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(Motion for Admission
***Pro Hac Vice* Pending)**

ATTORNEYS FOR CRIME VICTIMS/MOVANTS
MELVIN AND LERAH PARKER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

W.R. GRACE, HENRY A.
ESCHENBACH, JACK W.
WOLTER, WILLIAM J. McCAIG,
ROBERT J. BETTACCHI, O.
MARIO FAVORITO, ROBERT C.
WALSH,

Defendants.

CR 05-07-M-DWM

BRIEF IN SUPPORT OF PARKERS'
MOTION TO ASSERT RIGHTS
PURSUANT TO THE CRIME
VICTIMS' RIGHTS ACT AND IN
SUPPORT OF DECISION
FORTHWITH (BY FEBRUARY 17,
2009) ON THAT MOTION

COME NOW Melvin and Lerah Parker, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to assert their rights under the Act, including in particular their right to observe court proceedings.

The Court has concluded that the Parkers (and many other victims like them) are not protected by the CVRA because the trial in this case has yet to be held and the defendants are disputing the charges. As a result, the Parkers (who have been advised by the Government that they will be witnesses in this case) are currently subject to the Court's sequestration order excluding witnesses from observing the trial. The Parkers respectfully ask the Court to revisit this conclusion and afford them their right to attend the trial under the CVRA.

The CVRA creates a broad "bill of rights" for crime victims throughout the criminal justice process. As remedial legislation, the Act should be construed generously to achieve its purpose of guaranteeing victims a right to participate throughout the criminal justice process.

The Parkers are specifically identified in the Superseding Indictment as victims of the defendants' crimes. The Court's reasoning that, nonetheless, the Parkers are not "victims" until a jury returns a guilty verdict is contrary to the plain language of the statute and appellate court opinions, which all indicate that victims

of a crime have rights before a jury has returned a guilty verdict. The CVRA, for example, gives victims the right to be heard at bail hearings— hearings that take place at an early stage in the criminal process. The right of victims to be heard at the starting point of the criminal justice process demonstrates that a triggering event for victims having rights is the filing of an indictment— not a guilty verdict after trial.

The Ninth Circuit, too, has made plain that the victims have rights under the CVRA before a finding of guilt. In *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), the Circuit held that victims of a crime of violence who wished to attend trial could not be sequestered under Rule 615 of the Federal Rule of Evidence, because they had a guaranteed right under the CVRA to attend trial. Because the defendant had not been convicted of the charges at the time of the Ninth Circuit's ruling, *Mikhel* demonstrates that victims have rights even before a jury verdict of guilty.

Finally, this Court has already effectively held that the Parkers have rights under the CVRA. In rejecting an argument that the U.S. Attorney's Office had disseminated prejudicial pre-trial publicity in holding a public meeting regarding the prosecution, the Court ruled that the U.S. Attorney's Office had "duties" under the CVRA. Of course, the Government has no duties under the CVRA unless there are victims. Therefore, the fact that the victims have CVRA is already the "law of

the case.”

Accordingly, the Court should reconsider its ruling and hold that the Parkers (and other victims like them) can attend all proceedings in this case. The Parkers also respectfully request a decision on their motion by February 17, 2009, in light of their CVRA right to a decision “forthwith.”¹

BACKGROUND

Melvin and Lerah Parker reside in Libby, Montana, and have been told by the Government that they will be called as government witnesses in this case. As described in more detail below, they are specifically identified as victims in this case. Counts I and III of the Superseding Indictment identify them as having been harmed by the defendants’ crimes.

The Parkers are keenly interested in observing the trial and, if permitted, would attend many of the trial proceedings. They have both been diagnosed with asbestosis, a chronic inflammatory medical condition affecting lung tissue—a condition that they believe was directly caused by the defendants’ crimes. They therefore have a compelling interest in attending the trial, to hear medical and other testimony about potentially fatal risks from the disease.

¹ The Government has filed a brief in support of this position as well. In the interests of economy, the Parkers expressly adopt all of the arguments made by the Government in its brief.

The Parkers also wish to observe the trial in person to see whether justice is being done in the proceedings. W.R. Grace sold property (identified as the “Screening Plant property” in the Indictment, ¶¶ 15367) to the Parkers without disclosing the health hazards associated with the property. The Parkers then rebuilt their commercial nursery on that property, hiring employees and encouraging customers to come there, while also providing a temporary home to five grandchildren over extended period of time. As a result of this decision to purchase the screening plant, the Parkers’ children and grandchildren became exposed to undisclosed and dangerous levels of asbestos. Because of what has happened to their children, grandchildren, and others, the Parkers wish to personally observe as much of the trial as possible in order to understand what the defendants have done and how the criminal justice system is treating it.

