No. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCE ANDRICH, DON ASPINAL, SCOTT CONNELLY, JEFF CORBETT, CHARLENE EGLAND, JERRY GILBERT, IRA GILMER, RACHEL GREEN, KEITH LEWIS, DARREN MEADE, LEE PATIN, GLENN PUIT, ANTHONY ROBERTS, MICHAEL ROBERTS, MARK WARNER, and JIM ZASLAW,	)
Victim-Interveners/Petitioners,	)
v.	)
UNITED STATES DISTRICT COURT,	)
Respondent.	)
UNITED STATES OF AMERICA, Plaintiff, KIRK A. MCMAHAN, Defendant,	)
Real Parties in Interest,	)

PETITION FOR WRIT OF MANDAMUS - 18 U.S.C. § 3771(d)(3)

Petition from order of the U.S. District Court (C.D. Cal.), No. SACR 07-249-CJC, Honorable Cormac J. Carney, United States District Judge

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I. INTRODUCTION

A group of crime victims (the "Victim-Interveners") asks to be heard at sentencing in this case, scheduled for December 5, 2011, to provide evidence of criminal conduct committed by defendant Kirk McMahan against them since being on pretrial release following his guilty plea. The victims wish to present evidence that defendant has continued to engage in fraudulent conduct that is similar and related to the conduct that gave rise to his conviction. At a previous hearing, it became clear that defendant would be seeking a downward variance based on having led a law-abiding life since his guilty plea. The evidence the victims would present would directly rebut defendant's claim of having led a "law-abiding" life.

Although the district court initially indicated it wished to receive evidence on this issue, the government declined to present any such evidence. Victim-Interveners accordingly filed a motion to intervene and be heard. As crime victims, they have independent rights to participate under the Crime Victims' Rights Act (18 U.S.C. § 3771) (the "CVRA"). Among those rights is the right to be heard at sentencing.

Notwithstanding the victims' rights and the relevance of the evidence they would present at sentencing, the district court denied Victim-Interveners' motion to intervene and be heard. The court rested its denial on its conclusion, decided as a matter of first impression, that Victim-Interveners are not "crime victims" under

the CVRA because they are not the victims of the crime of conviction and to allow them to be heard at sentencing would pose constitutional problems. Contrary to the district court's conclusion, the language of the CVRA, its legislative history, and its interpretation by this Court, all make clear that Congress intended to broadly include all victims of federal offenses, regardless of whether they are the victims of the crime of conviction. Further, permitting the victims to present relevant evidence at sentencing poses no constitutional problems, since courts have wide discretion to consider a broad range of information in determining the appropriate sentence.

Accordingly, this Court should issue a writ of mandamus directing the district court to permit the victims to be heard at defendant's sentencing hearing.

II. PROPRIETY OF WRIT RELIEF

18 U.S.C. § 3771(d)(3) expressly provides that in the case of a motion seeking to enforce victims' rights, "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." The statute further provides that the Court "shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3). The

imminent sentencing hearing in this case on December 5, 2011, further requires, as a practical matter, action within the statutory period.[1]

This Court has held that, because of the express statutory provision for issuing a writ of mandamus under section 3771(d)(3), the Court need not apply the traditional standards applicable to discretionary writ review:

> The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute. We thus need not balance the *Bauman* factors in ruling on mandamus petitions brought under the CVRA; rather, we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error.

Kenna v. U.S. District Court, 435 F.3d 1011, 1017 (9th Cir. 2006). Here, for all the reasons discussed below, the district court legally erred in its interpretation of the CVRA and abused its discretion in refusing to allow the victims to be heard at sentencing, thus requiring that the Court issue a writ of mandamus.

Even if the CVRA's mandatory writ provision did not apply here, the Court could and should still exercise its discretion to issue a writ of mandamus. This

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[1] Victim-Interveners have filed a motion for reconsideration in the district court. However, as of the time of filing this petition, the district court has not yet ruled on the motion. Because of the inherently interlocutory nature of writ relief, the pendency of the motion for reconsideration does not preclude this Court from considering this petition, nor does the pendency of this petition preclude the district court from ruling on the motion for reconsideration. Because of the urgency of a decision before the upcoming sentencing hearing, Victim-Interveners could not further await decision on the motion for reconsideration before filing this petition. However, should the district court rule on the motion for reconsideration while this petition is pending, they will immediately notify this Court.

