximately harmed as a result of the commission of offenses for which restitution was

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[4] 18 U.S.C. § 3771(a). The CVRA also provides that the government must make its best efforts to "see that crime victims are notified of, and accorded, the rights described in subsection (a)," including the "reasonable right to confer with the attorney for the Government in the case" and the right to be "treated with fairness." 18 U.S.C. § 3771(c)(1).

[5] For instance, this Court has sentenced other mortgage "flippers" to pay criminal restitution to Trustcorp, a private bank. See note 4, supra. Government entities, including municipal agencies, may be entitled to restitution under the identical "victim" definition in the VWPA. See United States v. Martin, 128 F.3d 1188, 1191 (7th Cir.1997) and doc. # 19 (United States' brief) at 3.

agreed by plea agreement and 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.

6. The U.S. Department of Justice has given Movants notice of their status of crime victims. See Victim notification letter, attached as **EXHIBIT 1, App. 1-App. 3.** The CVRA applies to natural personals and business entities. See, *In re Stewart,* 552 F.3d 1285, 1288 (11th Cir. Fla., 2008) The CVRA applies to all federal offenses, not just those offenses for which statutory restitution provisions have been enacted. 18 U.S.C. § 3771(d). Second, it creates a new and powerful enforcement mechanism. *Id.* The CVRA confers standing upon both the government and the victims themselves to assert the rights afforded under the CVRA. *Id.* The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the CVRA rights. *Id.* The CVRA provides that the asserted rights are to be asserted first in the district court, and if the relief sought is denied the movant may petition for mandamus on an expedited basis. *Id.* § 3771(d)(3).

III.

DEFENDANT'S PLEA AGREEMENT EXPANDS THE STATUTORY DEFINITION OF VICTIM, RESTITUTION AND INCLUDES INJURY CAUSED BY ALL RELEVANT CONDUCT.

7. A significant feature of the 1990 amendments to the VWPA, which carries through to the current VWPA and MVRA, was an exception for plea agreements. *See United States v. Chalupnik,* 514 F.3d 748, 752-53 (8th Cir.2008) (referring to 18 U.S.C. § 3663(a)(3) as enacted in 1990). That provision in the current version of the VWPA states:

> "The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." . . .

The VWPA also states that:

> . . . "the court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." . . .

Id. § 3663(a)(1)(A).

A more complicated version of this exception appears in the MVRA. See id. §§ 3663A(a)(3) & (c)(1)-(3). The MVRA expressly states that a plea agreement can provide for restitution to persons "other than the victim of the offense," and if so the court ***shall*** so order. Id. § 3663A(a)(3).

The instant Plea Agreements of both Brian and Cheryl Potashnik provide that:

"**Sentence**: The maximum penalties the Court can impose includes:

> e. restitution to victims or to the community, which may be mandatory under the law, and which Potashnik agrees *may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone*;"

SEE EXHIBIT 2, App. 4-App.16

8. The Plea Agreements expand both the persons to whom restitution applies "victims or to the community", and expands the conduct beyond that of the Plea Agreement to "all relevant" conduct. When reviewing case law under the VWPA, the MVRA, and the CVRA, it is important to recognize that plea agreements pertaining to restitution can be entered into for the benefit of persons other than statutory "victims," and under offense statutes for which no statutory right to restitution exists, and for losses and amounts beyond those provided in restitution statutes. Persons having crime victim status under the CVRA, which applies to all federal offenses, can also enforce rights to participate in the plea process even if the actual offense statutes do not carry a statutory right to restitution.

9. The constraints and limitations of the Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA) do not apply where the defendant has entered a plea agreement. The Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, states that "[t]he court shall order

. . . restitution to the victim of the offense . . . [and], if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." Under this statute, restitution is allowable "only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States,* 495 U.S. 411, 420, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); see also *United States v. Akande,* 200 F.3d 136, 138 (3d Cir.1999) ("The conduct underlying the offense of conviction . . . stakes out the boundaries of the restitutionary authority.").

10. Where, as here, the conviction is the result of a plea agreement, "we look to the plea agreement and colloquy" to determine what is the "offense of conviction." *Akande,* 200 F.3d at 142. Here the Plea Agreements consent to restitution to "all relevant conduct" which includes all conduct alleged in the counts to which Brian and Cheryl Potashnik were indicted and all relevant conduct thereto.

SEE EXHIBIT 2, App. 4-App.16

11. Defendants Brian L. Potashnik and Cheryl Potashnik each entered plea agreements which in relevant part sets forth that:

3. "**Sentence**: The maximum penalties the Court can impose includes:

> e. restitution to victims or to the community, which may be mandatory under the law, and which Potashnik agrees may include restitution arising from *all relevant*

> *conduct, not limited to that arising from the offense of conviction alone*;"

The Plea Agreement goes on to recite in part that:

> "4. **Courts sentencing discretion and role of the Guidelines**: " . . . The parties also agree that no restitution or forfeiture results from this specific plea. If the Court accepts this plea agreement, this provision is binding on the Court".

SEE EXHIBIT 2, App. 4-App.16

12. The "specific plea" in the case of Brian Potashnik was Count 10 of the indictment. In the case of Cheryl Potashnik, the plea was to Count 7 of the indictment. Cheryl Potashnik's Plea Agreement contains no such restriction on the award of restitution.

13. Restitution under the MVRA is a criminal penalty and a component of the defendant's sentence. *United States v. Adams,* 363 F.3d 363, 365 (5th Cir.2004). The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C.A. § 3663A, was enacted in 1996 to amend the Victim and Witness Protection Act ("VWPA"), 18 U.S.C.A. § 3663, "by **requiring** district courts to impose 'full' restitution without considering the defendant's economic circumstances." *United States v. Karam,* 201 F.3d 320, 330 (4th Cir.2000). These amendments, however, do not change the fundamental premise that restitution is part of a

criminal defendant's sentence under either the VWPA or the MVRA.

14. Brian Potashnik's Plea Agreement agrees to restitution arising from "all relevant conduct", not limited to that arising from the offense of conviction alone, and agrees that restitution to victims or to the community may be mandatory under the law. The plea agreement goes on to contain a provision purporting to limit his restitution obligation, but on the contrary, the agreement clearly documents the parties' understanding that restitution would be a component of Brian's sentence and that Brian was agreeing "[t]o make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C.A. §§ 3663 and 3663A.

SEE EXHIBIT 2, App. 4-App.16

15. To the extent that the language in paragraph 4 which reads: "The parties also agree that no restitution or forfeiture results from this specific plea," there is a violation of the MVRA. Essentially, the Court is accepting a plea agreement, a binding provision upon the Court, but is also limiting the ability of the Court to award mandatory restitution, which clearly violates the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A. The MVRA ***requires*** the Court to impose full restitution and the Crime Victims' Rights Act (CVRA) which obligates the Court to award the victims "the right to full and timely restitution". Under § 3553(a) of Title 18, the district

court *is required* to consider "the need to provide restitution to any victims of the offense" . . .

16. To the extent that the various provisions of Brian Potashnik's Plea Agreement can be harmonized to read that the parties agreement is that he would not be required to pay restitution for the acts involved with Count 10, but on the other hand agree to all restitution arising from all relevant conduct to the victims of the relevant conduct (other than Count 10), then the intent obviously leaves broad latitude for the Court to fashion a restitution order as required by the MVRA and the CVRA.

MOVANTS ARE VICTIMS UNDER THE DEFINITION OF "VICTIM" IN CVRA AND ITS SOURCE STATUTES, THE VWPA AND MVRA ("STATUTORY VICTIM STATUS").

17. Movants are "crime victims" under the CVRA, which is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense." Id. § 3771(e). The House Committee report was silent on the meaning of that term, and there was no Senate Committee report on the CVRA. However, one of the chief sponsors of the bill, Sen. John Kyl, has explained that "the CVRA's definition of a crime victim is based on the federal restitution statutes," citing the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, and the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A. *See Kyl et al.,* supra n. 3, at 594 & n. 65; 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, 857 (2005) (noting that the CVRA's definition of "victim" comes from the MVRA 612 F.Supp.2d 453.

DEFENDANT'S RELEVANT CONDUCT

18. Brian and Cheryl Potashnik agreed to pay restitution to victims of their relevant conduct. The relevant conduct involves multiple conspiracies to commit bribery, money laundering, fraud and corruption by Defendants and others engaged in similar acts which were prosecuted by the federal government in multiple criminal prosecutions.

Brian Potashnik and Cheryl Potashnik were each charged with a total of 15 counts:

18 U.S.C. § 371 (§§ 666(a)(1)(B) and 666(a)(2)))	Conspiracy to Commit Bribery Concerning a State Government Receiving Federal Benefits	Counts 1
18 U.S.C. §§ 666(a)(1)(B) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 2-5
18 U.S.C. §§ 666(a)(2) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 6-9

18 U.S.C. § 371 (§§ 666(a)(1)(B) and 666(a)(2))	Conspiracy to Commit Bribery Concerning a Local Government Receiving Federal Benefits	Count 10
18 U.S.C. §§ 666(a)(1)(B) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 11-12
18 U.S.C. §§ 666(a)(2) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 13-14
18 U.S.C. § 981(a)(1)(C), 982(a)(1) and 28 U.S.C. § 2461	Forfeiture Allegation	Count 31

19. In a last minute compromise, Brian Potashnik pled guilty to Count 10 of the indictment. On July 22, 2009 Brian Potashnik admitted that he knowingly and willfully combined, conspired, confederated, and agreed with Hill, Lee and others, in the Northern District of Texas, in a transaction and series of transactions, to corruptly offer, give or agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of the City of Dallas, with the intent to reward Hill and Lee, agents of the City of Dallas, a local government that received benefits in excess of $10,000.00 under a federal program involving a grant and other forms of federal assistance during the one year periods beginning October 1, 2003, and October

1, 2004, for their performance of corrupt influence for the benefit of the Potashniks and the business.

20. Previous to Brian Potashnik's plea, Cheryl Potashnik also pled guilty to Count 7 of the indictment. On June 11, 2009,Cheryl Potashnik has admitted that, within Dallas County, in a transaction or series of transactions, she corruptly offered, gave or agreed to give something of value of $5,000.00 or more to a person, namely, Hodge, in connection with a business, transaction, or series of transactions of the State of Texas, with the intent to influence or reward Hodge, an agent of the State of Texas, a state government that received federal benefits in excess of $10,000.00 under a federal program involving a grant and other forms of federal assistance during the one period beginning on October 1, 2002, for her performance of corrupt influence for the benefit of the Potashniks and their business, Southwest Housing.

21. Brian and Cheryl Potashnik owned and/or control Southwest Housing Acquisition Corporation, ("SWH") and its affiliates, which included Affordable Housing Construction and Southwest Housing Management Corporation, were for-profit corporations that developed, built and managed affordable housing projects in South Dallas. Defendant Brian L. Potashnik was a real estate developer and the founder, president, and a principal of SWH. SWH relied heavily on tax-exempt bonds and housing tax credits to finance its developments. Consequently, the City Council's approval of SWH's zoning change applications and use of tax credit financing was crucial to its success.

Rosemont at Laureland and Rosemont at Scyene were SWH tax credit projects that were located in District 5. A portion of Rosemont at Laureland was also located in District 8.

22. James R. (Bill) Fisher, the president of Odyssey Residential Holdings, LP. Similar to Southwest Housing, Odyssey Residential Holdings, LP., sought local and state approval to finance and construct multifamily affordable housing developments in South Dallas using federal tax credits and tax-exempt bonds. Therefore, Southwest Housing was in direct competition with e Odyssey Residential Holdings. Any unfair competition, such as that complained of here, was by default directed at Odyssey and had an intended and direct competitive affect on Odyssey. Odyssey Residential Holdings, LP.

