

No. _____

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

In re: Sue and Ken Antrobus,

Petitioners

-against-

**United States District Court
for the District of Utah,**

Respondent.

**PETITION FOR WRIT OF MANDAMUS PURSUANT TO
THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3),
REQUIRING DECISION WITHIN 72 HOURS**

**Paul G. Cassell (#6078)
(Counsel of Record)
332 S. 1400 E.
Salt Lake City, UT 84112
Telephone: (801) 585-5202
Facsimile: (801) 581-6897
cassellp@law.utah.edu**

**Gregory C. Skordas (#3865)
Rebecca C. Hyde (#6409)
SKORDAS, CASTON & HYDE, LLC
341 So. Main Street, Suite 303
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 531-8885
gskordas@schhlaw.com**

Counsel for Crime Victim's Representatives Sue and Ken Antrobus

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CERTIFICATE OF INTERESTED PARTIES

There are no other parties to this litigation, including person or other entities financially interested in the outcome of the litigation, not revealed by the caption of this petition, except for the United States and Mackenzie Glade Hunter, the parties in the underlying criminal action, *United States v. Hunter*, Case No 2:07-CR-307-DAK (D. Utah).

STATEMENT OF THE RELIEF SOUGHT

Petitioners Ken and Sue Antrobus respectfully petition this Court, pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. P. 21, for a writ of mandamus directing the United States District Court for the District of Utah to recognize their murdered daughter, Vanessa Quinn, as a "crime victim" under the Crime Victims' Rights Act, 18 U.S.C. § 3771, of the crimes alleged against defendant Mackenie Glade Hunter in the criminal prosecution styled *United States v. Hunter*, Case No 2:07-CR-307-DAK (D. Utah).

ISSUE PRESENTED

_____ Defendant MacKenzie Hunter illegally sold a handgun to Sulejman Talovic, knowing he was a juvenile, in willful violation of federal criminal law. Talovic then used the gun to murder Vanessa Quinn. The issue presented by this petition is whether Vanessa Quinn will be recognized as a "victim" of Hunter's crime, thus permitting her parents to exercise her rights under the Crime Victims' Rights Act.

INTRODUCTION

In the summer of 2006, the defendant in the underlying criminal action, Mackenzie Hunter, illegally sold a .38 Smith & Wesson handgun to Sulejman Talovic – a minor who could not purchase such a gun, a fact the defendant well knew. The defendant also knew and had reason to believe that the gun would be used in a violent

crime. The defendant's belief was tragically confirmed eight months later, when Talovic used the handgun and another weapon in the now-infamous Trolley Square massacre to kill five people – including Vanessa Quinn.

Defendant Hunter ultimately pled guilty to unlawfully selling the handgun to Talovic. Vanessa's parents – Sue and Ken Antrobus – then filed a motion before the United States District Court for the District of Utah asserting her rights as a "victim" under the Crime Victims' Rights Act of 2004 (CVRA). As her representative, the Antrobuses sought (among other things) to make an in-court victim impact statement at the defendant's sentencing about the devastation the defendant's crime caused. Their motion explained that the CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense"¹ The Antrobuses contended that Vanessa was "directly" harmed when a bullet from the gun the defendant illegally sold to Talovic killed her. And this harm was "proximately" caused by the defendant's crime. Not only did the defendant make his criminal sale directly to Talovic, but he specifically knew and had reason to know that Talovic would use the gun to commit a violent crime.

In a Memorandum Decision and Order, the district court (Kimball, J.) rejected their request, concluding "that Vanessa Quinn was not directly and proximately

¹ 18 U.S.C. § 3771(e).

harmful by [the defendant's] sale of a firearm to a minor.”² The court reasoned that Quinn and the Antrobuses “are undoubtedly victims of Sulejman Talovic’s crimes. But the nexus between [the defendant’s] act of selling a firearm to a minor and Talovic’s deadly rampage through a shopping mall eight months later is too factually and temporally attenuated.”³

The Antrobuses come to this Court seeking to reverse that order and to be able to speak at defendant Hunter’s upcoming sentencing. When the defendant criminally sold the murder weapon, he had good reason to know that violent consequences could follow. Indeed, Congress’ very purpose in forbidding sales of handguns to minors was to prevent violent crimes. When Vanessa Quinn died from a bullet fired from the gun the defendant sold in violation of federal criminal law, she became a “victim” of his crime under the CVRA.

STATEMENT OF FACTS

In June or July 2007, defendant Hunter was approached by Sulejman Talovic for help buying a handgun. Talovic told the defendant that he (Talovic) could not legally buy a gun from a firearms dealer because he was a minor. Wanting to help Talovic circumvent the nation’s gun laws, the defendant then called a friend, Brenden

² Mem. Dec. & Order, Exhibit 8 to Mandamus Petn. at 8. A set of the exhibits relevant to this petition has been filed as a separate pleading and will be hereinafter cited as “Mandamus Ex.”