Court has broad authority to issue writs of mandamus. *See* 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.") This Court considers the following five factors in evaluating a petition for writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Credit Suisse v. U.S. District Court, 130 F.3d 1342, 1345 (9th Cir. 1997) (quoting *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). "None of these guidelines is determinative and all five guidelines need not be satisfied at once for a writ to issue." *Id.* Indeed, "[r]arely if ever will there be a case in which every one of the five *Bauman* factors indicates the same result or is relevant or applicable." *In re Gonzales*, 623 F.3d 1242, 1246 (2010). As discussed below, even apart from the CVRA, a writ of mandamus should issue under these traditional factors because the victims will have no recourse by appeal to correct the injustice that will result if sentencing goes forward without allowing them to be heard.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant's Criminal Conduct

On November 7, 2007, defendant was charged by Information with mail fraud in violation of 18 U.S.C. § 1341. (Exs. 1-6.)[2] The Information alleges that defendant participated in a fraudulent scheme arising out of his work with Brickbanc Capital ("Brickbanc"). On the same date, co-defendant Adam Stuart Zuckerman was charged, also by Information, with the same fraudulent scheme involving Brickbanc, in case number SACR 07-239-CJC. (Exs. 7-12.)

The Information alleges that as part of the scheme, defendant would locate small businesses and would communicate with these customers that Brickbanc could obtain money loans for them. Once the customers agreed to engage Brickbanc, defendant used false statements and promises to induce lenders to provide, not cash loans, but equipment leases to the small businesses. Then, rather than using the lease proceeds to purchase equipment as promised, defendant caused some of the money to be provided to the small businesses as a cash loan but caused another portion of the money to be paid to Brickbanc, from which he received funds.

[2] "Exs." refers to the Exhibits filed concurrently with this Petition for Writ of Mandamus, followed by the page numbers. "CR" refers to the Clerk's Record in the district court, followed by the docket number. "CR (Zuckerman)" refers to the Clerk's Record in co-defendant Zuckerman's case, No. SACR 07-239-CJC.

Defendant pled guilty to the charged mail fraud scheme. Sentencing was continued numerous times due to "ongoing discussions" between defendant and the government. (*See, e.g.*, CR 38.) Sentencing for co-defendant Zuckerman has likewise been continued numerous times due to ongoing discussions and his providing assistance to the government. (*See, e.g.*, CR (Zuckerman) 33.) Both defendants have been released on bond while awaiting sentencing.

While out on bond, defendant and Zuckerman have continued to work together in businesses offering small business financing and funding. (Exs. 147-48, 159, 161.) Among other things, defendant managed a business called "The X Banker" which, similar to Brickbanc, offered small business loans. (Exs. 149.) Numerous victims, including a number of the Victim-Interveners here, have been the victims of continuing fraudulent conduct by defendant, Zuckerman, and their associates in connection with their ongoing business ventures since being out on pretrial release. (Exs. 22-23.) Several victims have specifically come forward with information that defendant, through his work at The X Banker, falsely represented that The X Banker would provide them with business financing and that The X Banker would provide a 100 percent money-back guarantee if they failed to obtain the promised financing. However, in truth, The X Banker took the victims' money, but then failed to deliver the promised financing and failed to honor the money-back guarantee. (Exs. 149-56.)

On several occasions between 2009 and 2011, defendant's and Zuckerman's continuing association and continuing criminal conduct was reported to the government. (Exs. 23-24, 90-104, 150, 175-77.) However, the government took no action to revoke either of the defendants' bonds or to bring further charges.

B. The Sentencing Proceedings and the Motion to Intervene

A sentencing hearing was finally held in this case on August 29, 2011. Defendant took the position that he should be granted a downward variance based on his having reformed and led a law-abiding life since his guilty plea. The government acknowledged that defendant had made "useful changes" in his life and recommended a downward variance. (Exs. 34, 38 (RT 9, 13).) At the hearing, two victims, Charlene Egland and Darren Meade, appeared pro se and asked to make statements to the court. The district court heard from Ms. Egland and Mr. Meade, who stated that they had been victimized by defendant and others at The X Banker and other companies. (Exs. 44-58 (RT 19-33).) Ms. Egland related having paid The X Banker for financing services she never received, and Mr. Meade related fraudulent conduct by defendant and others, as well as threatening conduct by co-defendant Zuckerman. (*Id.*)