23. Donald W. Hill ("Hill"), an agent of local government, was elected to the Dallas City Council ("DCC"), District 5, in 1999, again in 2001, 2003 and 2005. As a member of the DCC, Hill and D'Angelo Lee, ("Lee"), a member of the Dallas City Planning Commission ("DCPC"), sought and received bribes from Defendants Brian Potashnik and Defendant Cheryl Potashnik (collectively "Potashniks"), owners of Defendant Southwest Housing Development Company, Inc. ("SWH"), in exchange for Hill and Lee's approval of SWH's Arbor Woods development and two affordable housing tax credit projects in District 5, Rosemont at Laureland and Rosemont at Scyene, within the City of Dallas Texas. Brian and Cheryl Potashnik conspired to bribe Hill and Lee, in

exchange for their official acts on the DCC and the Dallas City Plan and Zoning Commission, and to further the business interests of the Defendants and to oppose the business interests of Fisher and his business Odyssey Residential Holdings, LP.

24. On Hill's motion, the City Council approved resolutions supporting TDHCA tax-exempt bonds and 4% tax credits for both projects on October 27, 2004. The bond and tax credit applications for Rosemont at Laureland and Rosemont at Scyene were in direct competition with the bond and tax credit applications for two other projects located in District 5, Dallas West Village and Memorial Park Townhomes, which were being proposed by another affordable housing developer. In 2004, the City Council also approved resolutions supporting TDHCA tax-exempt bonds and 4% tax credits for two other SWH tax credit projects, Cherrycrest Villas and Arbor Woods.

25. Beginning, at least, in or about August 2004, Donald W. Hill, also known as Don Hill, D'Angelo Lee, Sheila D. Farrington, also known as Sheila Hill, Brian L. Potashnik, Cheryl L. Potashnik, also known as Cheryl L. Geiser, Rickey E. Robertson, also known as Rick Robertson, Andrea L. Spencer, also known as Toni Fisher and Toni Thomas, and Ronald W. Slovacek, also known as Ron Slovacek, did knowingly combine, conspire, confederate and agree with each other, and with others to commit bribery concerning an agent of local government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(1)(B), that is, as an agent of a local government that received benefits

in excess of $10,000.00 in each of the one-year periods beginning October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance, to corruptly solicit, demand, accept, and agree to accept, in a transaction and series of transactions, something of value of $5,000.00 or more from a person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of the City of Dallas; and bribery concerning an agent of a local government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(2), that is, in a transaction and series of transactions, to corruptly offer, give and agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of the City of Dallas, with intent to influence and reward an agent of local government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance.

The objects of the conspiracy included the following:

1. to unjustly enrich Hill and Lee though their corrupt solicitation, acceptance, and agreement to accept things of value in return for their performance of official acts on the Dallas City Council ("City Council" or "Council") and the Dallas City Plan and Zoning Commission ("CPC"), respectively;

2. to influence and reward Hill and Lee by corruptly offering, giving and agreeing to give things of value to them for their performance of official acts on the City Council and the CPC, respectively, that would advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik;

3. to use the office of City Council Member Hill and the office of Plan Commissioner Lee, including staff members employed therein, to perform official acts to advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik;

4. to conceal the illegal nature of Hill and Lee's solicitations for, and acceptance of, various things of value through the preparation of sham written agreements, the use of nominee companies, and the omission of material facts concerning the financial benefits that were sought on behalf of, and received by, Hill and Lee, all to ensure the continued existence and success of the conspiracy; and

5. to conceal the illegal nature of Brian L. Potashnik and Cheryl L. Potashnik's offer and remittance of various things of value through sham invoices, false accounting entries, and the award of a construction contract to Hill and Lee's associates.

26. Defendants facilitated Hodge's placement in the market rate unit, and further facilitated her payment of a reduced rent by supplementing Hodge's agreed-to reduced payments with payments from Defendants'

own funds. By signing various checks and obtaining various money orders payable to Rosemont of Arlington Park, Defendants caused payments to be made for the benefit of Hodge totaling more than the sum of $27,869.00 as bribery influence. During the time of the rent payments, Hodge continued to support SWH affordable housing projects. However, upon information and belief and not completely known by Odyssey until the now factually undisputed, September 2007 federal criminal indictment was made public, Defendants intentionally, knowingly and willfully paid Hodge, directly or indirectly, money or something of value for the purpose of favorable influence on SWH's projects and to cause interference with and/or gain a competitive edge against Odyssey's similar low income housing projects.

27. This Conspiracy scheme violated 18 U.S.C. § 371 (§§ 666(a)(1)(B) and 666(a)(2))) beginning, at least, on or about February 27, 2002, when Brian L. Potashnik, Cheryl L. Potashnik, and Gladys E. Hodge, also known as Terri Hodge, did knowingly combine, conspire, confederate and agree with each other, and with others to commit the following offenses:

1. bribery concerning an agent of a state government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(1)(B), that is, as an agent of a state government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2001, October 1, 2002, October 1, 2003, and October 1, 2004, pursuant to a federal program

involving a grant and other forms of federal assistance, to corruptly solicit, accept, and agree to accept, in a transaction and series of transactions, something of value of $5,000.00 or more from a person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of the State of Texas; and

2. bribery concerning an agent of a state government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(2), that is, in a transaction and series of transactions, to corruptly offer, give and agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of the State of Texas, with intent to influence and reward an agent of a state government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2001, October 1, 2002, October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance.

28. The objects of the conspiracy was to unjustly enrich Hodge through her corrupt solicitation, acceptance and agreement to accept things of value in return for her performance of official acts and use of her official position as a state representative; and to influence and reward Hodge by corruptly offering, giving and agreeing to give things of value to Hodge for her performance of official acts and use of her official position as a state representative that would

advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik and to unfairly complete with the scheme Victims.

29. The Potashniks in the Hodge conspiracy used the following manner and means, among others, to carry out the objects of the conspiracy:

1. As a state representative, Hodge would and did provide official assistance to affordable housing developers Brian L. Potashnik and Cheryl L. Potashnik, who sought TDHCA approval of their tax credit applications located in House District 100 and elsewhere.

2. Hodge would and did seek things of value for herself in return for providing official assistance to Brian L. Potashnik and Cheryl L. Potashnik. The things of value included rent subsidies, utility payments and new carpeting for her house.

3. Brian L. Potashnik and Cheryl L. Potashnik would and did offer things of value to Hodge to influence and reward her for her performance of official acts that advanced their business interests. The things of value included rent subsidies, utility payments and new carpeting for her house.

4. In return for things of value, Hodge would and did agree to perform and did perform a pattern of official acts to promote and advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik, which included:

a. submitting letters to the TDHCA in support of SWH tax credit projects located in House District 100; and

b. seeking the support of other elected officials for SWH projects located in other house districts.

5. Brian L. Potashnik and Cheryl L. Potashnik would and did use personal checks and money orders to conceal their payment of Hodge's rent.

6. Brian L. Potashnik and Cheryl L. Potashnik would and did cause SWH Management Corporation to keep the TXU Electric account for Hodge's apartment in SWH Management Corporation's name after Hodge moved into the apartment to conceal SWH's payment of Hodge's electricity bills.

7. Brian L. Potashnik and Cheryl L. Potashnik would and did maintain Hodge's rental file at SWH's corporate office to conceal the rental and utility payments they made for Hodge's benefit.

8. Brian L. Potashnik and Cheryl L. Potashnik would and did use personal checks and money orders on seventy three (73) separate occurrences to influence and reward Hodge for her performance of official acts to advance the Potashnik's business and to unfairly compete with Movant and others.

REVIEWING THE PLEA

30. In reviewing the victims' objections, this court will analyze many aspects of the proposed plea terms. Those terms must be analyzed under 18 U.S.C. §§ 3553, 3563, and 3572. Section 3553 requires, in relevant part, that in assessing the appropriateness of a sentence, a court must consider the history and characteristics of the defendant, the seriousness of the offense, whether the proposed sentence is an adequate deterrent to future criminal conduct, and whether the sentence protects the public.

31. Section 3572(a) provides, in relevant part, that in determining a fine, the court should consider the defendant's "income, earning capacity, and financial resources," "the burden that the fine will impose upon the defendant," "any pecuniary loss inflicted upon others as a result of the offense," and "whether the defendant can pass on to consumers or other persons the expense of the fine." Section 3572(a) also provides that the court should consider "the organization's role in the offense," "civil obligations arising from the organization's conduct," "any nonpecuniary loss caused or threatened by the offense," and "any prior civil or criminal misconduct by the organization."

RESTITUTION REQUESTED

32. Because Brian and Cheryl Potashnik pled guilty to conspiring with others and agreeing to pay restitution, they are liable to pay liquidated damages suffered by their victims. The Victim Witness and

Protection Act (VWPA) provides a court may order restitution to any victim of the offense. See Boyd, 222 F.3d at 50-51; *United States v. Nichols,* 169 F.3d 1255, 1278 (10th Cir.1999); *United States v. Plumley,* 993 F.2d 1140, 1142 (4th Cir.1993); See 18 U.S.C. § 3663(a)(1)(A) (Supp. III 1997). In *Hughey v. United States,* 495 U.S. 411, 413, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990), the Supreme Court instructed the VWPA authorizes "an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of the conviction." With these general principles in mind, the Movant now turns to their specific restitution requests.

33. In awarding restitution under the Mandatory Victims Restitution Act (MVRA), the method is not always exact when making a determination with the type of business loss. The proper measurement of loss in this case can be the total amount of loss attributable to the entire scheme even though the defendant plead to only one count out of 15. 18 U.S.C.A. § 3663 et seq.; *See, United Stated v. Arnold,* 947 F. 2d 1236, 1237 (5th Cir.1991). The actual liquidated loss to Movants attributable to the Defendant's bribery scheme is as follows:

Summary of Liquidated Damages

Cost of sites under our acquisition agreement with Provident Realty Advisors and Leon Backus			
$300,000 per site in District 5			**$ 600,000.00**
Architectural billings	**Sage & other costs**		**$ 11,186.40**
Engineering and Survey	**Jones and Carter**		
	RG Miller; DeShazo Tang		
	Survey Consultants	**Sub total**	**$112,865.66**
Consulting and Legal	**Kathy Nealy**		
	Jackson Walker		
	SMM and Petricca Sub Total		**$ 701,489.84**
TDHCA costs	**Application fees**		
	Commitment Fees		
	Due diligence Studies	**Sub total**	**$ 117,098.00**
		ESA	
		Market	
		Appraisal	
Soft costs			**$ 1,032.09**
	Printing		
	Renderings		
	Fed x etc		

Staff time	**Payroll and Benefits (not Fisher or Jafar)**	**$ 150,000.00**

Legal Fees to Haynes and Boone	**$ 200,000.00**

Sub total out of pockets	**$1,893,671.99**

34. Movants have attached documents specifically showing costs and expenses incurred that are attributable to the Defendant's bribery scheme. The damages incurred by Movants are specific to certain projects that were undertaken by Movants, in the normal scope of their business, more specifically: (1) the Memorial Park Property. These items are outlined and attached hereto as **Exhibit 3, App. 17-App. 80;** (2) the Westmoreland/Dallas Property. These items are outlined and attached hereto as **EXHIBIT 4, App. 81-App. 91**; (3) The Dallas West Village Property. These items are outlined and attached hereto as **EXHIBIT 5, App. 92-App. 137.** The aforementioned documents attached hereto are pages of records kept by James R. (Bill) Fisher and Odyssey Residential Holdings, LP in the regular course of their business. **SEE EXHIBIT 6, App. 138-App. 140.**