³ *Id.*

Brown, about a handgun that he had just given him. The defendant had gotten this gun – a .38 Smith & Wesson handgun – either by stealing it or trading cocaine for it. The defendant could not possess a gun at this time because he was addicted to cocaine. The defendant and Brown then had a hurried meeting with Talovic in a car in a McDonald’s parking lot, where they unlawfully sold the gun to him for \$800. The pair split the proceeds.⁴

The defendant was under no illusion that Talovic was buying a gun for a legitimate purpose. When he sold the gun to Talovic, the defendant “knew and had reasonable cause to know that . . . [Talovic] intended to carry or otherwise possess, or discharge, or otherwise use the handgun in the commission of a crime of violence.”⁵ The defendant later told law enforcement agents that he thought Talovic might rob a bank with it.⁶

As the defendant had accurately foreseen, Talovic used the gun to commit a violent crime. On February 12, 2007, Talovic entered the Trolley Square Shopping Center in Salt Lake City intending to kill as many people as possible. He murdered five people and seriously injured four more with the handgun sold to him by the

⁴ Victim’s Memo., Mandamus Ex. 5 at 3-4 (relevant fact #1). As filed in the district court, this Memorandum lacked pagination. For the convenience of the Court, page numbers have been inserted in the exhibit.

⁵ Indictment, Count II, Mandamus Ex. 1 at 2.

⁶ Victim’s Memo., Mandamus Ex. 5 at 4 (relevant fact #3).

defendant and with a 12-gauge shotgun. A bullet from the defendant's Smith and Wesson killed Vanessa Quinn. An off-duty police officer ultimately ended Talovic's rampage by shooting and killing him.

PROCEEDINGS BELOW

On May 16, 2006, defendant Hunter was indicted on two felony charges involving the handgun used to murder Vanessa Quinn. Count I charged that he had been a cocaine user in possession of a firearm. Particularly relevant here is Count II, which charged that the defendant unlawfully transferred the handgun to a person known to be a juvenile (i.e., Talovic) while the defendant "knew and had reasonable cause to know that [Talovic] intended to carry or otherwise possess, or discharge or otherwise use the handgun in the commission of a crime of violence," in violation of 18 U.S.C. § 922(x)(1) and 924(a)(6)(B)(ii).⁷

On November 1, 2007, the defendant pled guilty to Count I and to a Superseding Misdemeanor Information, which omitted Count II's allegation of knowing about a crime of violence and charged only that he unlawfully transferred a handgun to a known juvenile, in violation of 18 U.S.C. § 924(a)(6)(B)(i).⁸ As part of the plea agreement, the government agreed to seek leave of court to dismiss Count

⁷ Count II of the Indictment, Mandamus Ex. 1 at 2.

⁸ Mandamus Ex. 2.

II at the time of sentencing.⁹ The district court set sentencing for January 14, 2008.

On December 13, 2007, Sue and Ken Antrobus filed a motion seeking to have their murdered daughter Vanessa Quinn recognized as a victim of the defendant's crimes. As her representatives, they sought (among other things) to make an in-court victim impact statement at sentencing and to be heard on the proposed dismissal of Count II.¹⁰ Included with the motion was a victim impact statement from the Antrobuses explaining in strong terms why they wanted to be heard:

It's just so hard to believe in this country, The United States of America, your daughter can be murdered, and you're not a victim. What a sad world we live in. [We] think [we] deserve to give an impact statement, since Vanessa is not here to speak for herself. [We] don't think 10 minutes is asking for much considering what we've lost for a lifetime.¹¹

On December 20, 2007, they also filed a motion seeking disclosure of parts of the presentence report relevant to sentencing and to restitution and urging a lengthy sentence.¹²

At the latest, the time for responding to the Antrobuses' motion to have Vanessa Quinn recognized as a crime victim expired on December 31, 2007, and

⁹ Statement in Advance of Plea, Mandamus Ex. 3 at 4 (¶ 12.B.3).

¹⁰ Victim Memo., Mandamus. Ex. 5 at 15 (requesting right to make an in-court victim impact statement); *id.* at 4 n.1 (requesting right to be heard on proposed dismissal of Count II); *see also* Victim's Memo on PSR Disclosure, Mandamus Ex. 7 at 11 n.6.

¹¹ Victim Impact Statement, Ex. 1 to Mandamus Ex. 5 at 3 (small grammatical changes inserted).

¹² Victim's Memo. on PSR Disclosure, Mandamus Ex. 7.

neither the government nor the defense had filed any objection.¹³ Nonetheless, on January 3, 2008, the district court denied the motion. The court agreed that, as “Vanessa Quinn’s parents, the Antrobuses undoubtedly qualify to be representatives for their deceased daughter under the CVRA.”¹⁴ The court, however, concluded that Hunter’s criminal sale of the firearm was too factually and temporally separated from Quinn’s murder to justify recognition of her as a crime victim. The district court also declined to use its discretionary authority to hear from the Antrobuses at sentencing because it had “an adequate understanding” of the Antrobuses’ views.¹⁵

The next day, January 4, 2008, undersigned counsel contacted the Clerk’s Office of this Court, along with counsel for the parties in the case below, to advise that a mandamus petition would be filed in Denver on Tuesday, January 8, 2008.

Also on January 4, the Antrobuses followed up on earlier requests to the U.S. Attorney’s Office by filing in the district court a motion seeking an order directing the government to disclose all information in its possession showing that defendant Hunter knew or had reason to know that the gun he sold would be used in a crime. While that motion is now pending in the district court, this Court properly has jurisdiction over this petition as that motion explicitly states: “So that the record is

¹³ See Mem. Dec. & Order., Mandamus Ex. 8 at 4 n.1 (noting expiration of 15-day response time).

¹⁴ *Id.* at 3-4.