After hearing from Ms. Egland and Mr. Meade, the district court found that evidence that defendant had engaged in criminal conduct since the time of his guilty plea would be relevant to defendant's sentencing and, over the objections of

both the defense and the government, ordered an evidentiary hearing to be held on October 31, 2011. (Exs. 67-87 (RT 42-62).) The court observed that at issue in defendant's sentencing is whether he should receive a downward variance based on his leading a "law-abiding" and "righteous" life (Exs. 67-69 (RT 42-44)), and to make that determination it would be necessary to consider evidence that the defendant in fact has been committing further crimes (Exs. 78-80 (RT 53-55)). Accordingly, to consider this relevant evidence, the Court stated that it "want[ed] an inquiry made into these allegations," "want[ed] an evidentiary hearing" at which "we'll call witnesses" and the Court would "get to the bottom of it." (Exs. 82 (RT 57).) The Court also noted that the "Government is going to call the relevant witnesses," and the Court was "hoping there are going to be more witnesses." (Exs. 84 (RT 59).)

After the hearing, Mr. Meade contacted the government to make himself available to provide further information. (Exs. 185-86.) Investigative journalist Glenn Puit also contacted the government to alert them to the existence of additional victims of defendants McMahan and Zuckerman. (Exs. 24, 96-98.)

Despite the court's expressed desire to have an evidentiary hearing at which witnesses would be called, approximately a week before the scheduled hearing, the government indicated it did not intend to call any witnesses. (Exs. 19.) The government filed a document with the court under seal, apparently addressing this

issue. (CR 56.) Following the government's filing, the court ruled that defendant's sentencing would proceed on October 31, 2011 without an evidentiary hearing. (CR 57.)

Victim-Interveners then filed a motion to intervene and be heard at sentencing. (Exs. 13-105.) They argued that they are "crime victims" as that term is defined in the CVRA and as such have certain rights including the right to be heard at sentencing, and they pointed out, consistently with the district court's previous observations, the relevance of the evidence they would provide to defendant's sentencing. Victim-Interveners also requested a continuance of the sentencing proceeding for approximately one month to allow sufficient time to prepare their own evidence in light of the government's decision not to present evidence. Victim-Interveners further requested that the court order that the government's under seal filing be unsealed as to them to allow Victim-Interveners to respond.

The court on its own motion continued the sentencing hearing to December 5, 2011, to give time to consider Victim-Interveners' motion and oppositions to it. (CR 59.) Both defendant and the government filed oppositions to Victim-Interveners' motion. (Exs. 106-20.) They argued that Victim-Interveners are not "crime victims" under the CVRA because they were not the victims of the charged offense. (*Id.*) Victim-Interveners filed a reply, arguing that the statutory language

and legislative history demonstrate Congress's intent to include all crime victims, regardless of whether they are the victims of the charged offense. (Exs. 121-28.) Victim-Interveners further argued that, even apart from the mandatory provisions of the CVRA, the court had the discretion to and should consider their evidence as part of the court's sentencing determination. (*Id.*)

On November 16, 2011, the district court issued a ruling denying Victim-Interveners' motion. (Exs. 129-35.) The court recognized that the issue of whether Victim-Interveners are "crime victims" under the CVRA was a question of first impression. The court opined that to interpret the Act to include victims of crimes that were uncharged and unrelated to the crime of conviction would pose constitutional problems. For the same reason, the court rejected Victim-Interveners' argument that the court should consider their evidence as an exercise of its discretion in sentencing.

On November 22, 2011, Victim-Interveners filed a motion for reconsideration. (Exs. 136-88.) Victim-Interveners argued that the court's constitutional concerns were unfounded because the court has wide discretion at sentencing to consider a broad range of information, including uncharged, post-plea criminal conduct. In response to the court's apparent belief that the conduct at issue was "unrelated" to the crime of conviction, Victim-Interveners provided detailed proffers of the evidence they wished to present and argued that

defendant's post-plea conduct was in fact related to the offense of conviction because the evidence would show that defendant was continuing to engage in the same type of fraud with the same players as in the Brickbanc scheme. Victim-Interveners also renewed their request that the court unseal the government's filing so as to give them an opportunity to respond. As of the time of filing this petition, the district court has not ruled on Victim-Interveners' motion for reconsideration, and sentencing remains scheduled for December 5, 2011.