35. The unliquidated loss to Movants are attributable to the Defendant's bribery scheme is comprised of development revenue lost, and includes lost general contractor fees, and overhead that would have been allowed within the program guidelines, and are as follows:

Summary of Unliquidated Damages

Overhead and general contractor Fees on Memorial Park	**$ 1,054,310.00**
Overhead and general contractor Fees on Dallas West Village	**$ 794,000.00**
Developer fee for Memorial Park townhomes: ($991,761 is Deferred Developer Fee)	**$ 2,689,548.00**
Developer Fee for Dallas West Village: ($324,067 is Deferred Developer Fee)	**$ 2,502,338.00**
Sub total lost developer fee, general contractor fee and overhead	**$7,040,196.00**

36. Movants have attached documents forming the basis of lost profits, includes lost general contractor fees, deferred developer fees, and tax credit allocation amounts. Also included is documentation showing overhead that would have been allowed within the program guidelines that are attributable to the Defendant's bribery scheme. **SEE EXHIBIT 7, App. 141-App. 169.**

RELIEF REQEUSTED

WHEREFORE, James R. (Bill) Fisher and Odyssey Residential Holdings, LP asks this Court, pursuant to the Crime Victims' Rights Act (CVRA),

Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA) and to 18 U.S.C.A. § 3663 et seq., to find that in all things considered it is proper that Defendants Brian and Cheryl Potashnik be required to pay restitution, jointly and severally in the amount of **$8,933,867.99** to James R. (Bill) Fisher and Odyssey Residential Holdings, LP for actual losses suffered as a result of the bribery scheme to which they have pled guilty. Movants pray that the Court order restitution in the amount of $7,039,902.00 be paid jointly and severally by Defendants Brian and Cheryl Potashnik James R. (Bill) Fisher and Odyssey Residential Holdings, LP. within a definite time frame, or that all writs and processes issue. Movant's lastly request the court assess a fine equal to twice the damages caused the victims as set forth in the plea agreement.

Respectfully submitted,

JOHN H. CARNEY & ASSOCIATES

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CERTIFICATE OF CONFERENCE

I, Counsel for Movant, have conferred with the Assistant United States Attorney and the assigned U.S. Federal Probation Officer regarding the merits of the motion and they do not appose the Motion for Restitution. I have also conferred with Abby Lowel, counsel for Brian Potashnik and Matthew D. Orwig counsel for Cheryl Potashnik regarding the motion and both oppose the motion.

/s/ *John H. Carney*
John Carney

[Certificate Of Service Omitted In Printing]

No. 11-10006

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: James R. Fisher and Odyssey Residential Holdings, LP

Petitioners

– against –

United States District Court
for the Northern District of Texas,

Respondent.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3) FOR ENFORCEMENT OF VICTIMS RIGHTS UNDER THE VICTIM AND WITNESS PROTECTION ACT (VWPA) AND THE MANDATORY VICTIMS RESTITUTION ACT (MVRA)

(Filed Jan. 6, 2011)

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

This petition is filed by James R. Fisher and Odyssey Residential Holdings, LP, who are victims of a bribery and conspiracy to bribe scheme involving defendants Brian and Cheryl Potashnik, and their company, Southwest Housing.

The criminal case against Brian and Cheryl Potashnik has been prosecuted in the United States District Court for the Northern District of Texas, Dallas Division. It involves one 31-count indictment naming 14 people including former Dallas Mayor Pro Tem Don Hill and state Rep. Terri Hodge. There were also separate indictments charging James Fantroy and Jack Potashnik.

The indictments charge that the named individuals were part of a public bribery and extortion scheme involving affordable housing. Former Dallas Mayor Pro Tem Don Hill, consultant Sheila Farrington, State Rep. Terri Hodge, Black State Employees Association of Texas director Darren Reagan, James Fantroy, D'Angelo Lee, Brian and Cheryl Potashnik, Jack Potashnik, Gladys Hodge, Allen McGill, Jibreel Rashad, Rickey Robertson, Andrea Spencer, Ronald Slovacek, Kevin Dean and John Lewis were all named in the indictments.

Odyssey Residential Holdings, LP is privately held, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The criminal case has been handled by District Judge Lynn.

Because this is a mandamus petition, the United States District Court for the Northern District of Texas, Dallas Division, is technically the respondent. FED. R. APP. P. 21(b)(4).

Respectfully submitted,
JOHN H. CARNEY & ASSOCIATES

By: /s/ [Illegible]
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NOTICE OF RELATED PROCEEDINGS

3:07-cr-00289-M USA v. Hill et al.
Date filed: 09/27/2007

Other Court Information

Court Name	Case Number	Start Date	End Date
'USCA5'	'10-10211 (X10-10232)'		
	'10-10211'		
	'10-10211'		
	'10-10214'		
	'10-10216'		
	'10-10218'		
	'10-10299'		
	'10-10299'		
	'10-10299'		
	'10-10300'		

USCA5	10-10211 (X10-10645)	07/02/2010	
USCA5	10-10211 (X10-10667)	07/02/2010	

TO THE HONORABLE COURT OF APPEALS:

Petitioners, James R. Fisher and Odyssey Residential Holdings, LP submit this their *Petition for a Writ of Mandamus Pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(D)(3) for Enforcement of Victims Rights under the Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA)* seeking the issuance of a writ of mandamus arising from the court's Sentencing Order as to Brian Potashnik issued on December 23, 2010[1] denying restitution and to direct the district court to recognize James R. Fisher and Odyssey Residential Holdings, LP as "crime victims" with rights under the CVRA and MVRA and to award restitution. Petitioners support their petition as follows:

STATEMENT OF THE RELIEF SOUGHT

Petitioners James R. Fisher (Fisher) and Odyssey Residential Holdings, LP (Odyssey) (collective Petitioners) petition this Court, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3),

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[1] "the victim petitions the court of appeals for a writ of mandamus within 14 days" of the denial of the victim's motion in the district court. 18 U.S.C. §§ 3771(d)(3), 3771(d)(5).

the Mandatory Victims Restitution Act (MVRA), the All Writs Act, 28 U.S.C. § 1651; and Rule 21 of the Federal Rules of Appellate Procedure, for de novo review of Petitioners' status as crime victims, and for issuance of a writ of mandamus directing the United States District Court for the Northern District of Texas, Dallas Division, to recognize them as "crime victims" (**Appendix 024-Appendix 026**) under the MVRA and the CVRA of the crimes, charged in *United States v. Brian Potashnik et al.*, Case No. 3:07CR289-M, and to hold offenders accountable for their actions, specifically those that cause financial harm to victims. Petitioners should be afforded all of the rights that crime victims are guaranteed under the Acts – including, in particular, the right to full restitution.

Petitioners specifically request that this court enter its order directing the trial Court to award-restitution from Brian Potashnik to petitioners for:

1) $112,500.00 jointly and severally being the amount awarded against Hill, Lee and other arising from the trial Court's finding a mandatory award under the MVRA for Count 10 of the criminal complaint, Potashnik's plea count. **Appendix 193-Appendix 199**.

2) $200,000.00 restitution for legal fees paid by petitioners to Haynes & Boone which falls within the mandatory provisions of the MVRA, including victim attorney fees and other litigation expenses associated with

assistance to FBI in investigation of defendant's offense was in compliance with plain language of Mandatory Victims Restitution Act directing courts to require defendant convicted of fraud to reimburse victim for expenses incurred during participation in investigation or prosecution of offense.

3) $1,793,000.00 in direct out of pocket expenses, development costs incurred by Petitioners in the project development which Potashnik bribed city officials to deny and for which Potashnik gained approval of his competing projects. **Appendix 040-Appendix 160** and **Appendix 164-Appendix 192**.

PETITIONERS BELIEVE THAT THE TRIAL TRANSCIPT HAS BEEN FILED WITH THE APPEALS IDENTIFIED IN THE RELATED PROCEEDINGS.

PETITIONERS RELY UPON THE ATTACHED APPENDIX, INCLUDING THE PLEA PAPERS, FACTUAL RESUMES, AND THE CRIMINAL COMPLAINT TO WHICH ALL DEFENDANTS EITHER PLED OR WERE FOUND GUILTY AFTER TRIAL.

INTRODUCTORY STATEMENT

Since the passage of the Crime Victims Rights Act (CVRA) in late 2004, victims of federal crimes have not only had the right to full and timely restitution, but they also have an appellate mechanism to ensure that their federal rights are protected. *See* 18 U.S.C. § 3771. The status as victim may be

determined from the criminal complaint, which in this instance contains over 100 pages of factual allegations, for which the Grand Jury found probable cause to which presumptions attach and to which all defendants have either been convicted at trial or to which the defendants have pled guilty. These allegations were sufficient for the Department of Justice to designate petitioners as victims and upon which petitioners now seek relief.

Previous to the enactment of the landmark CVRA, the federal restitution laws were amended by the Mandatory Victims Restitution Act (MVRA) of 1996, which guaranteed crime victims restitution but without an appellate remedy for violations. 18 U.S.C. § 3663A. The need to revamp the federal restitution laws was evident within the legislative history of the MVRA, which stated:

> [u]nder existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to make victims whole. H.R. 665, the "Victim Restitution Act of 1995," is an important step forward in ensuring justice for the victims of crime and accountability for convicted criminals. By requiring full financial restitution, the Act **requires the offender to face the harm suffered by his victims and, to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of**

> **recouping the personal and financial losses resulting from crime.** H.R. Rep. 104-16, H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586 (Leg.Hist.). (emphasis added)

ISSUES PRESENTED

ISSUE 1: DID THE TRIAL COURT CLEARLY AND INDISPUTABLY ABUSE ITS DISCRETION BY DENYING PETITIONERS VICTIM STATUS; IMPROPERLY APPLYING THE DEFINITION OF "VICTIM" UNDER 3662A(2)

The government attorneys entered into a plea agreement with Brian Potashnik (see **Appendix 034-Appendix 039**) which, they argued, precluded the court from imposing any restitution or any forfeiture whatsoever. The government contended and still maintains that there were no victims whatsoever to the Potashniks' bribery schemes. Until the day of sentencing, the government argued that the plea agreement with Brian Potashnik precluded restitution and forfeiture, both for the count of the guilty plea and for all relevant conduct and that the plea agreement was binding on the court.[2] On the day of

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[2] ORDER as to Brian L Potashnik: On or before 12/8/2010 the Government will advise the Court in writing whether it takes the position that the plea agreement, if accepted, bars the Court from ordering Defendant to pay restitution. (Ordered by Judge Barbara M.G. Lynn on 12/3/2010) (dnc) (Entered: 12/03/2010)

sentencing, the government and Brian Potashnik modified the plea agreement to make the plea agreement advisory, but not binding on the court, giving the court latitude to sentence Brian Potashnik as the court saw fit, yet maintaining the government's position that it had foreclosed any financial sanctions against Brian Potashnik. **Appendix 200-Appendix 205.**

Both Potashniks have been sentenced, with a finding by the court that there were no victims, nor would restitution be awarded to any victim. Petitioners argue that Brian Potashnik's plea count [Count 10] is a MVRA count for which each of the Brian Potashnik's co-defendants was found liable to pay restitution which should be joint and several. Further Petitioners argue that the language of the plea agreement provided that Brian Potashnik was additionally obligated to pay restitution for "all relevant conduct." The disputed language of their plea agreements was:

3. "**Sentence**: The maximum penalties the Court can impose includes:

> e. restitution to victims or to the community, which may be mandatory under the law, and which Brian Potashnik agrees may include restitution arising from *all relevant conduct, not limited to that arising from the offense of conviction alone*;"

Appendix 035.