¹⁵ *Id.* at 13.

clear, nothing in this motion seeks any modification of the court’s Memorandum Decision and Order of January 3, 2008, concluding that they are not crime victims’ representatives. As far as the Antrobuses are concerned, that is a final decision on the subject that is now subject to mandamus review.”¹⁶

This petition followed, requiring action by this court within 72 hours.¹⁷ The Antrobuses sincerely apologize for the speed with which the Court will be forced to rule. However, unless the Court acts within 72 hours, the defendant’s January 14th sentencing will come and go without a chance for them to speak.

STANDARD OF REVIEW

As specifically provided in the CVRA,¹⁸ the Antrobuses are petitioning for a writ of mandamus. Such a writ is usually regarded as an “extraordinary remedy,”¹⁹ meaning that the challenged district court decision is subject to deferential review under a “higher standard.”²⁰ It would be inappropriate to require a putative crime victim proceeding under the CVRA to satisfy such a demanding standard of review.

As the Ninth Circuit cogently explained:

¹⁶ Mandamus Ex. 10 at 2 n.1.

¹⁷ 18 U.S.C. § 3771(d)(3) (“The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.”).

¹⁸ 18 U.S.C. § 3771(d)(3).

¹⁹ *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

²⁰ *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995).

the CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied.²¹

As a result, as the Ninth Circuit has squarely held, a court of appeals "must issue the writ whenever [it] find[s] that the district court's order reflects an abuse of discretion or legal error."²²

In this case, the issue presented is essentially a legal one – whether Vanessa Quinn was a "victim" of defendant Hunter's criminal gun sale within the meaning of the CVRA. This main issue should be reviewed under the usual standard of review for legal questions – *de novo* – giving deference to the district court's factual findings. To do anything else would flout Congress' intent in passing the CVRA. As one of the CVRA's co-sponsor's explained, appellate courts must "broadly defend" crime victims' rights and "remedy errors" of lower courts:

while 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

²¹ *Kenna v. U.S. District Court for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) (referring to provisions found in 18 U.S.C. § 3771(d)(3)).

²² *Kenna*, 435 F.3d at 1017.

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*.²³

Confirming the conclusion that *de novo* is the proper standard of review are numerous appellate court decisions regarding who qualifies as a “victim” under the Mandatory Victim Restitution Act (MVRA). As the district court noted below, the MVRA uses the same direct-and-proximate-harm language found in the CVRA.²⁴ The courts of appeals regularly apply a *de novo* standard of review to the issue of who qualifies as a “victim” under the MVRA, while applying a clear error standard to any factual findings underlying that legal conclusion.²⁵ This Circuit, too, has handled issues of the MVRA’s application under a *de novo* standard of review, with factual finding reviewed for clear error.²⁶

²³ 150 CONG. REC. S10910, S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphases added). *See also* 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, 619 (2005)(CVRA alters general rule that mandamus is a discretionary remedy).

²⁴ Mem. Dec. & Order, Mandamus Ex. 8 at 6 (citing 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). *Compare* 18 U.S.C. § 3771(3) (CVRA’s definition of “crime victim”) *with* 18 U.S.C. § 3663A(a)(2) (MVRA’s definition of “crime victim”).

²⁵ *See, e.g., United States v. Foley*, 508 F.3d 627, 632 (11th Cir. 2007) (noting that determination of who is a crime victim under the MVRA is a question of law reviewed *de novo*); *United States v. Holthaus*, 486 F.3d 451, 457 (8th Cir. 2007) (same); *United States v. De La Fuente*, 353 F.3d 766, 771-72 (9th Cir. 2003) (same).

²⁶ *See, e.g., United States v. Galloway*, ___ F.3d ___, 2007 WL 4285154 (10th Cir. 2007) (“We review *de novo* the district court’s application of the [MVRA], the district court’s factual findings for clear error, and the amount of restitution for abuse of discretion”); *United States v. Serawop*, 505 F.3d 1112, 1117 (10th Cir. 2007) (same).

Finally, there is no question that the Antrobuses have “standing” to file their petition. In passing the CVRA, Congress specifically intended to overrule this Court’s holding in *United States v. McVeigh*,²⁷ that victims of the Oklahoma City bombing lacked “standing” to assert their rights under the then-existing Victim’s Rights Act. In the CVRA, Congress added a provision stating directly that crime victims “may assert their rights” under the CVRA.²⁸ One of the CVRA’s co-sponsors stated on the Senate floor that the intent of this provision was “to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right[s] . . . under the former victims’ law that this bill replaces.”²⁹

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

The writ should issue because the district court erroneously concluded that Vanessa Quinn was not a “crime victim” of defendant Hunter’s crime under the CVRA. As explained below, the CVRA is remedial legislation, that should be given a liberal construction to protect crime victims’ rights. The CVRA broadly protects all persons who have been “directly and proximately harmed” by federal crimes. The defendant’s criminal sale of a handgun directly harmed Vanessa Quinn when she died

²⁷ 106 F.3d 325, 334 (10th Cir. 1997).

²⁸ 18 U.S.C. § 3771(d)(1).

²⁹ 150 CONG. REC. S10910, S10912 (Oct. 9, 2004) (statement of Sen. Kyl).

from a bullet fired from that gun. The defendant's crime also proximately harmed her, as the defendant had good reason to foresee that the gun would be used in a crime of violence. Indeed, preventing violent crimes was the very reason that Congress forbade the sale of handguns to juveniles. Common tort law principles also dictate that wrongdoers like the defendant cannot escape responsibility for the harms that follow from their actions when those harms are within the scope of the danger they wrongfully created. Defendant Hunter created the risk that Talovic would commit a violent crime by selling the gun to him in violation of federal criminal law, and, in fact, did so believing that Talovic would use the gun in a violent crime. The defendant therefore "proximately harmed" Vanessa Quinn when a crime of violence was actually committed.