IV. ARGUMENT

A. Victim-Interveners Have the Right To Be Heard Under the CVRA

The CVRA, codified at 18 U.S.C. § 3771, gives crime victims certain rights, including the "right not to be excluded from any such public court proceeding," the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing," and the "right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a). 18 U.S.C. § 3771(b) further 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)." Further, subsection (d)(1) provides that "[t]he crime victim or the crime victim's lawful representative . . . may assert the rights described in subsection (a)."

Notwithstanding these statutory rights, the district court denied Victim-Interveners' motion to be heard at defendant's sentencing. The district court's ruling was erroneous, as Congress has made clear its intent to broadly include within the statutory definition *all* victims of federal offenses, whether or not they are the victims of the offense charged. And contrary to the district court's reasoning, this clearly expressed legislative intent poses no constitutional problems, as it is well settled that district courts have wide discretion to consider a broad range of information in determining an appropriate sentence. The evidence the victims here would present is of conduct that is related to the crime of conviction and highly relevant at sentencing. Accordingly, this Court should issue a writ of mandamus to enforce Victim-Interveners' right to be heard at sentencing.

1. Victim-Interveners Are "Crime Victims" Under the CVRA

"Crime victim" for purposes of Section 3771 is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). Victim-Interveners plainly meet this statutory definition because they are individuals who have been directly and proximately harmed as a result of the commission of federal offenses committed either directly by defendant or in concert with others including co-schemer and co-defendant Adam Stuart Zuckerman, while on pretrial release in the

instant case. (Exs. 22-23.)[3] Victim-Interveners provided specific evidence of fraudulent representations made by defendant and his co-schemers regarding small business funding and financing services their companies would supposedly provide. (Exs. 146-84.)

Contrary to the parties' arguments in the district court, the CVRA does not limit its reach to victims of the crime charged. First, the statutory language contains no such limitation. Rather, the definition of "crime victim" expressly includes those harmed as a result of the commission of "***a*** Federal offense." 18 U.S.C. § 3771(e) (emphasis added). The statute does not limit the definition of "crime victim" to a person harmed as a result of "***the*** federal offense," or "the offense of conviction." Indeed, section 3771(d)(3) allows crime victims to assert their rights even where no prosecution is currently pending. Thus, the statutory language on its face demonstrates that Congress did not intend to limit crime victims' rights to only those proceedings in which the crime has been charged.

In fact, the legislative history demonstrates precisely the opposite legislative intent. In discussing the definition of "crime victim" to include victims of "a federal offense," the sponsor of the legislation explained: "This is an intentionally

[3] A detailed investigation by private investigators who are long-time veterans of the FBI has revealed that the numerous federal offenses of which Victim-Interveners are victims include securities fraud in violation of 18 U.S.C. § 1348, wire fraud in violation of 18 U.S.C. § 1343, witness retaliation in violation of 18 U.S.C. § 1513, threatening communications in violation of 18 U.S.C. § 875, and money laundering in violation of 18 U.S.C. § 1956. (Exs. 22.)

broad definition because all victims of crime deserve to have their rights protected, ***whether or not they are the victim of the count charged***." 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). This intent is consistent with the broader intent of the legislation: "It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *Id.* at S10911.[4]

Consistent with this legislative intent, this Court has interpreted the CVRA broadly, holding that "[t]he definition of a 'victim' under the CVRA is not limited to the person against whom a crime was actually perpetrated." *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006). Moreover, this Court, reviewing the legislative history, has recognized the legislative intent to "make crime victims full participants in the criminal justice system." *Kenna v. U.S. District Court*, 435

[4] This intent must be kept in mind in reading the language in subsection (b), relied upon by defendant in the district court, that crime victims' rights apply "in any court proceeding involving an offense against a crime victim." To be squared with the legislative intent to protect all crime victims, whether or not they are the victims of the count charged, this language cannot be read to mean that crime victims' rights are limited to those proceedings in which the offense against the crime victim has been charged. Rather, it must be construed – consistently with its use of the broad terms "any" proceeding "involving" "an" offense against a crime victim – to confer rights with respect to ***any*** proceeding at which ***an*** offense against a crime victim is ***involved.*** As discussed below, the sentencing at issue here certainly "involves" the offenses committed against these victims, as defendant himself has put these offenses directly in issue by claiming to have led a "law-abiding life."