The government argued at sentencing (and the court clearly and indisputably abused its discretion in accepting the argument) that the plea language above was only a disclosure of the court's maximum sentencing authority, and not an express agreement by Potashnik to pay restitution beyond the plea count. The government's argument meets itself coming around the corner, because absent an express agreement to pay restitution for all relevant conduct, the court is limited in its ability to order restitution to the count(s) of plea or conviction only. So, unless this language and defendant's express consent ["and which Potashnik agrees"] provides for the defendant's agreement to pay restitution for all relevant conduct, it was beyond the court's authority to order restitution for any count other than the plea count. The government's argument fails all logical analysis and the plain reading requires this court to find that Potashnik did agree to pay restitution for all relevant conduct and that the trial court committed clear error in failing to consider petitioners to be victims of the relevant conduct and to award restitution for the plea count and all relevant conduct.. This unambiguous plea language is not just notice of the court's maximum sentencing authority, but an express agreement to expand the court's authority to pay restitution for all relevant conduct and require the court to determine who the victims of the relevant conduct were. The court clearly and indisputably abused its discretion in not even considering, who were victims of "the relevant conduct" to which the Potashniks agreed to pay restitution and ignoring Petitioners' claims for

restitution damages from such relevant conduct. Brian Postashnik pled to Count 10 and suffered no restitution where his co-defendants Donald W. Hill and D'Angelo Lee were convicted of Count 10 at trial were assessed a mandatory MVRA restitution charge for Count 10. Brian Potashnik should be jointly and severally liable for the Count 10 restitution.

As to all relevant conduct, which may be mandatory and for which Brian Potashnik agreed to pay to victims and others in his plea agreement, the district court clearly and indisputably abused its discretion in never considering whether Petitioners were the victims of the relevant conduct and in not considering appropriate award of restitution.

Brian Potashnik's co-defendants, including Donald W. Hill and D'Angelo Lee were found guilty of Count 10, [Brian Potashnik's plea count] 18 USC 371(666(a)(1)(B) and 666(a)(2)), Conspiracy To Commit Bribery Concerning A Local Government Receiving Federal Benefits and ordered to pay $112,500.00 in restitution to Fisher. Query, how is Count 10 a MVRA mandatory restitution count for some defendants and not for others?

Petitioners further argue that this language, adopted in virtually all plea agreement forms, is in direct response to the mandate of the crime victim statutes and tracks the language of the statues and was drafted and regularly used to fulfill the Department of Justice's obligations under the CVRA.

The trial Court clearly and indisputably abuse its discretion by finding that petitioners were not d protected "crime victims" under the MVRA because they were not "directly harmed as the result of the conspiracy to which Brian Potashnik pled guilty and for all relevant conduct including each of the other counts of the indictment, not just the crimes to which they pled guilty.

ISSUE 2: DID THE TRIAL COURT CLEARLY AND INDISPUTABLY ABUSE ITS DISCRETION BY FINDING THAT BRIBERY AND CONSPIRACY TO COMMIT BRIBERY, AND THE OTHER RELEVANT CONDUCT OF DEFENDANT BRIAN POTASHNIK, WERE NOT CRIMES SUBJECT TO THE MANDATORY VICTIMS RESTITUTION ACT (MVRA)?

The second issue presented is whether bribery and conspiracy to commit bribery and any or all of relevant conduct are crimes covered by the MVRA, which would have obligated the court to award restitution against Brian Potashnik. If so, were Petitioners "victims" under the MVRA to which restitution should be paid and how much is to be paid. Petitioners urge this court to find that bribery and conspiracy to commit bribery are offenses "committed by fraud or deceit" so as to fall within 3663A(c)(1)(A)(ii). In *U.S. v. Liu*, 200 Fed.Appx. 39 C.A.2 (N.Y.), 2006, the court found that the MVRA applied to bribery, and the court required that defendants who pleaded guilty to bribery of a bank official pay restitution. See also

United States v. Catoggio, 326 F.3d 323, 326 (2d Cir.2003).

By enacting MVRA in 1996, Congress created a class of offenses for which restitution was mandatory upon conviction, without regard to the defendant's financial circumstances. 18 U.S.C. § 3663A(a), 18 U.S.C. § 3664(f)(1)(A). The only elements necessary to impose restitution under MVRA are (1) conviction of an enumerated offense, and (2) a determination of the amount of restitution owed. The amount of restitution owed is "the full amount of each victim's losses as determined by the court." *Id.* § 3664(f)(1)(A). The relevant portions of the MVRA state:

> Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

18 U.S.C. § 3663A(a)(1).

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

18 U.S.C. § 3664(f)(1)(a).

Subsection (c) also provides:

As 18 U.S.C. § 3663A(c)(1) states, restitution is mandatory for any offense –

(A) that is-

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

18 U.S.C. § 3663A(c)(1).

Petitioners respectfully suggest that bribery is thus "an offense against property under [Title 18 of the United States Code], specifically, an offense committed by fraud or deceit." The outcome of this issue depends upon the language of § 3663A(a)(1) and (2), which Congress added to the VWPA in 1990 to include a broad description of victims:

> "For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means **any person directly harmed** by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."

The MVRA authorizes a district court to order restitution to victims of certain offenses, including Title 18 offenses. 18 U.S.C. § 3663A(a)(1), 18 U.S.C. §3663A(c)(1)(A)(ii). It defines "victim" as "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 as "**any person directly harmed by the defendant's criminal conduct in the course of the scheme**." 18 U.S.C. § 3663A(a)(2) (emphasis added). A defendant sentenced under the MVRA is only responsible to pay restitution for the conduct underlying the offense for which he has been convicted. *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir.1999) (stating that the purpose of the MVRA is to "restrict the award of restitution to the limits of the offense"). "[W]here a fraudulent scheme is an element of the conviction, the court may award restitution for 'actions pursuant to that scheme.'" *United States v. Cothran,* 302 F.3d 279, 289 (5th Cir.2002) (quoting *United States v. Stouffer*, 986 F.2d 916, 928 (5th Cir.1993)) and 18 U.S.C. § 3663(a)(2).

The Amendment is widely viewed as partially overruling *Hughey's* restrictive interpretation of the VWPA and expanding district courts' authority to grant restitution. See *United States v. Kones*, 77 F.3d 66, 69 (3rd Cir.1996); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 n. 1 (4th Cir.1995). The majority view is that the 1990 Amendment "did have

a substantive impact on the amount of restitution a court could order when a defendant is convicted of an offense involving a scheme, conspiracy, or pattern." *United States v. DeSalvo*, 41 F.3d 505, 515 (9th Cir.1994). Therefore, Federal courts now allow broader restitution orders encompassing losses that result from a criminal scheme or conspiracy, regardless of whether the defendant is convicted for each criminal act within that scheme. See, e.g., *United States v. Manzer*, 69 F.3d 222, 230 (8th Cir.1995). The harm must be a direct result of the defendant's criminal conduct, though, or "closely related to the scheme." *Kones*, 77 F.3d 66, 70. The detailed factual allegations of the complaint, the uncontroverted testimony of Mr. Fisher at trial and sentencing established that his business Odyssey was directly harmed as a result of Potashnik's bribery of Hill and Lee which was contemporaneous with Hill's delay and denial of Fisher's applications.

ISSUE 3: DID THE TRIAL COURT CLEARLY AND INDISPUTABLY ABUSE ITS DISCRETION AND VIOLATE THE MVRA BY REFUSING TO AWARD RESTITUTION TO PETITIONERS AFTER MAKING THE DETERMINATION THAT RESTITUTION WAS MANDATORY IN COUNT 10 AS TO HILL AND LEE, AND FURTHER FOR REFUSING TO MAKE THE RESTITUTION JOINT AND SEVERAL AS TO POTASHNIK?

Individual federal defendant convicted of conspiracy must pay restitution resulting from the

conduct of the entire conspiracy and not simply reimburse the losses resulting from his individual conduct. 18 U.S.C.A. § 3663A. *U.S. v. Bogart* 490 F.Supp.2d 885 (S.D.Ohio, 2007). *U.S. v. Martinez* 610 F.3d 1216 (C.A.10 (N.M.), 2010).

Donald W. Hill and D'Angelo Lee were accessed restitution for Count 10 in the amount of $112,500.00 representing sum, but not all of the monies paid as bribes. By virtue of his plea to Count 10, and the Court's prior finding that restitution for Count 10 was mandatory under the MRVA, Brian Potashnik should have been charged jointly and severally liable for the same level, albeit the minimum level of restitution.

The Act requires the offender to face the harm suffered by his victims and, to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime. H.R. Rep. 104-16, H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586 (Leg.Hist.). (emphasis added).

STATEMENT OF FACTS

Brian Potashnik and Cheryl Potashnik were each charged with a total of 15 counts:

18 U.S.C. § 371 (§§ 666(a)(1)(B) and 666(a)(2)))	Conspiracy to Commit Bribery Concerning a State Government Receiving Federal Benefits	Counts 1
18 U.S.C. §§ 666(a)(1)(B) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 2-5
18 U.S.C. §§ 666(a)(2) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 6-9
18 U.S.C. § 371 (§§ 666(a)(1)(B) and 666(a)(2))	Conspiracy to Commit Bribery Concerning a Local Government Receiving Federal Benefits	Count 10
18 U.S.C. §§ 666(a)(1)(B) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 11-12
18 U.S.C. §§ 666(a)(2) and 2	Bribery Concerning a State Government Receiving Federal Benefits and Aiding and Abetting	Counts 13-14
18 U.S.C. § 981(a)(1)(C), 982(a)(1) and 28 U.S.C. § 2461	Forfeiture Allegation	Count 31

Brian Potashnik entered a plea agreement to Count 10 in which he agreed to pay restitution to victims of his relevant conduct in his plea agreement. **Appendix 034-Appendix 039.** Donald W. Hill and D'Angelo Lee and others were convicted of Count 10

and assessed mandatory restitution. **Appendix 193-Appendix 199.** As owners of Southwest Housing Development Company, Inc, Brian and Cheryl Potashnik's relevant conduct involved more than 130 separate and discrete overt acts in furtherance of multiple conspiracies to commit bribery and conspiracy to commit bribery of public officials responsible for approval of their affordable housing construction and tax credits. Defendants and others engaged in similar acts, which were prosecuted by the federal government in multiple criminal prosecutions.

In a last minute compromise, Cheryl Potashnik entered into a plea agreement, which forced her husband, Brian Potashnik, to also plea. Brian Potashnik pled guilty to Count 10 of the indictment, a conspiracy count. The government entered into plea agreements which on their face agreed to pay restitution to victims for "all relevant conduct" but which the government argued precluded any restitution or forfeiture. Petitioners contend that these agreements alone, if given the construction urged by the government, violated the victim's rights statutes. **Appendix 001-Appendix 022.**

On July 22, 2009, Brian Potashnik admitted that he knowingly and willfully combined, conspired, confederated, and agreed with Donald W. Hill, D'Angelo Lee and others, in the Northern District of Texas, in a transaction and series of transactions, to corruptly offer, give or agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of

the City of Dallas, with the intent to reward Donald W. Hill and D'Angelo. Lee, agents of the City of Dallas, for their performance of corrupt influence for the benefit of the Potashniks and their business. **Appendix 034-Appendix 039.**

Specifically, Brian Potashnik bribed Donald W. Hill and D'Angelo Lee to obtain approvals for his Laureland and Scyene projects in Hill's counsel district and to defeat Fisher and Odyssey's competing projects where regulations in effect prevented both builders' projects from being approved. **Appendix 161-Appendix 163.** It was one or the other who could receive approvals.

