

No. 10-3201

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

In re: Martin McNulty,

Petitioner

-against-

**United States District Court
for the Southern District of Ohio,**

Respondent.

**REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS
PURSUANT TO THE CRIME VICTIM'S RIGHTS ACT,
18 U.S.C. § 3771(d)(3)**

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Petitioner Martin McNulty respectfully submits this reply in support of his Petition for a Writ of Mandamus pursuant to the Crime Victims' Rights Act ("CVRA").

The United States opposes Mr. McNulty's petition on the grounds that he can seek monetary relief in a civil lawsuit. But Mr. McNulty's petition does not seek monetary relief, but seeks recognition that he is a "victim" under the CVRA, a designation that would entitle him to eight specific individual rights enumerated in the CVRA, 18 U.S.C. § 3771(a), and would require that the United States use its best efforts to see that he is accorded these rights, 18 U.S.C. § 3771(c)(1). Mr. McNulty intends to assert his rights as a crime victim under the CVRA not only in the present case, but also in any related criminal proceedings against co-conspirators of Defendant Arctic Glacier International, Inc. ("Arctic Glacier"), such as Home City Ice Company.

Respondents United States and Arctic Glacier both argue that the district court could properly have denied restitution for reasons different than those articulated by the district court. But Mr. McNulty does not seek reversal of the district court's denial of restitution – only a remand for reconsideration of Mr. McNulty's restitution request in light of its error in finding that he was not a victim.

Respondent Arctic Glacier suggests that only targeted victims of the customer allocation conspiracy who suffered antitrust injury – i.e., customers – can be victims. (Arctic Glacier Opp’n at 12-13, 15-16, 28). This position is inconsistent with cases finding that persons who were not targets of the crime of conviction can be considered “victims” for purposes of restitution. *See, e.g., Moore v. United States*, 178 F.3d 994, 1001 (8th Cir. 1999) (holding that bystander in a bank robbery was a victim and rejecting defendant’s argument that bystander “was not a ‘victim’ of the attempted bank robbery since [defendant] was attempting to rob the bank, not [the bystander]”); *see generally* McNulty’s Mandamus Petition at 22-23 and authorities cited therein.

Arctic Glacier argues that there is no evidence of Mr. McNulty’s claims, but Mr. McNulty submitted a declaration (Ex. 1 to McNulty Petition) and other evidence to the probation officer in support of his allegations, and his allegations were not disputed by Arctic Glacier at the sentencing hearing.

Finally, Arctic Glacier argues that Mr. McNulty’s claims for restitution are barred by a release signed in February 2005. (Arctic Opp’n at 28-29). But even if a release could prevent an award of restitution (which it does not, *see United States v. Bearden*, 274 F.3d 1031, 1040-41 (6th Cir. 2001)), the release would only bar Mr. McNulty’s claims prior to the date of the release, and Mr. McNulty seeks

restitution for harm that he suffered after the release – namely, the boycott of Mr. McNulty in the packaged ice industry, which occurred after the release.

Dated: February 26, 2010

Respectfully submitted,

s/Daniel Low

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2010, the foregoing Reply in Support of Petition for a Writ of Mandamus Pursuant to the Crime Victim's Rights Act, 18 U.S.C. § 3771(d)(3) was electronically filed with the Court's CM/ECF system, which will send notice and an electronic copy of the same to all counsel of record.

s/ Daniel L. Low
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