F.3d 1011, 1016 (9th Cir. 2006). In *Kenna*, the Court also noted Senator Kyl's comments that the statutory language "not be an excuse for minimizing the victim's opportunity to be heard." *Id.* at 1015.

The parties and the district court acknowledged that no Ninth Circuit authority holds that "crime victims" are limited to the victims of the crime charged. While the parties pointed to non-binding out-of-circuit authority they claim supports this proposition, as the district court correctly recognized, none of the out-of-circuit authorities actually addresses the issue presented here. Rather, each of the cases addresses the different issue of harms that are too attenuated to be considered "proximately caused" by the offenses committed by the defendant.

For example, in *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), the principal case relied on by the parties, the issue was whether an employee who was fired and blackballed from employment for refusing to participate in an antitrust conspiracy was a "crime victim." The court held that the employee was not a "crime victim" under the CVRA because firing and blackballing were only civil, not criminal, harms and were only tangentially linked to the defendant employer's criminal conduct of conspiracy and restraint of interstate commerce. *Id.* at 351-52; *accord In re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) (insufficient nexus between murder and defendant's crime of drug trafficking); *In re Antrobus*, 519 F.3d 1123, 1125-26 (10th Cir. 2008) (murder not proximately caused by defendant's crime of

supplying handgun to juvenile); *United States v. Sharp*, 463 F. Supp. 2d 556, 565-67 (E.D. Va. 2006) (insufficient causal link between domestic abuse by user of marijuana and defendant's conduct in conspiring to distribute marijuana).

Moreover, in *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005), relied upon by the government, the court ultimately concluded that ambiguity over whether the CVRA applies to victims of uncharged conduct counsels erring on the side of caution. *Id.* at 326-27. The court explained that "it is important to avoid the pitfall of seeking to determine who is 'actually' a victim as a threshold for safeguarding the rights set forth in § 3771." *Id.* at 327 (citation omitted). The court went on to explain that it would follow "an inclusive approach" and would presume that any person who the government asserts or who self-identifies as having been "harmed by conduct attributed to a defendant . . . enjoys all of the procedural and substantive rights set forth in § 3771." *Id.*

Thus, under expressed Congressional intent, because Victim-Interveners are victims of federal offenses for which defendant is responsible, they are "crime victims" and must be afforded the rights granted in the CVRA, including the right to be heard at defendant's upcoming sentencing.

2. Allowing Victim-Interveners To Be Heard at Sentencing Does Not Raise Constitutional Problems

In holding that the CVRA does not apply to victims of criminal conduct that goes beyond the crime of conviction, the district court relied on the premise that to

interpret the Act to include such victims would raise constitutional problems, specifically that it would deprive defendant of his Sixth Amendment and due process rights because it would not be subject to the same constitutional protections as would apply if the conduct were charged as new offenses. (Exs. 133-34.) The court's constitutional concerns are unfounded.

The Supreme Court has long made clear that the constitutional constraints placed on the adjudication of guilt do not apply to sentencing determinations, but rather the sentencing judge has "wide discretion" to consider evidence to determine the appropriate punishment within the bounds fixed by law. *See, e.g., Williams v. New York*, 337 U.S. 241, 251 (1949) ("In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."). As this Court recently explained, "[t]he Sixth Amendment guarantees that a conviction must rest 'upon a jury determination that the defendant is guilty of every element of the crime with which he is charged.' As the Supreme Court has made clear, however, once there is a conviction, the sentencing judge is possessed of extraordinarily broad powers to find the facts that will drive the sentence." *United States v. Fitch*, 659 F.3d 788, 794 (9th Cir. Sept. 23, 2011)

(citation omitted). While the Sixth Amendment does require a jury determination beyond a reasonable doubt of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000), the Sixth Amendment imposes no similar constraint on facts found in applying the now-advisory Sentencing Guidelines, *United States v. Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

Applying these principles, both the Supreme Court and this Court have upheld sentencing judges' consideration of uncharged criminal conduct at sentencing. In *Williams*, the Court upheld the sentencing judge's consideration of 30 uncharged burglaries in sentencing a murder defendant. And in *Fitch*, this Court held that the district court properly considered facts evidencing that a fraud defendant had killed his wife, even though the defendant had never been charged with the murder. *See also United States v. Watts*, 519 U.S. 148 (1997) (court may consider even acquitted conduct at sentencing); *United States v. Mezas de Jesus*, 217 F.3d 638, 642-44 (9th Cir. 2000) (court could properly consider uncharged kidnapping, though disproportionate effect of sentencing enhancement based on kidnapping required proof by clear and convincing evidence).