The Parkers had no knowledge that the Court had considered their right to attend the trial under the CVRA and only recently learned that they would be denied the opportunity to attend the trial. They then secured pro bono legal counsel to file this motion.

I. THE CVRA CREATES A BROAD AND ENCOMPASSING BILL OF RIGHTS FOR CRIME VICTIMS THROUGHOUT THE CRIMINAL JUSTICE PROCESS.

The Parkers are asserting their rights under the Crime Victims’ Rights Act. The

CVRA “was designed to be a ‘broad and encompassing’ statutory victims’ bill of rights.” *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)). 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 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).

The Crime Victims’ Rights Act gives victims “the right to participate in the system.” 150 CONG. REC. S4263 (Apr. 22, 2004) (statement of Sen. Feinstein). See generally Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYUL Rev. 850-52. To assure such participation at all stages in the process, the Act grants victims eight specific rights:

- (1) The right to be reasonably protected from the accused;
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;
- (3) The right not to be excluded from any such public court

- proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
 - (5) The reasonable right to confer with the attorney for the Government in the case;
 - (6) The right to full and timely restitution as provided in law;
 - (7) The right to proceedings free from unreasonable delay; and
 - (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a). These changes were intended to make the victim “an independent participant *in the proceedings*.” 150 CONG. REC. S10911 (Oct. 9, 2004) (statement of Sen. Kyl)(emphasis added).

Of particular importance to this motion is the right of the victim “not to be excluded from any such public court proceeding” in the absence of particularized findings of a compelling reason for exclusion. The provision “allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case” 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Kyl). In extending this right in the federal system, Congress tracked parallel provisions around the country. *See generally* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to*

Attend the Trial: The Reascendant National Consensus 9 LEWIS & CLARK L. REV. 481 (2005).

Because the CVRA is remedial legislation, it “should be broadly construed to effectuate its purpose.” *Bodine v. Graco, Inc.*, 533 F.3d 1145, 1153 (9th Cir. 2008). Moreover, not only must the CVRA as a whole be interpreted liberally, but its definition of ‘crime victim’ requires a generous construction. After reciting the definition of victims, 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. . . .” 150 CONG. REC. S10912 (Oct. 9, 2004) (emphasis added). 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*, 435 F.3d at 1015-16 (discussing significance of CVRA sponsors’ floor statements). The provision at issue here must thus be construed broadly in favor of the Parkers.

II. THE PARKERS ARE “CRIME VICTIMS” UNDER THE CVRA BECAUSE THEY ARE SPECIFICALLY IDENTIFIED IN THE INDICTMENT AS HAVING BEEN VICTIMIZED BY THE DEFENDANTS’ CRIMES.

A. THE INDICTMENT SPECIFICALLY IDENTIFIES THE PARKERS AS VICTIMS.

Under the CVRA, the Parkers are “crime victims” of the charges against the defendants as they are specifically identified in the indictment as having been

“directly and proximately harmed” by the charges. 18 U.S.C. § 3771(e) (emphasis added). Here the Superseding Indictment specifically identifies the Parkers as victims in Count I and Count III. Count I (the conspiracy count) charges that “[o]n or about December 17, 1993, defendants W.R. GRACE and BETTACHI knowing the Screening Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Screening Plant property to *the Parkers* and failed to disclose the health hazard associated with said property.” Indictment ¶ 165 (emphasis added). The Conspiracy Count goes on to state that “[b]eginning on or about December 17, 1993, defendants W.R. Grace, BETTACHI and STRINGER, knowing the Screening Plant property was contaminated with tremolite asbestos and *knowing that the Parkers* resided on and established a commercial nursery on said property, failed to disclose the health hazard associated with said property.” Indictment ¶ 166 (emphasis added).

Count III alleges knowing endangerment under the Clean Air Act, specifically:

That beginning on or about November 3, 1999 and continuing until on or about June 15, 2000, at Libby within the State and District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury by selling real property known as the “Screening Plant” to *the Parker family*, in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2. (emphasis added).

Thus, there can be no doubt that the Indictment identifies the Parkers as the victims

of the defendants' charged crimes.

B. A VICTIM WHO IS LISTED IN THE INDICTMENT HAS RIGHTS UNDER THE CVRA.

A court can properly presume that a count in 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.² 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." LAFAYE, ISRAEL, KING & KERR, 1 CRIMINAL PROCEDURE § 1.5(k) at n. 415.5 (3rd ed. 2007-08) (emphasis added).