The government argued there were no victims whatsoever to their crimes, notwithstanding that several of Brian Potashnik's co-defendants were assessed restitution under the MVRA.

Previous to Brian Potashnik's plea, Cheryl Potashnik also pled guilty to Count 7 of the indictment. On June 11, 2009, Cheryl Potashnik admitted to relevant conduct that, within Dallas County, in a transaction or series of transactions, she corruptly offered, gave or agreed to give something of value of $5,000.00 or more to a person, namely, Hodge, in connection with a business, transaction, or series of transactions of the State of Texas, with the intent to influence or reward Hodge, an agent of the State of Texas, for her performance of corrupt influence for the benefit of the Potashniks and their business, Southwest Housing. **Appendix 027-Appendix 033.**

Brian and Cheryl Potashnik owned and/or controlled Southwest Housing Acquisition Corporation and its affiliates, which included Affordable Housing Construction and Southwest Housing Management Corporation, were for-profit corporations that developed, built and managed affordable housing projects in South Dallas. **Appendix 206-Appendix 395.** Brian Potashnik was a real estate developer and the founder, president, and a principal of SWH. *Id.* SWH relied heavily on tax-exempt bonds and housing tax credits to finance its developments. *Id.*

Consequently, the City Council's approval of Southwest Housing Acquisition Corporation's zoning change applications and use of tax credit financing was crucial to its success. *Id.* Rosemont at Laureland and Rosemont at Scyene were SWH tax credit projects that were located in District 5. A portion of Rosemont at Laureland was also located in District 8. *Id.*

Donald W. Hill (Hill), an agent of local government, was elected to the Dallas City Council (DCC), District 5, in 1999, again in 2001, 2003 and 2005. *Id.*

As a member of the DCC, Hill and D'Angelo Lee (Lee), a member of the Dallas City Planning Commission ("DCPC"), sought and received bribes from Brian Potashnik and Defendant Cheryl Potashnik (collectively Potashniks), owners of Defendant Southwest Housing Development Company, Inc (SWH). In exchange for Hill and Lee's approval of SWH's Arbor Woods development and two affordable housing tax

credit projects in District 5, Rosemont at Laureland and – Rosemont at Scyene, within the City of Dallas Texas. *Id.*

Brian and Cheryl Potashnik conspired to bribe Hill and Lee, in exchange for their official acts on the DCC and the Dallas City Plan and Zoning Commission, and to obtain approvals and tax credits for Arbor Woods development and two affordable housing tax credit projects in District 5, Rosemont at Laureland and Rosemont at Scyene and to oppose the competing projects sponsored by Fisher and his business Odyssey Residential Holdings, LP in District 5 being proposed simultaneously with those of Potashniks. *Id.*

On Hill's motion, the City Council approved resolutions supporting TDHCA tax-exempt bonds and 4% tax credits for both of Brian Potashnik's projects on October 27, 2004. *Id.* The payments to Hill and Lee identified in Count 10 began in August 2004 while the applications were pending. *Id.* The payments, made through co-defendant Shelia Farrington, were issued one-half from the checkbook of Rosemont at Laureland and the other half from the checkbook of Rosemont at Scyene. *Id.*

The bond and tax credit applications for Rosemont at Laureland and Rosemont at Scyene were in direct competition with the bond and tax credit applications for two other projects located in District 5, Dallas West Village and Memorial Park

Townhomes, which were being proposed by petitioners. **Appendix 161-Appendix 163.**

In 2004, the City Council also approved resolutions supporting TDHCA tax-exempt bonds and 4% tax credits for two other SWH tax credit projects, Cherrycrest Villas and Arbor Woods. **Appendix 001-Appendix 022.**

Beginning, at least, in or about August 2004, Hill, Lee, Sheila D. Farrington, also known as Sheila Hill, Brian Potashnik, Cheryl Potashnik, Rickey E. Robertson, also known as Rick Robertson, Andrea L. Spencer, also known as Toni Fisher and Toni Thomas, and Ronald W. Slovacek, also known as Ron Slovacek, did knowingly combine, conspire, confederate and agree with each other, and with others to commit bribery concerning an agent of local government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(1)(B), to corruptly solicit, demand, accept, and agree to accept, in a transaction and series of transactions, something of value of $5,000.00 or more from a person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of the City of Dallas; and bribery concerning an agent of a local government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(2), that is, in a transaction and series of transactions, to corruptly offer, give and agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of the City of Dallas, with intent to influence and reward an agent of local

government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance. **Appendix 206-Appendix 395.**

The objects of the conspiracy included the following:

1. to unjustly enrich Hill and Lee though their corrupt solicitation, acceptance, and agreement to accept things of value in return for their performance of official acts on the Dallas City Council ("City Council" or "Council") and the Dallas City Plan and Zoning Commission ("CPC"), respectively;

2. to influence and reward Hill and Lee by corruptly offering, giving and agreeing to give things of value to them for their performance of official acts on the City Council and the CPC, respectively, that would advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik;

3. to use the office of City Council Member Hill and the office of Plan Commissioner Lee, including staff members employed therein, to perform official acts to advance the business interests of Brian L. Potashnik and Cheryl L. Potashnik;

4. to conceal the illegal nature of Hill and Lee's solicitations for, and acceptance of, various things of value through the preparation of

sham written agreements, the use of nominee companies, and the omission of material facts concerning the financial benefits that were sought on behalf of, and received by, Hill and Lee, all to ensure the continued existence and success of the conspiracy; and

5. to conceal the illegal nature of Brian L. Potashnik and Cheryl L. Potashnik's offer and remittance of various things of value through sham invoices, false accounting entries, and the award of a construction contract to Hill and Lee's associates.

Id.

Defendants facilitated Hodge's placement in the market rate unit, and further facilitated her payment of a reduced rent by supplementing Hodge's agreed-to reduced payments with payments from Defendants' own funds. *Id.*

By signing various checks and obtaining various money orders payable to Rosemont of Arlington Park, Defendants caused payments to be made for the benefit of Hodge totaling more than the sum of $27,869.00 as bribery influence. *Id.* During the time of the rent payments, Hodge continued to support SWH affordable housing projects to the direct harm to Fisher/Odyssey. *Id.*

Defendants intentionally, knowingly and willfully paid Hodge, directly or indirectly, money or something of value for the purpose of favorable influence on SWH's projects and to cause interference with

and/or gain a competitive edge against Odyssey's similar low income housing projects. *Id.*

This Conspiracy scheme violated 18 U.S.C. § 371 (§§ 666(a)(1)(B) and § 666(a)(2))) and was relevant conduct of Brian Potashnik and directly harmed petitioners as each development project required support of the local politicians and when support was given to one project over the other, it was mutually exclusive and directly harmed the project not supported. The relevant conduct included the conspiracy wherein Cheryl Potashnik, and Gladys E. Hodge, also known as Terri Hodge, did knowingly combine, conspire, confederate and agree with each other, and with others to commit the following offenses:

1. bribery concerning an agent of a state government, receiving federal benefits, in violation of 18 § 666(a)(1)(B), that is, as an agent of a state government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2001, October 1, 2002, October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance, to corruptly solicit, accept, and agree to accept, in a transaction and series of transactions, something of value of $5,000.00 or more from a person, intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of the State of Texas; and

2. bribery concerning an agent of a state government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(2), that is, in a transaction and series of transactions, to corruptly offer, give and agree to give something of value of $5,000.00 or more to a person, in connection with any business, transaction, and series of transactions of the State of Texas, with intent to influence and reward an agent of a state government that received benefits in excess of $10,000.00 in each of the one-year periods beginning October 1, 2001, October 1, 2002, October 1, 2003, and October 1, 2004, pursuant to a federal program involving a grant and other forms of federal assistance.

The objects of the conspiracy was to unjustly enrich Hodge through her corrupt solicitation, acceptance and agreement to accept things of value in return for her performance of official acts and use of her official position as a state representative; and to influence and reward Hodge by corruptly offering, giving and agreeing to give things of value to Hodge for her performance of official acts and use of her official position as a state representative that would advance the business interests of Brian Potashnik and Cheryl Potashnik by giving express support for the applications for Rosemont at Laureland and Rosemont at Scyene which were in direct competition with the bond and tax credit applications for petitioners two projects located in District 5, known as Dallas West Village and Memorial Park Townhomes, so as to directly harm petitioners, scheme Victims.

The Potashniks in the Hodge conspiracy used the following manner and means, among others, to carry out the objects of the conspiracy:

> In return for things of value, Hodge would and did agree to perform and did perform a pattern of official acts to promote and advance the business interests of Brian Potashnik and Cheryl Potashnik, which included:
>
> a. submitting letters to the TDHCA in support of SWH tax credit projects located in House District 100; which included District 5 and the applications for Rosemont at Laureland and Rosemont at Scyene and
>
> b. seeking the support of other elected officials for SWH projects located in other house districts,
>
> Brian Potashnik and Cheryl Potashnik would and did use personal checks and money orders to conceal their payment of Hodge's rent.
>
> Brian L. Potashnik and Cheryl L. Potashnik would and did use personal checks and money orders on seventy-three (73) separate occurrences to influence and reward Gladys E. Hodge for her performance of official acts to advance the Potashnik's business and to unfairly compete with Movant and others.

Id.

PROCEEDINGS BELOW

As set forth in the criminal complaint filed on September 27, 2007, the Government charged in Count 1 a conspiracy by the Potashniks that spanned years 2001 through 2004 that the defendants conspired to bribe public officials. **Appendix 206-Appendix 395.** It was not until the summer of 2004 that competition with Fisher and his company Odyssey for development in Hill's district 5 that the conspiracy was expanded and when Brian Potashnik began to bribe those directly in control of the approval and permitting processes. See **Appendix 252-Appendix 293** for the factual recitation to which Brian Potashnik plead guilty and to which each co-defendant was convicted at trial.

According to plea documents filed in the case, from August 2004 through June 2005, deputy mayor pro tem Hill and his Plan Commission appointee, Lee, pressured Brian Potashnik to corruptly provide them, through the hiring of a specific community consultant and a specific subcontractor, with things of value to reward these agents of local government in connection with the business of the Dallas City Council and the City Plan and Zoning Commission. **Appendix 206-Appendix 395.**

Potashnik claims he did this to advance the general interests of SWH, rather than for any specific SWH development. The facts and timeline clearly evidence that the bribery was to accomplish the

Sycene and Laureland projects and to defeat Fisher's competing projects.

Brian Potashnik wanted that support to continue and refusing Hill and Lee's demands would adversely affect SWH. So, after initially refusing their demands, Potashnik agreed to their demands to hire a specific community consultant and to hire a specific subcontractor. **Appendix 206-Appendix 395.**

Potashnik claims to have "consciously avoided actual knowledge or inquiry that Hill and/or Lee would share financially in these contracts" they were requiring him to enter. This is beyond credible.

OTHER ADEQUATE MEANS

The Petitioners have "no other adequate means" to attain the desired relief in that the Honorable Judge Hoffman, district judge sitting for the 68th Judicial District Court found that Petitioners's claims, including civil RICO were barred by limitations and found that the four year statute of limitations had expired before Petitioners civil action was filed. Victims cannot appeal the court's denial of their victim status and since there was likely no other means for obtaining review of district court's decision, petitioners have no other adequate means of review of the denial of restitution.