This Court has also made clear that the sentencing court may consider post-offense criminal conduct while on release pending sentencing. In *United States v.*

Myers, 41 F.3d 531, 532-34 (9th Cir. 1994), the court held that in a fraud case, the defendant's post-plea commission of additional fraud was properly considered in imposing an upward departure. In so holding, the Ninth Circuit joined every other circuit to have addressed the issue. *Id.* at 533. Indeed, as the Court explained, the defendant's post-offense criminal conduct "constitutes the strongest possible evidence of a likelihood that she will continue to commit similar crimes in the future." *Id.* at 534.

Further, in *United States v. Mara*, 523 F. 3d 1036 (9th Cir. 2008), this Court held that unrelated, uncharged criminal conduct following a guilty plea may properly be considered at sentencing. There, the defendant was involved in a physical altercation in jail while awaiting sentencing. This Court, again joining the overwhelming majority of circuits to have considered the issue, held that this post-offense conduct was properly considered in deciding not to grant a sentencing reduction for acceptance of responsibility. *Id.*at 1039. The Court also rejected the defendant's challenge that the information regarding the jailhouse incident was only hearsay contained in a police report. Noting the general rule that relevant information may be considered at sentencing without regard to the rules of evidence, the Court held that the statements in the police report were sufficiently corroborated to provide the requisite indicia of reliability. *Id.*

Here, for the same reasons, evidence of further criminal activity by defendant is both properly considered and highly relevant at defendant's sentencing. It is not constitutionally required that this activity be charged, nor that it be related to the offense of conviction (though, as discussed below, the conduct here is certainly related to the offense of conviction). It is also not required that the evidence be admissible under the Rules of Evidence or otherwise subject to trial procedure (though the victims here did submit sworn declarations and are willing to appear at an evidentiary hearing). Thus, purported constitutional concerns cannot justify interpreting the CVRA, contrary to the language and legislative history of the Act, to exclude victims of federal offenses simply because they were not the victims of the particular acts alleged in the indictment.

3. The Further Criminal Activity Here Is Related to the Offense Conduct and Highly Relevant to Defendant's Sentencing

As discussed above, nothing in the CVRA or the Constitution requires that, to be heard at sentencing, a "crime victim" must be the victim of the offense charged, or even of an offense that is related to the offense charged. However, even if a requirement of a relationship between the charged offense and the crime victim's offense could be read into the statute, the conduct to which Victim-Interveners wish to speak is in fact related to the charged offense. In fact, it represented a continuation of the same fraudulent conduct, involving the same

players, the same type of small-business financing operation, and the same use of false representations in a nationwide scheme to make money.

Although the Brickbanc operation that is the subject of the charged offense was shut down as a result of the government's intervention, defendant continued to work closely with co-defendant Zuckerman and others from Brickbanc. (Exs. 147-48, 159.) Both McMahan and Zuckerman used aliases in an obvious effort to conceal their connection to the Brickbanc scheme. (Exs. 147-48, 157.) Zuckerman became a partner in "Mercury Ventures," and through that entity established various entities he also controlled, including "The X Banker." (Exs. 147.) Mercury Ventures, like Brickbanc, engaged in small business financing and funding; Zuckerman and others associated with the Mercury Ventures entities fraudulently represented that they would secure significant investor funding for new companies when in fact little or no money was actually invested in those companies. (Exs. 147, 158-59.)

Defendant McMahan ran The X Banker at Zuckerman's direction. (Exs. 148, 158-59.) Just as with Brickbanc, The X Banker targeted small business owners, offering business credit services. (*Id.*) Significantly, one of the offerings of The X Banker, was the offer of equipment leases – the core of the Brickbanc scheme. (Exs. 174.)

Numerous victims have reported being victims of fraudulent representations by The X Banker. (Exs. 146-56.) These victims were told that The X Banker would provide business loans and credit building services, and were offered a 100 percent money-back guarantee if they did not obtain at least $100,000 in business credit. (Exs. 149, 151, 153-54, 156, 174, 180.) Each of the victims paid The X Banker money for these services and often incurred automatic monthly charges. (Exs. 149, 151, 154, 156.) The X Banker did not perform the services or obtain the financing promised; yet, directly contrary to the money-back guarantee, The X Banker refused to refund the victims' money to them. (Exs. 151, 153-56.) Defendant was directly involved in these fraudulent representations. (Exs. 151, 153-54, 183.)

