

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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UNITED STATES OF AMERICA, . Case No. 1:09-cr-149
 .
Plaintiff, . **Motion Hearing via Telephone**
 . **Conference Call**
 .
- v - .
 . Tuesday, February 16, 2010
 . 1:00 PM
ARCTIC GLACIER INTERNATIONAL, .
INC., .
 .
Defendant. . Cincinnati, Ohio
 .

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HERMAN J. WEBER, SENIOR JUDGE

APPEARANCES:

For the Plaintiff: KEVIN C. CULUM, ESQ.
DONALD M. LYON, ESQ.
United States Department of Justice
Antitrust Division
Carl B. Stokes U.S. Court House
801 West Superior Avenue, 14th Floor
Cleveland, Ohio 44113-1857

For the Defendant: JOHN M. MAJORAS, ESQ.
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, Ohio 43215-2673

For the Petitioners: DAVID F. AXELROD, ESQ.
Axelrod LLC
250 Civic Center Drive, Suite 500
Columbus, Ohio 43215

MATTHEW S. WILD, ESQ.
Levitt & Kaizer
40 Fulton Street, 23rd Floor
New York, New York 10038

1 APPEARANCES (Continued):

2 For the victims DANIEL L. LOW, ESQ.
3 Martin McNulty & Kotchen & Low LLP
4 Gary Mowery: 2300 M Street, N.W.
Suite 800
Washington, DC 20037

5 Law Clerk: Amy Peters Thomas, Esq.

6 Courtroom Deputy: Darlene Maury

7 Court Reporter: Luke T. Lavin, RDR, CRR
8 838 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

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P R O C E E D I N G S

(In chambers at 1:00 PM.)

COURTROOM DEPUTY: Judge Weber's chambers.

MR. AXELROD: Hi. This is David Axelrod.

COURTROOM DEPUTY: Who else do we have on the line?

MR. AXELROD: Well, I'm actually about to try to
conference now.

COURTROOM DEPUTY: Okay. Wonderful.

MR. AXELROD: So cross your fingers.

COURTROOM DEPUTY: Thank you.

MR. AXELROD: Everyone here? Kevin?

MR. CULUM: Yes.

MR. AXELROD: All right. Do we have the whole party
here?

MR. CULUM: I think so.

MR. WILD: We're here. Hang on a second.

UNIDENTIFIED SPEAKER: Hello?

COURTROOM DEPUTY: Okay. Do we have everyone?

MR. AXELROD: I think so. Why don't we take a roll
call just to be sure.

THE COURT: Hi, everybody. Why don't you just enter
your appearance for the record. And we'll start with -- well,
Mr. Culum, I guess you're still in the plaintiff's seat or
the --

MR. CULUM: I am. I am the plaintiff, and I'm here

1 with Don Lyon.

2 THE COURT: And defendant?

3 MR. MAJORAS: Yes. John Majoras from Arctic Glacier.

4 THE COURT: Then Mr. Axelrod?

5 MR. AXELROD: David Axelrod for the victim
6 petitioners. Also on the phone is Matthew Wild of Levitt and
7 Kaizer in New York.

8 THE COURT: And how are you, Mr. Wild?

9 MR. WILD: Very well, thank you. And yourself, Your
10 Honor?

11 THE COURT: I'm snowed in, but outside of that, fine.
12 Mr. Low?

13 MR. WILD: We're getting snow here now too.

14 THE COURT: Is it? Well, if it's heading your way,
15 it's going to be a burden for the City of New York, that's for
16 sure.

17 MR. WILD: Well, yeah, I can imagine.

18 THE COURT: Mr. Low, are you there?

19 MR. LOW: Yes, Your Honor. Daniel Low on behalf of
20 Mr. McNulty and Mr. Mowery.

21 THE COURT: All right. Now, Mr. Low, you did
22 actually, in my opinion, present a claim for restitution, and I
23 just wanted to get the amounts on record. I think Mr. -- well,
24 let me see. Mr. McNulty was requesting \$6 million; is that
25 right?

1 MR. LOW: Yes, Your Honor.

2 THE COURT: And Mr. --

3 Is it Maury?

4 MR. LOW: Mowery.

5 THE COURT: -- Mowery was requesting, I thought,
6 385,000, but I'm not sure about that number.

7 MR. LOW: Umm --

8 THE COURT: It was the difference between what he was
9 offered originally, and I think it was by Home City, and what
10 he was paid, what he was paid.