RIGHT TO THE ISSUANCE OF A WRIT IS "CLEAR AND INDISPUTABLE"

Petitioners have made an evidentiary showing that they are "Crime Victims" under the CVRA and therefore have standing seek mandamus relief. Generally **Appendix 001-Appendix 022.** Petitioners contend that they have demonstrated a right to the issuance of a writ that is "clear and indisputable;" in that the joint and several liability under the MVRA is mandatory and that by virtue of Potashnik's plea to Count 10, wherein the court found restitution mandatory, the court was obligated to make the restitution joint and several. *Id.* Further, the legal fees and expenses paid to the law firm of Haynes & Boone incurred by Fisher in assisting the government in the investigation and prosecution of this case are clearly mandatory MVRA restitution amounts which the court was obligated to award.

APPROPRIATE UNDER THE CIRCUMSTANCES

Petitioners ask this Court in the exercise of discretion, to find that petitioners are victims and find that writ is "appropriate under the circumstances." Mandamus is appropriate as set forth above as the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court. 28 U.S.C.A. § 1651(a). The trial court has violated the mandatory provisions of the MVRA and failed to comply with CVRA and Congress expressly empowered this Court to afford

petitioners all of the rights that crime victims are guaranteed under the Acts – including in particular the right to full restitution. The district court's decision denying victims restitution from Brian Potashnik is not *appropriate* on the grounds that by a preponderance of the evidence that the defendant's criminal conduct related to the offenses proximately caused victim's damages, or alternatively that the conspiracy conduct "directly harmed" petitioners as required for victims to be entitled to mandamus relief. 18 U.S.C.A. § 2259.

STANDARD OF REVIEW

I. JAMES R. FISHER AND ODYSSEY RESIDENTIAL HOLDINGS, LP URGE THIS COURT TO APPLY ORDINARY APPELLATE REVIEW, NOT DEFERENTIAL MANDAMUS REVIEW.

Even though Fisher and Odyssey have filed a petition for mandamus relief, they urge that they are entitled to ordinary appellate review of their claims rather than deferential mandamus review. They further urge that whether Fisher and Odyssey fit the definition of "crime victims" under the CVRA – is a legal issue that is reviewed de novo. *See, e.g., United States v. Brock-Davis,* 504 F.3d 991, 996, 998-99 (9th Cir. 2007) (reviewing issue of whether entity was a "crime victim" under restitution statute de novo); *United States v. De La Fuente,* 353 F.3d 766, 771 (9th Cir. 2003) (same).

James R. Fisher and Odyssey Residential Holdings, LP come before the Court through a provision in the CVRA specifically providing that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).

Ordinarily, the issuance of a writ of mandamus lies in large part within the discretion of the court of appeals. See *Bauman v. U.S. Dist. Court,* 557 F.2d 650 (9th Cir. 1977). The plain language of the CVRA, however, specifically and obviously overrules conventional mandamus standards by directing that "[t]he court of appeals shall take up and decide such application forthwith. . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). As explained by the CVRA's Senate cosponsor, Senator Feinstein, the CVRA thus involves "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 his rights by a trial court to the court of appeals. . . ." 150 CONG. REC. S4262 (April 22, 2004) (statement of Sen. Feinstein) (emphases added).

Other Courts has held that petitioners under the CVRA are entitled to ordinary appellate review and need not make some extraordinary showing. In *Kenna v. United States District Court for the Central District of California,* 435 F.3d 1011 (9th Cir. 2006), this Court explained that the CVRA's plain language modifies many aspects of mandamus procedure to give crime victims a quick way to obtain appellate

review: [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute. Id. at 1017. Three Circuits agree with this Court, although there is now a "circuit split" on this issue. See In re *W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 562-63 (2d Cir. 2005) ("a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus"); *In re Stewart,* 552 F.3d 1285, 1289 (11th Cir. 2008) (recognizing petitioners as "victims" under the CVRA without requiring any extraordinary showing); *In re Walsh,* 229 Fed.Appx. 58 at *2 (3rd Cir. 2007) (citing and following *Kenna* and *Huff* in affording ordinary appellate review). But see *In re Antrobus,* 519 F.3d 1123, 1124 (10th Cir. 2008) (without looking at the legislative history or purposes of the CVRA "respectfully disagree[ing] with the decision of our sister circuit courts" and holding that crime victims must meet heightened mandamus standards of showing a "clear and indisputable" error); *In re Dean,* 527 F.3d 391, 394 (5th Cir. 2008) (same). Because *Dean* is the settled law of this

Circuit, unless the court adopts the standard of sister circuits, Petitioners must meet heightened mandamus standards of showing a "clear and indisputable" error in the review of their claims after de novo review of their status as victims.

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."

Mandamus is appropriate only "when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Dresser Indus., Inc.,* 972 F.2d 540, 543 (5th Cir.1992) (citing *In re Chesson,* 897 F.2d at 159). Specifically, a court must find three requirements before a writ will issue: (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "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," *Cheney v. United States District Court for the District of Columbia,* 542 U.S. 367, 124 S.Ct. 2576, 2587, 159 L.Ed.2d 459 (2004) (partially quoting

Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (alterations in original; internal citations and quotations omitted)).

As the Supreme Court has recently noted, "[t]hese hurdles, however demanding, are not insuperable." Id. at 2587 (quoting *Ex parte Republic of Peru,* 318 U.S. 578, 588, 63 S.Ct. 793, 799, 87 L.Ed. 1014 (1943)).

II. THE LEGAL QUESTION OF WHETHER JAMES R. FISHER AND ODYSSEY RESIDENTIAL HOLDINGS, LP ARE "VICTIMS" IS REVIEWED DENOVO.

The legal question underlying this petition – whether Petitioners fit the definition of "crime victims" under the CVRA – is a legal issue that is reviewed de novo. See, e.g., *United States v. Brock-Davis,* 504 F.3d 991, 996, 998-99 (9th Cir. 2007) (reviewing issue of whether entity was a "crime victim" under restitution statute de novo); *United States v. De La Fuente,* 353 F.3d 766, 771 (9th Cir. 2003) (same). Petitioners were issued a Victim Notice, assigned a number and access code by the Department Of Justice Victim Notification System. **Appendix 024-Appendix 026.** It was only after the prosecutors entered into a plea agreement which they argue waived all restitution did pretrial services reverse their victim determination.

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

Fisher and Odyssey have the statutory rights as "crime victims" under the MVRA and the CVRA. CVRA promises all "victims" of federal crimes a series of rights, including the right to participate in plea negotiations. 18 U.S.C. § 3771(a)(3). It broadly defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). Nonetheless, the district court has refused to recognize Fisher and Odyssey as victims of Brian Potashnik's crimes even though their co-conspirators were sentenced to pay Fisher restitution and Brian Potashnik agreed to pay restitution for all relevant conduct. **Appendix 034-Appendix 039.**

Certain portions of the restitution requested fall within the mandatory provisions of the MVRA, including victim for attorney fees and other litigation expenses associated with assistance to FBI in investigation of defendant's offense was in compliance with plain language of Mandatory Victims Restitution Act directing courts to require defendant convicted of fraud to reimburse victim for expenses incurred during participation in investigation or prosecution of offense.

I. THE CRIME VICTIMS' RIGHTS ACT BROADLY DEFINES THE "CRIME VICTIMS" WHO ARE ENTITLED TO CLAIM ITS PROTECTIONS, INCLUDING ITS RIGHT TO ATTEND THE TRIAL.

A. The CVRA is Remedial Legislation That Gives Crime Victims Generous Rights to Participate in the Federal Criminal Justice Process.

The Crime Victims' Rights Act is broad, remedial legislation that Congress passed and the President signed into law in October 2004. Pub. L. No. 108-405, 118 Stat. 2251 (codified at 18 U.S.C. § 3771). Congress intended to enact a "broad and encompassing" statute "which provides enforce[ablel rights for victims." 150 CONG. REC. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). Congress was concerned that crime victims in the federal system were "treated as nonparticipants in a critical event in their lives. They were kept in the dark by . . . a court system that simply did not have a place for them." *Id.* To reform the system, Congress gave victims "the simple right to know what is going on, to participate in the process where the information that victims and their families can provide may be material and relevant. . . ." *Id.*

The CVRA gives victims of federal crimes a series of rights, including the right to notice of court proceedings and the right "not to be excluded from any . . . public court proceeding" except on clear and convincing evidence that the victim's testimony would

be materially altered. 18 U.S.C. § 3771(a)(3). The CVRA further assures victims broadly that they will "be treated with fairness." 18 U.S.C. § 3771(a)(8). Congress intended the CVRA to dramatically rework federal criminal proceedings.

In the course of construing the CVRA generously, one circuit has observed: "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D. Cal.,* 435 F.3d 1011, 1013 (9th Cir. 2006). Accordingly, as remedial legislation, the CVRA "is to be construed broadly so as to achieve the Act's objective." *Padilla v. Lever,* 463 F.3d 1046, 1057 (9th Cir. 2006).

Congress intended that the courts give the CVRA's Definition of "Crime Victim" a generous construction. This Court should give liberal construction not only to the CVRA as a whole but to its definition of "crime victim" in particular. After reciting the definition of "victim" language at issue here, one of the Act's two co-sponsors explained that it was "an intentionally broad definition because all victims of crime deserve to have their rights protected. . . ." 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. See *Kenna v.*

United States District Court for the Central District of California, 435 F.3d 1011, 1015-16 (9th Cir. 2006) (discussing significance of CVRA sponsors' floor statements). The provision at issue here must thus be construed broadly in favor of Fisher and Odyssey.

B. James R. Fisher and odyssey are entitled to assert their rights as "crime victims" based on the allegations in the indictment.

Fisher and Odyssey are entitled to rely on an indictment's allegations in obtaining their rights and status. **See Appendix 206-Appendix 395.** Based upon the criminal complaint the Department of Justice issued Fisher and Odyssey a Victim Notice. **Appendix 024-Appendix 026.**

A court can properly presume that an indictment is supported by probable cause. See *FDIC v. Mallen,* 486 U.S. 230, 240-41 (1988). Accordingly, an allegation in the indictment that a person is a victim is sufficient to trigger rights under the CVRA. As one of the nation's leading criminal procedure hornbooks has explained: "Whether a person is a victim is determined pretrial by reference to the factual allegations in the charging instrument." LAFAVE, ISRAEL, KING & KERR, 1 CRIMINAL PROCEDURE § 1.5(k) at n. 415.5 (3rd ed. 2007-08). Any other conclusion would gut the CVRA. The CVRA gives crime victims rights with regard to proceedings involving not only convicted defendants, but also rights before any

conviction. *See* Hon. 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, 594 (2005) (article by CVRA Senate co-sponsor explaining that rights apply at least by indictment).

One clear example is the CVRA's conferral of rights on victims to be heard at bail hearings. See 18 U.S.C. § 3771(a)(4) (giving victims the right to be heard at any proceeding involving "release"). Of course, a defendant has not been convicted at this point in the process – yet the CVRA gives victims procedural rights at this time. These rights implicitly require courts to treat persons as "crime victims" under the CVRA based on the allegations in a filed criminal indictment. This is a commonplace feature of crime victims' rights enactments around the country. See generally BELOOF, CASSELL & TWIST, VICTIMS IN CRIMINAL PROCEDURE 52 (2d ed. 2006) ("Most victims' rights statutes . . . link formal victim status to the filing of criminal charges"). If victims' rights had to await a jury determination of guilt, then it would be impossible to afford crime victims any rights in the criminal justice system except at sentencing. As one federal judge has recognized, "That syllogism – which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt – produces an absurd result that I must presume Congress did not intend." *United States v. Turner,* 367 F.Supp.2d 319, 326 (E.D.N.Y. 2005).