Thus, the evidence the victims seek to introduce is directly related to and relevant to defendant's sentencing for his fraud offense. Defendant's continuing involvement in fraud surrounding small business financing demonstrates that he has simply continued to perpetuate the same fraudulent conduct for which he is being sentenced. This information is properly considered by the district court in evaluating defendant's conduct and character, the need for deterrence, and the need to protect the public, and in determining the appropriate sentence.

Indeed, the district court, even after hearing only the limited information presented at the August 29, 2011 hearing, recognized the obvious relevance of this

evidence to defendant's sentencing. As the court then observed, at issue in defendant McMahan's sentencing is whether he should receive a downward variance based on his leading a "law-abiding" and "righteous" life (Exs. 67-68 (RT 42-44)), and to make that determination it is necessary to consider evidence that the defendant in fact has been committing further crimes (Exs. 78-80 (RT 53-55)). Met with surprising resistance from the government, the court expressed that it was "baffled" as to how it could *not* consider such evidence of further criminal activity, as it bears directly on this issue. (Exs. 75 (RT 50).) Accordingly, to consider this relevant evidence, the court stated that it "want[ed] an inquiry made into these allegations," "want[ed] an evidentiary hearing" at which "we'll call witnesses" and the Court would "get to the bottom of it." (Exs. 82 (RT 57).) The court also noted that the "Government is going to call the relevant witnesses," and the court was "hoping there are going to be more witnesses." (Exs. 84 (RT 59).) These witnesses have now come forward with relevant evidence, and they should be allowed to be heard.

4. The Victims Need Not and Should Not Be Excluded Because of the Government's Inaction

The district court placed the responsibility for presenting the crime victims' evidence on the government and placed significant weight on the fact that the government elected not to present this evidence. However, as discussed above, it

is not required that the criminal conduct be charged by the government for the victims to have a right to be heard.

Indeed, the CVRA, by design, confers rights on *victims*, not the government. The Act was enacted in recognition of "the poor treatment of crime victims in the criminal process," and the desire that victims' rights not be "whittled down or marginalized by the courts ***or the executive branch***." 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). As this Court has explained, the CVRA confers rights on victims that are independent of the parties:

> 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, 435 F.3d at 1013. Thus, the CVRA gives both the government and the victims themselves the ability to enforce the rights conferred. *Id.*

Here, the government was notified repeatedly of the fraudulent activities of defendant and co-defendant Zuckerman and their association together, but the government showed an unfortunate lack of interest. (Exs. 23-24, 150, 162.) After the August 29, 2011 hearing, the government engaged in a perfunctory and even hostile "interview" with one of the victims. (Exs. 162.) The government was also notified of the existence of additional victims (Exs. 24, 96-98), but the government

elected not to further investigate or present any of this evidence to the court, giving rise to Victim-Interveners' independent request to be heard.

The government has, for reasons of its own, elected to align itself with the defense in this case, apparently having developed a cooperative – even friendly – relationship with the defendants.[5] Whatever the government's interest might be, however, members of the public have been harmed by defendant's conduct. The government's inattention and even opposition to the victims' rights, far from justifying exclusion of the victims, undermines public confidence in the justice system and is precisely the reason the victims should be allowed to be heard.

B. Regardless of the Applicability of the CVRA, the District Court Should Consider Evidence from Victim-Interveners in Making Its Sentencing Determination

Even if Victim-Interveners were not crime victims for purposes of the CVRA, the district court should consider the evidence they wish to present pursuant to its wide sentencing discretion. It is well established that a "district court may consider a wide variety of information at sentencing that could not otherwise be considered at trial, *see* 18 U.S.C. § 3661, and is not bound by the

[5] Court documents on the public dockets reveal that defendant McMahan's sentencing has been continued numerous times due to "ongoing discussions" between him and the government, and defendant Zuckerman's sentencing likewise has been continued due to such ongoing discussions and his providing assistance to the government pursuant to his plea agreement. (CR 38, CR (Zuckerman) 33.) The relationship has apparently become so friendly that at a prior hearing, one of the victims witnessed the prosecutor even give defendant Zuckerman a hug. (Exs. 159-60.)

rules of evidence, *see* Fed. R. Evid. 1101(d)(3)." *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir. 2009). Indeed, 18 U.S.C. § 3661 makes clear that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Likewise, the Sentencing Guidelines provide that "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a) (policy statement).