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)

² It is not necessary, however, that a victim be listed in the indictment to have rights under the CVRA. *See In re Stewart*, ___ F.3d ___, 2008 WL 526344 at *3 (11th Cir. 2008) ("The CVRA . . . does not limit the class of victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the

(article by CVRA Senate 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"); Beloof & Cassell, *The Crime Victim's Right to Attend The Trial*, *supra*, 9 LEWIS & CLARK L. REV. at 504-14 (collecting state laws and court decisions on victims right to attend trial; no example of victims denied right to attend until jury made a finding of guilt). It could hardly be otherwise. 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

crime's commission.").

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). This Court should reach the same conclusion here.

C. THE NINTH CIRCUIT AND OTHER APPELLATE COURTS HAVE RECOGNIZED THAT CRIME VICTIMS HAVE RIGHTS BEFORE A JURY FINDING OF GUILT.

The Court has stated that the issue of whether the Parkers and others were harmed by the defendants was “the critical issue or issues that are going to be tried . . .” Hearing Tr. (Jan. 22, 2009) at 304305. The Court thus concluded that until there was a trial followed by guilty verdicts, the Parkers (and other victims like them) would lack rights under the CVRA. In so reasoning, the Court’s decision directly conflicts with a number of cases, most noteworthy *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006). There, the trial judge had issued a pre-trial ruling excluding certain family members of murder victims from attending a murder trial. The trial judge had held that they were witnesses in the case and therefore subject to exclusion under Rule 615 of the Federal Rules of Evidence. On the government’s

mandamus petition, the Ninth Circuit reversed the sequestration order, explaining: “While the district court’s summary exclusion of the victim-witnesses may have been proper under Rule 615 prior to the enactment of the CVRA, . . . the CVRA abrogated Rule 615, at least with respect to crime victims.” *Id.* at 1139. Of course, when the Ninth Circuit described the witnesses as “crime victims,” there had been no jury determination that a murder had been committed, much less that the defendant had committed it. The Court’s reasoning here that the Parkers (and other victims) are not protected by the CVRA until the issue of liability has been fully tried directly conflicts with the Ninth Circuit’s holding in *Mikhel*.

The Court’s reasoning also conflicts with other appellate court authority. For example, in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), victims of a corporate environmental crime urged the district court to reject a plea agreement that had been reached between the Government and the corporate defendant on grounds that the victims had not been consulted *even before charges had been filed*. The Fifth Circuit agreed with the victims that the Government failure to confer before filing charges violated the CVRA:

The district court acknowledged that “[t]here are clearly rights under the CVRA that apply before any prosecution is underway.” *BP Products*, 2008 WL 501321 at *11, 2008 U.S. Dist. LEXIS 12893, at *36. Logically, this includes the CVRA’s establishment of the victims’ “reasonable right to confer with the attorney for the

Government.” 18 U.S.C. § 3771(a)(5). At least in the posture of this case . . . , the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims’ views on the possible details of a plea bargain.

527 F.3d at 394. Of course, if the victims in the *Dean* case had rights under the CVRA even *before* the filing of any charges, it is impossible to see why the Parkers should be denied their rights under the CVRA after the filing of charges specifically listing them as victims. Moreover, it is important to understand that *Dean* involved an explosion at an oil refinery in Texas, in which the responsible corporation’s criminal liability (if any) and that liability’s connection to the explosion were disputed before the corporation pled guilty. Thus, the Fifth Circuit has implicitly rejected this Court’s reasoning that, simply because a defendant intends to challenge causation, no victims exist under the CVRA.

D. IT IS ALREADY THE “LAW OF THE CASE” THAT THE PARKERS ARE VICTIMS IN THIS MATTER.

This Court has already held that the Parkers and other victims have rights under the CVRA. This “law of the case” should not be revisited.

On September 30, 2005, this Court released an order denying the defendants’ motion for sanctions against the Government for alleged improper pretrial publicity.

In the course of the ruling, the Court rejected a defense argument that a Victim Witness Specialist within the U.S. Attorney’s Office had made improper statements

regarding the case during a public meeting under the CVRA. The Court held:

Most of the statements made by the Specialist are probably within the “legitimate law enforcement purpose” exception *because they were made in the course of fulfilling of DOJ's duties under the [CVRA]*. This is so even if the statements should not have been made in the manner they were. Although these statements were made in public and disseminated in at least one local newspaper, they relate to topics that the DOJ is arguably required to address under the [CVRA], including a right to have timely notice of proceedings.