I. THE CVRA CREATES BROAD RIGHTS FOR CRIME VICTIMS.

The Antrobuses are asserting the rights of their murdered daughter Vanessa Quinn under the Crime Victims' Rights Act. The CVRA "was designed to be a 'broad and encompassing' statutory victims' bill of rights."³⁰ Congress intended the CVRA to dramatically rework the federal criminal justice system. In the course of construing the CVRA generously, the Ninth Circuit observed: "The criminal justice system has long functioned on the assumption that crime victims should behave like

³⁰ *United States v. Degenhardt*, 405 F.Supp.2d 1341, 1342 (D. Utah 2005) (quoting 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

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.”³¹ Accordingly, because the CVRA is remedial legislation, courts should interpret it “liberally to facilitate and accomplish its purposes and intent.”³²

Not only must the CVRA as a whole be interpreted liberally, but its definition of “crime victim” requires a generous construction. After reciting the direct-and-proximate-harm language at issue here, one of the Act’s two co-sponsors – Senator Kyl – explained that “[t]his is an *intentionally broad definition* because all victims of crime deserve to have their rights protected”³³ 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.³⁴ The provision at issue here must thus be construed broadly in favor of the Antrobuses.

II. THE CVRA RECOGNIZES AS A “CRIME VICTIM” ANYONE WHO HAS BEEN DIRECTLY AND PROXIMATELY HARMED BY A CRIME.

Under the CVRA, Vanessa Quinn is a “crime victim” of defendant Hunter’s

³¹ *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

³² *Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1118 (10th Cir. 2005) (noting remedial legislation should be “interpreted liberally to facilitate and accomplish its purposes and intent”).

³³ 150 CONG. REC. S10912 (Oct. 9, 2004) (emphasis added).

³⁴ *See Kenna*, 435 F.3d at 1015-16 (discussing significance of CVRA sponsors’ floor statements).

criminal firearms sale, as she was “a person directly and proximately harmed” by it.³⁵ The CVRA must be interpreted consistent with its plain language.³⁶ The straightforward way to read the statute is that the “direct harm” component requires the court to determine whether the defendant’s crime was a but-for cause of harm to the person, while the “proximate harm” component requires the court to determine whether that harm was a reasonably connected consequence of the crime.

The Seventh Circuit’s decision in *United States v. Donaby*³⁷ usefully illustrates this approach.³⁸ In that case, the defendant robbed a bank, then damaged his stolen getaway car (a police vehicle). The district court awarded restitution to the police department for the damage under the MVRA. Interpreting the direct-and-proximate harm language at issue here, the Seventh Circuit explained that “but for the robbery, it is certain that this particular chase would not have occurred.”³⁹ Moreover, the court explained that direct-and-proximate harm is *not* limited “to the elements of the offense. . . . Thus, while fleeing the bank is not an element of bank robbery, the

³⁵ 18 U.S.C. § 3771(e) (emphasis added)

³⁶ See *United States v. Serawop* 505 F.3d 1112, 1120 (10th Cir. 2007).

³⁷ 349 F.3d 1046 (7th Cir. 2003).

³⁸ Similar illustrations can be found in *United States v. Vaknin*, 112 F.3d 579, 589 (1st Cir. 1997) (interpreting MVRA victim provision to require “but for causation” and a “causal nexus between the conduct and the loss [that] is not too attenuated”); *United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1992) (interpreting MVRA victim provision to find that sons of murder victim were “victims”; “[t]hey have been directly and proximately harmed as a result of their father’s death because they have lost, among other things, a source of financial support”).

³⁹ 349 F.3d at 1053.

damage to [the police department] was a direct and proximate consequence of the specific conduct involved in robbing the bank.”⁴⁰ Because the chase was a “direct and foreseeable consequence of the robbery,”⁴¹ the police department was a victim of the crime – even though no police officer was anywhere close to the bank when it was robbed.

Applying these principles here, the question becomes whether the defendant’s crime of unlawfully selling the murder weapon to Talovic was the “but for” cause of Vanessa Quinn’s death and, if so, whether there was a sufficient nexus between the criminal sale of the weapon and its use in the murder. Both of these requirements are satisfied, as explained in the next section.

III. VANESSA QUINN WAS DIRECTLY AND PROXIMATELY HARMED BY THE DEFENDANT’S CRIME.

A. The Defendant’s Crime Directly Harmed Vanessa Quinn.

The defendant’s crime “directly harmed” Vanessa – indeed, it was fatal to her. Defendant Hunter unlawfully sold his handgun to Talovic; Talovic murdered Vanessa with it.⁴² There can be no doubt that the defendant’s crime was the direct – i.e., the but for – cause of her death. If the defendant had complied with the federal criminal

⁴⁰ *Id.*

⁴¹ *Id.* at 1055.

⁴² Mem. Dec. & Order, Mandamus Ex. 8 at 2.

law, Vanessa could not possibly have been murdered with his gun.