Indeed, one court has even indicated that "[i]t goes without saying that" victims would have rights under the CVRA after the filing of an indictment. *United States v. Rubin,* 558 F.Supp.2d 411, 422 (E.D.N.Y. 2008). The ninth circuit has followed the same approach. See *In re Mikhel,* 453 F.3d 1137, 1139 (9th Cir. 2006) (reversing pre-trial sequestration order of victim family members under the CVRA before any finding of guilt).

The sweeping congressional purpose would be plainly thwarted if large swaths of the federal criminal code were viewed as defining mere "victimless" crimes outside the protections of the CVRA. Congress presumably would not have wanted the uninjured target of an attempted murder or drive-by shooting to be denied victim status simply because of the mere fortuity of the criminal's bad aim with his gun.

The Ninth Circuit has held that the need to take remedial measures because of a crime is "direct and proximate harm" from that crime. A good illustration comes from *United States v. De La Fuente,* 353 F.3d 766 (9th Cir. 2003), a case in which the court found that the U.S. Postal Service was a "crime victim" of the offense of mailing threats to injure contained in 18 U.S.C. § 876(c). In *De La Fuente,* the defendant had mailed a letter with a harmless white powder, attempting to simulate anthrax. When the letter broke open at a mail processing center, the Postal Service was forced to evacuate the center, losing the work time of its employees. Because these losses were

"directly related to the offense conduct," the court concluded that the Postal Service had been "directly and proximately harmed" under the restitution statute, 18 U.S.C. § 3663A(a)(2). As a result, the Postal Service was a "victim" of the offense and eligible for restitution for its employees lost time.

II. THE COURT SHOULD RULE WITHIN 72 HOURS AND THEN ULTIMATELY PUBLISH ITS DECISION ON THIS PETITION IN VIEW OF THE NATIONAL IMPORTANCE OF THE ISSUES PRESENTED.

The statue provides that Fisher and Odyssey are entitled to a decision on their Petition within 72 hours. See 18 U.S.C. 3771(d)(3). They do not invoke their right to an accelerated decision if the court needs additional time to make a fair and just decision. The petitioners acknowledge that this Court has the authority to review mandamus petitions under the CVRA outside of the 72-hour window set forth in the statute. Cf. *Kenna v. United States Dist. Ct. for the Centr. Dist. of Cal.,* 435 F.3d 1011, 1018 (9th Cir. 2006) (ruling on CVRA mandamus petition outside of statutory timeframe). The CVRA requires the Court to either grant this Petition or "clearly state on the record in a written opinion" any reason for denying it. 18 U.S.C. § 3771(d)(3). James R. Fisher and Odyssey respectfully request that the Court, on such time table set by the court to release a published opinion on the disposition of their Petition. More important,

the issues raised by this Petition are likely to recur and go to the heart of the proper administration of the CVRA. There are only a few published appellate court opinions on who qualifies as a protected "crime victim" under the CVRA. See *In re Antrobus,* 519 F.3d 1123, 1125 (10th Cir. 2008) (resolving "crime victim" issue under the CVRA and finding only one published district court opinion on the subject). Moreover, many crime victims lack sufficient funds to secure legal counsel to carefully brief CVRA issues or to pursue them in the appellate courts. Accordingly, it is extremely important that, in those cases where crime victims have been able to secure counsel, that a body of case law surrounding the CVRA develop. Therefore, the Court will hopefully publish its opinion.

CONCLUSION

James R. Fisher and Odyssey were directly and proximately harmed as a result of offenses charged against the defendants. The writ should therefore issue to direct the district court to recognize James R. Fisher and Odyssey as "crime victims" with rights under the CVRA and MVRA.. The Court should also publish its decision on this Petition, because the decision will answer important questions regarding which "crime victims" can obtain protections under the CVRA – a question of national importance that is likely to recur in the future.

Respectfully submitted,
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[Certificate Of Service Omitted In Printing]

No. 11-10006

IN THE

United States Court Of Appeals

FOR THE

Fifth Circuit

In re: James R. Fisher and
Odyssey Residential Holdings, L.P.,

Petitioners

Petition for a Writ of Mandamus
to the Northern District of Texas

PETITION FOR REHEARING EN BANC

(Filed Jan. 21, 2011)

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

This petition is filed by James R. Fisher and Odyssey Residential Holdings, L.P., who are victims of a bribery and conspiracy to bribe scheme involving defendants Brian and Cheryl Potashnik, and their company, Southwest Housing.

The criminal case against Brian and Cheryl Potashnik has been prosecuted in the United States District Court for the Northern District of Texas, Dallas Division, Case No. 3-07-CR-00289-M. It involves one 31-count indictment naming 14 people including former Dallas Mayor Pro Tem Don Hill and state Rep. Terri Hodge. There were also separate indictments charging James Fantroy and Jack Potashnik.

The indictments charge that the named individuals were part of a public bribery and extortion scheme involving affordable housing. Former Dallas Mayor Pro Tem Don Hill, consultant Sheila Farrington, State Rep. Terri Hodge, Black State Employees Association of Texas director Darren Reagan, James Fantroy, D'Angelo Lee, Brian and Cheryl Potashnik, Jack Potashnik, Gladys Hodge, Allen McGill, Jibreel Rashad, Rickey Robertson, Andrea Spencer, Ronald Slovacek, Kevin Dean and John Lewis were all named in the indictments.

Odyssey Residential Holdings, LP is privately held, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The criminal case has been handled by District Judge Lynn.

Because this is a Petition for Review, the United States District Court for the Northern District of Texas, Dallas Division, is technically the respondent. Fed. R. App. P., Rule 21(b)(4).

Respectfully submitted,

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STATEMENT PERSUANT TO RULE 35

The full Court should rehear the issue of whether the victims must establish "clear and indisputable" error to secure appellate protection of their rights under the Crime Victim's Rights Act (CVRA) – an issue of exceptional public importance on which an acknowledged seven-circuit split currently exists.

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PETITION FOR REHEARING EN BANC

TO THE HONORABLE COURT OF APPEALS:

Petitioners, James R. Fisher and Odyssey Residential Holdings, LP, respectfully submit this petition for rehearing en banc of the decision rendered by a panel of this Court on January 10, 2011, *In re Fisher,* Case No. 11-1006, and would support their petition as follows:

STATEMENT OF ISSUES

The full Court should rehear the issue of whether the victims must establish "clear and indisputable" error to secure appellate protection of their rights under the Crime Victim's Rights Act (CVRA) – an issue of exceptional public importance on which an acknowledged seven-circuit split currently exists. The seven circuits are irreconcilably split, on whether crime victims challenging a district court decision through a CVRA mandamus petition are entitled to ordinary appellate review (as the Second, Third, Ninth, and Eleventh Circuits have all specifically held), or whether they are only entitled to deferential review for "clear and indisputable" errors by the district court (as the panel here held, relying on an earlier panel decision that simply followed a Tenth Circuit decision to that effect).

The refusal of the panel to give the victims here full appellate review violates the command of the CVRA that "[t]he court of appeals *shall take up and*

decide such application forthwith. . . .” 18 U.S.C. § 3771(d)(3) (emphasis added). In merely ruling that the victims had not shown “clear and indisputable” error by the trial court, the panel did not “decide” their application for restitution. In doing so, the panel violated not only the plain language of the CVRA, but also Congress’ clearly expressed legislative intent that the CVRA would create “*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.” 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphasis added). The full court should rehear this issue of vital importance to crime victims throughout this Circuit.

COURSE OF PROCEEDING

On June 22, 2009, Defendant Brian Potashnik (Potashnik) plead guilty to conspiracy to bribe a public official “concerning a local government receiving federal benefits”, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 666(a)(2).

On December 17, 2010, the district court (Lynn, J.) sentenced Potashnik to 14 months in the custody of the Bureau of Prisons, a fine of $50,000, and forfeiture to the City of Dallas of $1,250,000. The judgment and conviction order stated that the forfeited funds “represent[ed] profits earned by the defendant in the transactions which are the subject of this case.” Without making any factual findings, the district

court summarily declined the request of the victims for restitution for losses they had suffered from the offense, including losses stemming from the bribed officials' decisions to refuse to approve construction projects pursued by the victims.

On January 6, 2011, the victims filed a timely mandamus petition for review, as specifically authorized by the CVRA. *See* 18 U.S.C. § 3771(d)(3). The petition argued that the victims were entitled to restitution under the *Mandatory* Victims' Restitution Act (MVRA) and the CVRA.

THE PANEL DECISION

On January 10, 2011, a panel of this Court denied the victims' petition. The majority first cited to this Court's earlier decision in *In re Dean,* 527 F.3d 391 (5th Cir. 2008), that a crime victim proceeding under the CVRA must satisfy the common law requirements for mandamus relief, namely that "[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.'" Slip op. at 2 (citing *Dean,* 527 F.3d at 394). The panel concluded that the victims had satisfied both the first and third prongs of this three-part test – that is, that the victims had no other means to attain restitution and that it would be

appropriate to give them relief if they were legally entitled to restitution. The panel also concluded, however, that the victims had "failed to satisfy the *heavy* burden required by the second requirement." *Id.* (emphasis added). The panel thus never decided whether the district court had erred in denying the victims restitution. Rather, the panel ventured to say only that there was evidence presented at the sentencing hearing "that, when reasonably construed, *could* lead to the conclusion that the amount of restitution claims was too speculative to label [the victims] directly or proximately harmed by the actions of Potashnik." *Id.* at 2 (emphasis added). After tersely recounting the evidence, the panel explained that "[w]e 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 [victims] were not victims of Potashnik's crime because the harm is too speculative to be considered direct or proximate." Slip op. at 3 (emphasis added). For the same reason, the panel also concluded that the district court had properly construed the plea agreement as blocking the possibility of awarding restitution. The panel would not say that the district court was correct, but only went so far as to say that "[w]e are satisfied that the district court's construction of the plea agreement is *permissible* under our standard of review." Slip op. at 3-4 (emphasis added).

ARGUMENT

THE FULL COURT SHOULD REHEAR THE CASE TO DECIDE THE IMPORTANT ISSUE OF WHETHER CRIME VICTIMS CAN OBTAIN ORDINARY APPELLATE REVIEW OF THEIR CLAIMS UNDER A CVRA MANDAMUS ACTION.

The full Court should rehear the case on the important issue of whether crime victims can obtain ordinary appellate review of their claims under the CVRA. The panel simply ducked the ultimate issue of whether the trial court had correctly denied the victims restitution. The panel was able to do so because it relied on this Court's earlier decision in *In re Dean,* 527 F.3d 391 (5th Cir. 2008), that crime victims must satisfy the common law requirements for mandamus petitioners of proving a clear and indisputable error. *See* Slip op. at 2 (citing *In re Dean*). However, *Dean* took a minority position among the circuits, with devastating consequences for crime victims. In the new and evolving field of crime victims' rights, it will be the rare crime victim who can establish "clearly and indisputably" that a district court has erred in handling a crime victims' issue. Thus, *In re Dean* essentially sounds a death knell for meaningful protection of crime victims before this Court. The full Court should reconsider *Dean* and reverse it en banc.[1]

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[1] In their CVRA mandamus petition to the panel, the victims specifically presented this argument. *See* Mandamus

(Continued on following page)

By allowing panel decisions, such as the one at issue here, *Dean* contravenes the plain language of the CVRA. The CVRA flatly provides that "[t]he court of appeals *shall take up and decide* such application forthwith. . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). The panel did not "take up and decide" the victims' application arguing that the district court had incorrectly denied them restitution, holding instead only that the district court had not acted so far outside of its authority as to have indisputably erred. This discretionary approach to appellate review contravenes the CVRA, as one leading authority on crime victims' rights has explained:

> the problem in review of victims' rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations. . . . One could not credibly suggest that criminal defendants' constitutional rights are to be reviewed only in the discretion of the court. . . . The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.