Thus, "[a] sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come.' " *Vanderwerfhorst*, 576 F.3d at 935 (quoting *Nichols v. United States*, 511 U.S. 738, 747 (1994), and *United States v. Tucker*, 404 U.S. 443, 446 (1972)). Indeed, this Court has expressly held that "'[h]earsay evidence of unproved criminal activity not passed on by a court,' for example, 'may be considered in sentencing.'" *Id.* (quoting *Farrow v. United States*, 580 F.2d 1339, 1360 (9th Cir.1978)).

The Eighth Circuit's recent decision in *United States v. Ortiz*, 636 F.3d 389, 393-94 (8th Cir. 2011), is instructive. There, the district court permitted victims to

testify at sentencing about the total losses they suffered, overruling the defendant's objection that the victims' testimony should be limited to the scope of the offense. *Id.* at 393. The Eighth Circuit affirmed, explaining: "The question therefore is whether the 'right to be reasonably heard' at sentencing is properly limited to presentation of relevant and admissible evidence. It is not. In sentencing, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* (internal quotation marks, brackets, and citations omitted). The court further noted the broad authority of district courts to consider "information which could aid them in determining whether to vary from the Guidelines." *Id.* at 394.

Here, as the district court itself had already observed, evidence that defendant has been engaged in further criminal activity while on pretrial release would certainly aid the court in evaluating the background, character, and conduct of the defendants and, specifically, in determining whether to vary from the guidelines. Defendant put this issue directly before the court, seeking a downward variance based on having led a law-abiding life.

Nevertheless, the district court then reversed course and ruled that it would not consider this evidence. The court noted that U.S.S.G. § 1B1.3 limits "relevant conduct" to acts that occurred during, in preparation for, or to avoid detection or responsibility for the crime of conviction. However, this provision is only for the

purpose of applying certain sentencing adjustments under the Guidelines. The next provision makes clear that in determining a point within the range or whether to depart from the Guidelines, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4. Here, regardless of whether the victims' evidence would result in an adjustment under the Guidelines, it is certainly relevant and properly considered by the Court in determining what sentence to ultimately impose. Indeed, such evidence is highly relevant here to rebut defendant's assertion that he is entitled to a downward variance based on having led a law-abiding life since his guilty plea. It would be a strange perversion of justice to allow a defendant to make such an assertion but disallow the relevant evidence that would rebut it.

Thus, even if the CVRA did not mandate relief here, this Court should exercise its discretion to order a writ of mandamus under 28 U.S.C. § 1651. Applying the *Bauman* factors here, it is clear that mandamus relief is appropriate. Victim-Interveners will have no ability to obtain relief on appeal and will be irreparably harmed if not given the opportunity to be heard at sentencing. The district court's decision not to consider Victim-Interveners' proffered evidence is clearly erroneous as a matter of law because it is contrary to well-established statutory and constitutional law giving the court authority to consider a broad range

of information in determining the appropriate sentence, and the proffered evidence is plainly relevant to sentencing here. Finally, as the district court observed, this case presents an issue of first impression, and it is imperative that this Court resolve the important question of whether members of the public harmed by the defendant's conduct while on pretrial release can be excluded from bringing this information to light at sentencing.

V. CONCLUSION

For the foregoing reasons, Victim-Interveners respectfully request that the Court issue a writ of mandamus directing the district court to permit them to be heard at sentencing.

Dated: November 29, 2011

LAW OFFICES OF BECKY WALKER JAMES

By: /s/Becky Walker James
BECKY WALKER JAMES

Attorney for Victim-Interveners/Petitioners

STATEMENT OF RELATED CASES

Victim-Interveners are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 21(d), the undersigned counsel hereby certifies that the attached Petition for Writ of Mandamus is proportionately spaced, has a typeface of 14 points or more and is no more than 30 pages.

Dated: November 29, 2011

/s/Becky Walker James
Becky Walker James

Attorney for Victim-Interveners/Petitioners

9th Circuit Case Number(s) Not yet assigned

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

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