B. The Defendant’s Crime Proximately Harmed Vanessa Quinn.

The only remaining question – and the key question raised by this petition – is whether the nexus between the defendant’s crime and Vanessa’s death was sufficiently close to conclude she was “proximately harmed.” It was on this point that the district court rejected the Antrobuses’ motion. The district court decided that the “nexus between Hunter’s act of selling a firearm to a minor and Talovic’s deadly rampage through a shopping mall eight months later is too factually and temporally attenuated.”⁴³ The district court distinguished the supporting caselaw provided by the Antrobuses on the grounds that “in each of those cases, the harm was a result of the defendant’s own action, not the actions of an intervening actor.”⁴⁴ Thus, concluded the district court, Vanessa Quinn was not a “victim” of Hunter’s criminal sale of the firearm because “[t]he action of Talovic were an independent, intervening cause which broke the necessary chain of caustion.”⁴⁵

The district court’s analysis, while thoughtfully articulated on an expedited basis, is incorrect for at least three reasons. First, the existence of an intervening actor does not automatically relieve an initial wrongdoer of responsibility for

⁴³ *Id.* at 8.

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

resulting harm – as relevant caselaw holds. Second, the existence of an intervening actor does not prevent a finding that a defendant proximately harmed a victim where the dangerous actions of that subsequent actor were the very reason Congress criminalized the defendant’s actions in the first place. And finally, with regard to the facts of this particular case, defendant Hunter not only should have foreseen a violent crime by the intervening actor (Talovic), he in fact *did* foresee a violent crime.

1. An Intervening Actor Does Not Automatically Break Any Chain of Proximate Harm.

The District Court erred in concluding that the existence of an intervening actor– the shootings by Talovic – broke “the necessary chain of causation.” The district court may have gone astray on this point because it erroneously stated that in all of the Antrobuses’ cited cases, “the harm was a result of the defendant’s own action, not the actions of an intervening actor.”⁴⁶ This is simply untrue, as in their memorandum below⁴⁷ the Antrobuses prominently cited and discussed the Ninth Circuit’s decision in *United States v. Hackett*⁴⁸ – a case involving an intervening actor that is flatly contrary to the district court’s conclusion.

Hackett involved the question of who qualifies as a “victim” under the

⁴⁶ *Id.*

⁴⁷ See Victim’s Memo, Mandamus Ex. 5 at 12-13.

⁴⁸ 311 F.3d 989, 992-93 (9th Cir. 2002).

MVRA’s “direct and proximate harm” language. Victor Hackett pled guilty to aiding and abetting methamphetamine manufacture. He was a frequent visitor to the residence of Shandy Felch. One day when Hackett was gone, Felch placed a jar of chemicals used to manufacture methamphetamine on a hot plate. The jar exploded, causing a serious fire in the home.

In affirming a district court restitution award against Hackett to an insurance company that had insured the home, the Ninth Circuit recited the direct-and-proximate harm provision in the restitution statute. The Circuit then explained that an intervening cause is not an automatic barrier to restitution liability:

The main inquiry for causation in restitution cases [is] whether there was an intervening cause, and, if so, whether this intervening cause was directly related to the offense conduct. Thus, the conduct underlying the offense of conviction must have caused a loss for which a court may order restitution. . . . Any subsequent action that contributes to the loss, such as an intervening cause must be directly related to the defendant’s conduct.⁴⁹

Applying those principles, the Circuit noted that “Hackett does not dispute that he helped acquire ingredients used in the manufacturing process. It was not unreasonable for the district court to conclude that Hackett’s conduct *created the circumstances* under which the harm or loss occurred.”⁵⁰

⁴⁹ 311 F.3d at 992 (*citing and quoting United States v. Meksian*, 170 F.3d 1260, 1263 (9th Cir. 1999); *United States v. Gamma Tech Indus.*, 265 F.3d 917, 928 (9th Cir. 2001)).

⁵⁰ 311 F.3d at 993 (emphasis added).

Hackett disproves the district court’s conclusion that none of the Antrobuses’ cited cases involved “the actions of an intervening actor.” Felch – obviously an intervening actor – placed the jar of chemicals on the hot plate that led to the fire that led to the restitution award against Hackett. Even though Hackett was gone at the time, he was nonetheless accountable for the fire, because he “created the circumstances” leading to it. Similarly, defendant Hunter created the circumstances leading to Vanessa Quinn’s murder by unlawfully selling Talovic the murder weapon.

Furthermore, *Hackett* demonstrates the proper mode of analysis in intervening actor situations. The issue is not (as the district court mistakenly concluded) simply *whether* an intervening cause existed, but whether the intervening cause was, as *Hackett* puts it, “directly related to the offense conduct.” The issue is helpfully analyzed by looking to legal principles governing “proximate cause” in tort cases. Those principles plainly dictate that defendant Hunter’s crime proximately caused Vanessa Quinn’s death, as demonstrated next.

2. Proximate Harm Exists Where the Actions of an Intervening Actor Are the Very Reason for Criminal Liability.

Defendant Hunter pled guilty to the crime of selling a handgun to Talovic, a known juvenile. The very reason Congress criminalized that transaction was because of concern that a firearm sold to a juvenile might lead to violent crimes, either

immediately or in the future. As the relevant legislative history explains, “Violent criminals often start their criminal careers on streets where the ready availability of guns to young people results in the acceptability of their random use.”⁵¹ Because Congress’ concern about violent crimes was the very basis for the criminal statute in this case, defendant Hunter’s crime is proximately linked to the violent crime that stemmed from it.