Petition at 26 ("James R. Fisher and Odyssey Residential Holdings, LP urge this Court to apply ordinary appellate review, not deferential mandamus review) (citing the decisions from the 2nd, 3rd, 9th, and 11th circuits on this question). Of course, the panel was powerless to overturn this Court's previous decision in *In re Dean* – a constraint that the full Court is not operating under.

Douglas E. Beloof, *The Third Wave of Crime Victims' Rights.' Standing, Remedy, and Review,* 2005 BYU L. REV. 255, 347; *accord* 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, 621-25 (2010) (concluding *Dean* is flatly at odds with the language of the CVRA).

Dean did not independently analyze the standard of review issue, but instead mistakenly relied on a Tenth Circuit decision that used the rule of statutory construction involving "borrow[ed] terms of art." *See Dean,* 527 F.3d at 393 (citing *In re Antrobus,* 519 F.3d 1123, 1124 (10th Cir. 2008)). The CVRA, however, expressly altered the common law principles that otherwise might apply to review of other mandamus petitions. Congress certainly chose a "writ of mandamus" as the procedural tool for crime victims to obtain quick review of trial court actions. But Congress obviously sought to forge that typically discretionary tool into a powerful new, non-discretionary remedy that would fully protect crime victims by requiring courts of appeals to "take up and decide" such applications. Congress required appellate courts to "decide" an application, that is, to "make a final choice or judgment about." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006). The panel here never made a final choice or judgment about whether the victims were entitled to restitution.

Dean should have followed the Second, Third, Ninth, and Eleventh Circuits. The Second Circuit has

held 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" under the CVRA, and therefore, "a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *In re W.R. Huff Asset Mgmt, Co.,* 409 F.3d 555, 562-63 (2d Cir. 2005) (emphasis added). Likewise, the Ninth Circuit stated in *Kenna v. U.S. District Court for the Central District of California,* 435 F.3d 1011, 1017 (9th Cir. 2006) (Kozinski, J):

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, . . . and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

The Eleventh Circuit, too, disagrees with *Dean,* giving crime victims ordinary appellate review in a decision following *Dean.* See *In re Stewart,* 552 F.3d 1285 (11th Cir. 2008). (The Third Circuit also disagrees, albeit in an unpublished decision. *In re Walsh,*

229 Fed. Appx. 58 at 2 (3rd Cir. 2007) (citing 2nd and 9th Circuit decisions).

Finally, *Dean* violates a cardinal rule of statutory construction that a "statute should be read to avoid rendering its language redundant if reasonably possible." *Arana v. Ochsner Health Plan,* 352 F.3d 973, 978 (5th Cir. 2003). *Dean* interpreted the CVRA's language "the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3), to mean only that the movant may petition for a discretionary writ of mandamus. But before the CVRA, a crime victim could (like anyone else) seek mandamus under the All Writs Act. *See* 28 U.S.C. § 1651. Thus, under the panel's interpretation, the CVRA mandamus provision is rendered utterly superfluous.

If any doubt remains about the victims' right to relief under the plain language of the CVRA, the CVRA's legislative history unequivocally demonstrates that Congress wanted crime victims "broadly" protected through traditional appellate review. None of the other circuits who have denied crime victims traditional appellate review have even glanced at the legislative history of the CVRA's mandamus petition.[2] Yet in this Circuit, when a statute is ambiguous, the

[2] In addition to this Court's *Dean* decision and the Tenth Circuit's *Antrobus* decision, the Sixth Circuit has also issued a terse decision refusing to give victims ordinary appellate review. *In re McNulty,* 597 F.3d 344, 348-49 (6th Cir. 2010).

Court turns to legislative history. *See In re Condor Ins. Ltd.,* 601 F.3d 319, 321 (5th Cir. 2010). A statute is "ambiguous if it is susceptible to more than one reasonable interpretation. . . ." *Id.* (internal quotation omitted). The Second, Third, Ninth and Eleventh Circuits have all interpreted the CVRA mandamus petition provision as giving crime victims regular appellate review, surely evidence that a "reasonable interpretation" of the statute is the one protecting crime victims. That interpretation is fully confirmed by the legislation history. One of the Senate co-sponsors of the CVRA stated directly that the law "required" appellate courts to "broadly defend" crime victims and "remedy errors of lower courts":

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] 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 lower courts and this provision requires them to do so for victim's rights.*

150 CONG. REC. at S10912 (statement of Sen. Kyl) (emphases added). Contradicting *Dean*'s conclusion

that the CVRA simply imports a "common law tradition," 527 F.3d at 393, Senator Feinstein stated directly that the Act would create "*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." 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphases added); *see also id,* (statement of Sen. Kyl) (crime victims must be able to have . . . the appellate courts *take the appeal and order relief*").

It is well settled that statements made by the sponsors of legislation "deserve to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.,* 426 U.S. 548, 564 (1976); *see, e.g., United States v. Cuellar,* 478 F.3d 282, 299 (5th Cir. 2007) (looking to floor statement of bill's sponsors to determine congressional intent). *Dean* erred in not even considering the expressed views of Senators Kyl and Feinstein. *See Kenna,* 435 F.3d at 1015 (giving significant weight to Senators Kyl and Feinstein's unchallenged remarks about the CVRA and noting that "they expressed . . . a consensus, at least in the Senate").

Dean's premise – followed by the panel below – defies the basic architecture of the CVRA, for "without the ability to enforce [victims] rights in the criminal trial and *appellate* courts of this country, any rights afforded are, at best, rhetoric." 150 CONG. REC. S10912 (statement. of Sen. Kyl) (emphasis added). At the very least, the full Court should rehear this

important issue and decide whether victims whose rights have been violated by district courts can secure ordinary appellate protection. This Court, en banc, should follow the majority approach of the other courts of appeals and give the victims regular appellate review of their claims.

It is important to recognize that the standard of review is outcome-determinative in this case. If the full Court en banc, gives the victims here ordinary appellate review, they will then be entitled to reversal of the district court's erroneous decision. The panel only half-heartedly defended the conclusion of the district court that petitioners were not "victims"; thus, the panel ventured only the tepid assertion that there was evidence that "could lead" to the conclusion reached by the district court. But for the reasons elaborated at length in the victims' CVRA petition, the district court's summary decision to deny them restitution was factually and legally unsupportable. As the full Court can quickly confirm by reviewing the full record in this case, Potashnik was involved in a bribery scheme that resulted in the victims being denied approval of construction projects as a direct result of Potashnik's bribery. *See, e.g.,* Victim's Mandamus Petn. at 4-8. That bribery "directly" harmed the victims, ultimately producing substantial financial losses to them. *See* Victim's Mandamus Petn., *passim.*

Under the *Mandatory* Victims Restitution Act, the victims were entitled to restitution. The MVRA *requires* a district court to enter a restitution award

for certain kinds of federal crimes, "*including any offense committed by fraud or deceit*." 18 U.S.C. § 3663A(c)(1) (emphasis added). Potashnik pled guilty to Count 10 of the indictment, which charged that he and others had conspired to "corruptly offer, give, and agree to give something of value of $5,000 or more to a person" in connection with federal programs run by the City of Dallas. Appx. 253. The means for doing this included such deceitful means as concealing the bribes "through the preparation of sham written agreements, the use of nominee companies, and the omission of material facts concerning the financial benefits that were sought on behalf of, and received by" the bribed government officials. Appx. 254. *See generally* Appx. 254-93 (detailing sham gifts, fraudulent reporting, concealed kickbacks, structured bank withdrawals, "front" companies, hidden bribery payments, and other overt acts in furtherance of the conspiracy). It is hard to imagine a crime that more clearly involved fraud and deceit than Potashnik's. Yet the district court summarily denied the victims' argument on this point in a single sentence, without any explanation, factual findings, or legal conclusions, Appx. 436. *Cf.* 18 U.S.C. § 3771(b)(1) ("The reasons for any decision denying relief under [the CVRA] shall be clearly stated on the record.").

The panel thought that the district court might plausibly have concluded that the victims here were not "directly and proximately" harmed by Potashnik's fraud. Slip op. at 2. But at the sentencing hearing, the victims presented compelling oral arguments that

they were so harmed. And the Justice Department had previously sent the victims notice that they were "victims" under the CVRA. Appx. 25. The district court made no factual findings as to why the victims were not harmed when bribed government officials denied them approvals for their construction projects, while at the same time approving projects for their competitors. *See e.g.,* Appx. 411 (bribes being paid to steal contracts away from the victims). There is simply no factual record on which the district court's decision can be affirmed, and under conventional appellate review the victims would be entitled at the very least to a remand for that reason alone. And both the panel and the district court inaccurately recited the legal standard governing restitution under the expansive MVRA. Unlike other restitution statutes, the MVRA does not require proof that a victim has been "directly *and proximately* harmed," but only proof of "direct" harm in the course of a conspiracy. 18 U.S.C. § 3663A(a)(2). Here again, under ordinary standards of appellate review, a reversal is required because of error in recounting the applicable legal standard.

The victims here were not only authorized restitution by the MVRA, but also by Potashnik's plea agreement. The plea agreement provided that the court could impose penalties including "restitution to *victims or to the community,* . . . and which Potashnik agrees may include restitution arising from *all relevant conduct, not limited to that arising from the offense of conviction alone*." The district court

summarily denied the victims' request for restitution under this provision, finding that it did not expand the scope of restitution beyond the MVRA. Once again, the denial was made in a single-sentence oral ruling, without the benefit of explanation, factual findings, or legal explanation. Appx. 437. But under the MVRA, restitution would not extend to "all relevant conduct" or to "the community." The district court's conclusion that the plea agreement did not extend the right to restitution was plainly wrong.

In sum, the panel has remarkably sanctioned the conclusion that bribing a. public official to deny approvals for certain construction projects and approve competing projects is somehow a "victimless" crime that does not require any restitution under either the *Mandatory* Victims Restitution Act or under a plea agreement broadly permitting restitution for all relevant conduct and the affected community. The panel did not seem sanguine about this unfortunate conclusion. It almost apologetically began its opinion with the statement that "[b]ecause our precedent requires us to apply a *highly deferential* standard when reviewing petitions for writs of mandamus, even under the [CVRA and MVRA], we deny the writ." Slip op. at 1 (emphasis added). The full Court is empowered to overturn this precedent,

and then award the victims the restitution to which they are entitled.[3]

CONCLUSION

The full Court should rehear the matter en banc on the issue of whether crime victims can obtain ordinary appellate review of their claims through a CVRA mandamus petition. The full Court should then overturn *In re Dean,* give the victims regular appellate review, and grant the victims the restitution to which they are legally entitled.

Respectfully submitted,

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[3] Alternatively, the full Court could make clear that the victims in this case are "victims" within the meaning of the MVRA, and then remand for a full restitution hearing at which the precise amount of restitution to which they are entitled could be determined.

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