United States v. Grace, 401 F.Supp.2d 1057, 1063-64 (D. Mont. 2005) (emphasis reordered). In ruling that the U.S. Attorney’s Office had made statements “in the course of fulfilling DOJ’s duties under the [CVRA],” the Court necessarily found that there were “crime victims” under the Act. The Office could not have duties under the *Crime Victims Rights Act* if there were no crime victims.

The Court similarly ruled that the Office had obligations under the CVRA in its order directing discussion of issues at a status conference on October 24, 2008. The order identified as a matter to be discussed “[t]he Crime Victims Right Act, 18 U.S.C. § 3771, and the government’s plans for complying with the statute’s directive that the prosecution make its best efforts to see that crime victims are notified of and according their rights under the statute.” Order of Oct. 10, 2008 at 2 (dkt. #814). Here again, the Government would have no need to make its “best efforts” to notify crime victims unless there were crime victims that the statute

obligated it to notify.

In light of these earlier rulings, for the Court to now reverse course and hold that the Parkers lack rights under the CVRA would run contrary to the “law of the case.” Such reversal without any change in circumstances of the case or the relevant legal landscape is inappropriate. *See Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 573 (9th Cir. 2005)

The duty to enforce rights under the CVRA does not extend merely to prosecutors. The Act is quite clear that courts, too, have obligations to respect the rights of victims. *See* 18 U.S.C. § 3771(b)(1) (“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 [the CVRA].”). Because this Court has previously found that the U.S. Attorney’s Office has “duties” to afford victims their rights under the CVRA, the Court should also conclude that it has a duty to afford victims like the Parkers their rights under the Act – including specifically their right to attend court proceedings.

III. THE COURT SHOULD ISSUE ITS RULING ON THIS MOTION “FORTHWITH” BY FEBRUARY 17, 2009.

Because the Parkers are asserting rights under the CVRA, they have a statutory right to a decision “forthwith.” *See* 18 U.S.C. § 3771(d)(3) (“The district

court shall take up and decide any motion asserting a victim's right forthwith.").

This can be read to mean that the victims have a right to a decision "immediately" and "without delay." BLACK'S LAW DICTIONARY 680 (8th ed. 2004). To facilitate an orderly disposition of their motion – and to give the defendants an opportunity to respond³ – the Parkers expressly waive their right to a decision "forthwith" but for a limited time – up to close of business on February 17, 2009 *Cf.* 18 U.S.C. § 3771(d)(3) (courts of appeals required to rule on crime victims' mandamus petitions within seventy-two hours). The Parkers note that the Government's brief raising the same legal issues was filed more than a week ago, so both the Court and the defendants are familiar with the issues they present.

Appreciating that the Court is preparing to handle a complex, multiweek trial, the Parkers respectfully request a ruling from the Court on their motion by February 17, in light of their congressionally-conferred right to a decision "forthwith." A ruling by that time will also give the Parkers an opportunity to determine whether there is any need to seek appellate relief before the beginning of testimony in the trial. *See* 18 U.S.C. § 3771(d)(3) (authorizing movants under the CVRA to seek mandamus review in the court of appeals; court of appeals to rule

³ A draft of this memorandum was e-mailed to counsel for the parties on the morning of February 10, 2009.

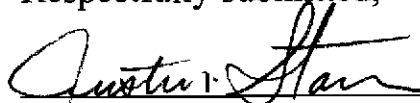
within seventy-two hours).⁴

CONCLUSION

The Court should recognize Melvin and Lerah Parker as “crime victims” under the Crime Victims’ Rights Act and extend them their rights, including the right to not to be excluded from any public court proceedings. The Court should rule on their motion by February 17, 2009.

Dated: February 11, 2009.

Respectfully submitted,



Justin Starin, Esq.

Tornabene & McKenna

Paul G. Cassell (Utah Bar #6078)
(motion for admission *pro hac vice*
pending)

Counsel for Melvin and Lerah Parker

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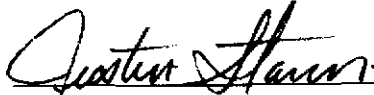
4 If the Court does not grant the Parkers’ motion or the Government’s motion on or before February 17, 2009, they currently intend to explore whether it would be appropriate to file a mandamus petition with the Ninth Circuit on or shortly after February 19, 2009. In view of the extremely short time frames created by the CVRA, the Parkers wanted to provide advance notice to counsel for the parties and the Court of how they might proceed to avoid any surprise and provide counsel an opportunity to prepare appropriate responses.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2009 I filed a copy of the foregoing document conventionally with the clerk of this court, who then filed the foregoing in the court's CM/ECF system and transmitted a notice of electronic filing which constitutes notice to all counsel of record who are registered users, except for David Bernick and Vernon Broderick who were served by mail at the following addresses:

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