This conclusion rests on a widely-accepted principle of tort law, well stated in the section dealing with proximate cause (called “legal cause”) in the *Restatement (Second) of Torts*:

If the likelihood that a third person may act in a particular manner is . . . one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or *criminal* does not prevent the actor from being liable for harm caused thereby.⁵²

In the context of this case, “the hazard” which was the impetus for Congress to forbid firearms sales to juveniles was potential violent crimes by those persons. Thus, the subsequent criminal acts by Talovic does not, in the words of the *Restatement*, “prevent [defendant Hunter] from being liable for harm caused thereby,” but in fact establish a proximate connection between the defendant’s crime and Vanessa Quinn’s

⁵¹ See H. REP. 103-389, 103d Cong., 1st Sess. at (1993).

⁵² RESTATEMENT (SECOND) OF TORTS § 449 at 482 (1964) (emphasis added); see also *McDermott v. Midland Management, Inc.*, 997 F.2d 768, 772 (10th Cir. 1993) (relying on this provision to allow tort case to proceed alleging negligence by a landlord in permitting crime to occur in an apartment).

death.

A good illustration of this principle comes from the Florida Supreme Court's decision in *K-Mart Enterprises v. Keller*.⁵³ There, during a firearm sale, a K-Mart employee failed to ask two questions required by the Gun Control Act of 1968 (the same statute with which the defendant is charged with violating). As a result, the employee did not learn that the buyer of the firearm was under indictment and therefore ineligible to purchase the firearm. Six weeks after the sale, the buyer lent the firearm to his brother, who shot Keller. In affirming a negligence judgment against K-Mart in Keller's favor, the Florida Supreme Court explained that the intervening cause questions in the case were "answered by a statute in which [Congress] has in effect specified the type of harm for which a tortfeasor is liable."⁵⁴ The court noted that "the shooting of Keller was the type of harm, or within the risk designed to be prevented by the Gun Control Act – the misuse of a firearm by an irresponsible purchaser – so that K-Mart's non-adherence to that statute constituted a legal cause of the plaintiff's injuries."⁵⁵ The court did not need to look far "for reasons Congress enacted the Gun Control Act."⁵⁶ Citing a Supreme Court decision

⁵³ 439 So.2d 283 (Fla. 1983).

⁵⁴ *Id.* at 286.

⁵⁵ *Id.* (internal quotation omitted).

⁵⁶ *Id.*

that reviewed the relevant legislative history, the purpose was plainly keeping guns away from those who might commit crimes:

Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. The principle purpose of the federal gun control legislation, therefore, was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of *age*, criminal background or incompetency.⁵⁷

Relying on the *Restatement* language discussed above, the Florida Supreme Court then concluded that “[s]ince the irresponsibility and unpredictability of the recipient was the very reason that Congress forbade such a transfer of the firearm, it can make no difference that the danger was actually realized, as it almost invariably must be, in what would in other contexts be deemed an unanticipable manner.”⁵⁸ The court concluded by noting that “numerous cases have held that the criminal misuse of a firearm does not insulate the seller from liability arising out of a violation of similar provisions of the Gun Control Act.”⁵⁹ It should be emphasized that this case (and

⁵⁷ *Id.* (emphasis added and deleted) (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974), reviewing S. Rep. No. 1501, 90th Cong, 2d Sess. 22 (1968)).

⁵⁸ 439 So.2d at 287.

⁵⁹ *Id.* (collecting cases).

Congress recently passed the Protection of Lawful Commerce in Firearms Act, restricting such suits against firearms manufacturers and dealers in some circumstances. Congress, however, specifically permitted civil suits to move forward where the seller knowingly violated 18 U.S.C. § 922(g). See 15 U.S.C. § 7903(5)(A)(iii)(II). Here, of course, the defendant pled guilty to a violation of § 922(g).

others like it⁶⁰) involve legitimate gun dealers making otherwise-lawful sales, not a prohibited person (a cocaine addict) making a criminal sale of a handgun on the street. This Court should therefore follow in this well-trodden and well-reasoned path and conclude that the defendant “proximately harmed” Vanessa Quinn by criminally selling a firearm to her murderer.

3. Defendant Hunter Actually Foresaw Subsequent Harm from His Crime.

Based on the foregoing principles, Hunter is accountable by operation of law for the subsequent crime he produced because it was reasonably foreseeable. But this case involves not only implied foreseeability, but actual foreseeability: defendant Hunter not only *could* reasonably foresee a violent crime stemming from his unlawful firearm sale – he in fact *did* foresee a violent crime.

Here it is necessary to make a brief excursion into the factual record. On this

⁶⁰ See, e.g., *Rubin v. Johnson*, 550 N.E.2d 324, 332-33 (Ind. App. 1990) (violation of handgun sale statute forbidding sale to mentally incompetent buyer was negligence per se and buyer’s criminal use of handgun was not an intervening cause that eliminated seller’s liability); *Ileto v. Glock*, 349 F.3d 1191, 1208-09 (9th Cir. 2003) (allowing a shooting victim to proceed with a tort action against *lawful* gun manufacturers and distributors based only on allegations that the sales practices of companies created “an illegal secondary gun market”); *Decker v. Gibson Products Co. of Albany, Inc.*, 679 F.2d 212, 215 (11th Cir. 1982) (allowing negligence action by mother of murder victim to proceed against seller who sold to felon in violation of the Gun Control Act); *James v. Arms Technology, Inc.*, 820 A.2d 27, 39 (N.J. Super. 2003) (alleged harm to City of Newark from channeling of guns to illegal market by gun manufacturers not so remote as to defeat proximate cause); *Gallara v. Koskovich*, 836 A.2d 840, 848-55 (N.J. Super. 2003) (sporting goods store had duty to victims to prevent the theft and subsequent criminal misuse of its handguns). See generally James L. Isham, Annotation, *Liability of One Who Provides, By Sale or Otherwise, Firearm or Ammunition to Adult Who Shoots Another*, 39 A.L.R.4TH 517.

issue in the court below, the Antrobuses relied on two things: first, the Indictment, which charges in Count II that Hunter actually knew that his handgun would be used in a subsequent crime of violence; and, second, that “[t]he defendant later told law enforcement agents that he though Talovic might rob a bank with [the handgun].”⁶¹ The district court dealt with only the second point, and not the first. It concluded that the Hunter’s statement about a possible bank robbery was, at most, “surmise[.]” and “general speculation.”⁶² Each of these two points is discussed separately.

a. The Indictment Reveals that Hunter Actually Foresaw a Subsequent Crime.

To reverse the district court, it is (at most) only necessary to rely on the Antrobuses first factual point – that Count II of the Indictment charged that defendant Hunter feloniously sold a handgun to a juvenile while he “knew and had reasonable cause to know that the juvenile intended to carry or otherwise possess, or discharge or otherwise use the handgun in the commission of a crime of violence.”⁶³ A court can properly presume that a count in an indictment is supported by probable cause.⁶⁴ But the district court did not discuss this proffered fact anywhere in its opinion.

⁶¹ See Victim Memo, Mandamus Ex. at 4 (facts relevant to the motion #2, citing Count II of the Indictment & facts relevant to the motion #3, citing *Salt Lake Tribune*, which in turn cited law enforcement sources).

⁶² Mem. Dec. & Order, Mandamus Ex. 8 at 10, 8.

⁶³ Count II of the Indictment, Mandamus Ex. 1 at 2.

⁶⁴ See *FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988).

While defendant Hunter has not pled guilty to Count II and, pursuant to its plea agreement, the United States will move to dismiss this count “at the time of sentencing,”⁶⁵ at this juncture in the case, charges in the pending Indictment are a proper basis for finding that Vanessa Quinn is a victim. 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.⁶⁶ The CVRA confers on victims the right to “notice of any public court proceeding[s].”⁶⁷ It also allows victims to object to releasing defendants on bail or accepting a plea agreements to lesser charges.⁶⁸ 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.⁶⁹

Of particular relevance here is the Antrobuses’ right under the CVRA to be heard regarding the proposed dismissal of Count II at sentencing. Any such dismissal requires leave of court,⁷⁰ and the court below has previously held that under the

⁶⁵ Statement in Advance of Plea, Mandamus Ex. 3 at 4 (¶ 12.B.3).

⁶⁶ 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 sponsor explaining that rights apply at least by indictment).

⁶⁷ 18 U.S.C. § 3771(a)(2).

⁶⁸ 18 U.S.C. § 3771(a)(4).

⁶⁹ 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”).

⁷⁰ See FED. R. CRIM. P. 48(a).

CVRA “before granting any motion by the government . . . to dismiss charges involving a specific victim, the court must have the victim’s views on the motion.”⁷¹

In the court below, the Antrobuses specifically invoked their right under the CVRA to be heard on the possible dismissal of Count II.⁷²

For all these reasons, the Court can clearly rely on Count II of the Indictment to conclude that the defendant “knew and had reasonable cause to know” that the handgun he criminally sold would be used in the commission of a crime of violence. With that proposition in place, a conclusion of “proximate harm” follows inexorably, as proximate harm is surely established when a defendant commits a crime foreseeing a harmful consequence flowing from it. This Court should accordingly conclude that Vanessa Quinn was proximately harmed by the defendant’s crime.

b. Foreseeability is also Shown by Defendant Hunter’s Belief that Talovic Wanted the Gun to Rob a Bank.

In the court below, the Antrobuses also proffered as an undisputed fact that “the defendant later told law enforcement agents that he thought Talovic might rob a bank with [the gun].”⁷³ The district court found this point unpersuasive, concluding

⁷¹ *United States v. Heaton*, 458 F.Supp.2d 1271, 1273 (D. Utah 2006).

⁷² Victim’s Memo, Mandamus Ex. 5 at 4 n.1; Victim’s Memo. on PSR Disclosure, Mandamus Ex. 7 at 11 n.6.

⁷³ Victim’s Memo., Mandamus Ex. 5 at 4 (proffered fact #3).

that the defendant’s concern about a bank robbery was, at most, “general speculation.”⁷⁴ The court reasoned that “[e]ven if Hunter believed that Talovic may commit a crime with the handgun, the *nature* of that crime was unforeseeable.”⁷⁵ But to require that the defendant foresee the “nature” of the subsequent harm flowing from his actions is to create a requirement at odds with conventional legal principles. The law on foreseeability has never required such perfect foresight. Instead, as leading tort hornbooks report, there is “universal agreement” that “what is required to be foreseeable is only the general character or general type of the event or harm, and *not* its precise *nature*, details, or above all manner of occurrence.”⁷⁶ Thus, “[i]t is not essential that the (initial) [wrongdoer] be able to foresee the exact *nature* and

⁷⁴ Mem. Dec. & Order, Mandamus Ex. 8 at 8.

Undersigned counsel represents to this Court that he has a good faith belief that the U.S. Attorney’s Office currently has in its possession law enforcement reports or other documents reflecting far more than just “speculation” on this point – specifically, documents reflecting that Talovic directly told defendant Hunter that he wanted the gun to rob a bank (although Hunter apparently claims that he thought this was a joke). Such a statement would seemingly lay to rest any doubt about the foreseeability to defendant Hunter of the risk of subsequent violence stemming from his criminal sale. Unfortunately, despite the Antrobuses’ diligent efforts to obtain this information, the U.S. Attorney’s Office has yet to disclose this statement to the district court or to the Antrobuses. This has led the Antrobuses to file the currently pending motion in the district court for an order directing the government to disclose all information in its possession showing that defendant Hunter knew or had reason to know that the gun he unlawful sold would be used in a violent crime. Mandamus Ex. 9. For all the reasons discussed in this petition, however, the Court can readily rule in favor of the Antrobuses based on information currently in the record.

⁷⁵ Mem. Dec. & Op., Mandamus Ex. 8, at 8 (emphasis added).

⁷⁶ PROSSER AND KEETON ON THE LAW OF TORTS § 43 at 299 (5th ed. 1984) (emphases added and internal quotations omitted); accord 4 HARPER, JAMES AND GRAY ON TORTS § 20.5(6) at 203 (3rd ed. 2007) (“Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen.”).

extent of the injuries or the precise manner in which the injuries occur. The test is whether the harm that does occur is within the scope of danger created by the defendant's negligent conduct."⁷⁷ Of course, the "general character" of the harm that the defendant was creating when he unlawfully sold the gun to Talovic was that Talovic might use it in a violent crime. And that was the "scope of the danger" created by the unlawful sale – indeed, it was the very reason that the criminal law was passed.

Accordingly, this Court should hold that defendant Hunter had reason to foresee, and did in fact foresee, violence stemming from his unlawful firearm sale and that, for this reason, the murder of Vanessa Quinn was a "proximate harm" of his crime.

4. The Passage of Time Between the Defendant's Crime and Vanessa's Murder Does Not Relieve the Defendant of Responsibility.

The district court also alluded to fact that, after defendant Hunter criminally sold the gun to Talovic, seven or eight months went by before the shooting. The passage of these months while Talovic decided when to strike is not particularly significant because a but-for connection between the defendant's crime and Vanessa Quinn's murder remains clear. As Prosser and Keaton have explained in the tort

⁷⁷ 3 SPEISER, KRAUSE & GANS, THE AMERICAN LAW OF TORTS § 11:3 at 390 (1986 & 2007 Supp.) (emphasis added and deleted).

context:

Remoteness in time . . . may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that such . . . remoteness should of itself bar recovery. The defendant who sets a bomb which explodes ten years later . . . has caused the result, and should obviously bear the consequences.”⁷⁸

Prosser and Keaton’s analysis applies perfectly here.⁷⁹ By unlawfully selling a handgun to Talovic, the defendant effectively “set a bomb” – that is, set loose a person who was prohibited by federal criminal law from carrying such a weapon. The bomb “exploded” some eight months later when Talovic did precisely what Congress was concerned about: committed multiple violent crimes. And nothing in the record shows any intervening change in circumstances from the day on which the defendant unlawfully sold the gun to the day Talovic murdered Vanessa Quinn with it. For all these reasons, this Court should hold, as a matter of law, that defendant Hunter’s criminal sale of a firearm “proximately harmed” Vanessa Quinn.

⁷⁸ See PROSSER AND KEETON ON THE LAW OF TORTS, § 43 at 283 (5th ed. 1984).

⁷⁹ *Accord Rubin v. Johnson*, 550 N.E.2d 324, 326 (Ind. App. 1990) (tort liability proper where six months passed between illegal firearm sale to mentally defective person and shooting).

CONCLUSION

Defendant Hunter's crime of selling a handgun to a known juvenile "directly and proximately" harmed Vanessa Quinn when the handgun was used to murder her. As a result, she is a "crime victim" of his offense within the meaning of the CVRA. The decision of the district court to the contrary must therefore be reversed and this Court should issue a writ of mandamus to that effect. The Court should also publish its decision on this petition, because this is the first CVRA petition filed in this Circuit and the important question of how to define a "crime victim" under the CVRA is likely to recur in the future.

Respectfully submitted,

_____/s/_____
Paul G. Cassell (#6078)
(Counsel of Record)
332 S. 1400 E.
Salt Lake City, UT 84112
Telephone: (801) 585-5202
Facsimile: (801) 581-6897
cassellp@law.utah.edu

Gregory C. Skordas (#3865)
Rebecca C. Hyde (#6409)
SKORDAS, CASTON & HYDE, LLC
341 So. Main Street, Suite 303
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 531-8885
gskordas@schhlaw.com

Counsel for Crime Victim's Representatives Sue and Ken Antrobus

Dated: January 7, 2008

CERTIFICATE OF SERVICE

In accord with Rule 25, Federal Rules of Appellate Procedure, I hereby certify I have this 7th day of January, 2008, served copies of the foregoing Petition for Writ of Mandamus Pursuant to the Crime Victims' Rights Act, upon the persons and counsel listed below by Federal Express overnight delivery, addressed to:

Judge Dale A. Kimball
United States District Court
District of Utah
350 So. Main St.
Salt Lake City, UT 84101
(801) 524-6100

John Huber, Esq.
United States Attorney's Office
185 South State St., Suite 400
Salt Lake City, UT 84111
(801) 524-5682

David Finlayson
Attorney for Mackenzie Glade Hunter
43 E. 400 So.
Salt Lake City, UT 84111
(801) 220-0700

_____/s/_____
Paul G. Cassell