11 MR. LOW: Your Honor, I believe it was 388,000.

12 THE COURT: Okay. Well, in other words, I'm in the
13 ballpark anyway.

14 MR. LOW: Yes, Your Honor.

15 THE COURT: All right. So those were the two
16 restitution amounts that were before the Court, and, of course,
17 I went ahead and proceeded as I did.

18 Now, Mr. Axelrod, you can bring me up to date on your
19 request. And as far as I read your motion and as I understand
20 it, you were objecting to two or three things: declining to
21 recognize them as victims.

22 And those were the -- I'm not going to pronounce all their
23 names. Are they the same ones that you have represented
24 throughout, or have you added some names?

25 MR. AXELROD: Your Honor, I have the same group of

1 clients that I have represented throughout.

2 THE COURT: All right. And then accepting the plea
3 despite the government's failure to offer the victims an
4 opportunity to confer before its entry, and denying them access
5 to the presentence investigative report.

6 And that, as I understand, is what we're going to be
7 discussing now, and then the motion, of course, to stay and
8 whether I will stay the proceedings. And you certainly have a
9 right to file mandamus. That seems to be the hallmark of the
10 statute and Congress' intent as it now exists. However, it's
11 kind of a hybrid mandamus. It's more of an appeal than it is a
12 mandamus. But be that as it may, that's something that the
13 circuit will filter out for me.

14 So, Mr. Axelrod, if you want to go forward, you can
15 incorporate what you've already said over the past, I think,
16 three meetings we've had, or maybe four.

17 MR. AXELROD: Your Honor, I will be unusually brief.
18 As I said at the conclusion of the sentencing hearing, we
19 appreciate the Court's graciousness in hearing from us at great
20 length throughout these proceedings.

21 Unfortunately, we believe that we were simply never able to
22 overcome the fact that we were not invited to the party until
23 too late, that the government, despite having been acquainted
24 with Mr. Wild and knowing that he represented a class of
25 indirect purchasers, did not contact him before the plea

1 agreement was entered. And once it was entered, it was a
2 Sisyphean effort to try to get the plea agreement changed in a
3 way that it would conform to what we believe the facts are and
4 to what we believe the law requires.

5 And, obviously, we had a variety of substantive objections
6 that we had hoped the Court would agree with, but -- and that
7 the Court would rule based on substance, but we believe
8 procedurally, nonetheless, we've been denied our rights. And
9 it's important to us, and we -- we want to pursue them.

10 THE COURT: Mr. Culum, what kind of a record do you
11 want to make in this case? And maybe you can agree to a brief
12 stay.

13 MR. CULUM: Well, Your Honor, let me address that
14 first. We do not believe that a stay is necessary in this
15 case. We believe, as Mr. Axelrod conceded, or conceded at the
16 hearing, all the rights of the Crime Victims' Rights Act have
17 been conferred upon the victims and the petitioners in this
18 proceeding. That being said, we certainly defer to the Court's
19 discretion in terms of -- you know, if a stay is warranted in
20 the Court's decision matrix, that's fine, but we don't believe
21 that one is necessary here.

22 Let me address a couple of issues somewhat substantively.
23 And I'm sure that counsel for Arctic -- Mr. Majoras -- will
24 discuss more thoroughly how any additional delay could harm
25 Arctic Glacier. And certainly I am not in a position to do so,

1 but certainly we are aware of the issues, as are the victims,
2 in terms of the precarious financial condition of the company
3 as they made at great length in the sentencing hearing.

4 In very short order we want to re-establish that the
5 victims were accorded all the rights enumerated under 3771(a).
6 That was clearly established in the record, and we rely on the
7 record.

8 It seems to me that the opportunity to file this type of a
9 motion or petition could have been done earlier. There's
10 almost an estoppel issue. Thursday there was no mention at the
11 end of the hearing that such a motion would be filed, no effort
12 to alert us until 9:30 this morning that such a motion would be
13 coming. We think that time to -- you know, that because time
14 is of the essence, no further delay is required.

15 We also notice that in the objections to the plea agreement
16 that were filed by Mr. Axelrod, there was no reasserting of the
17 idea that we had not conferred with the petitioners in this
18 case. I believe that the arraignment -- you know, we have
19 conferred. Conferring does not mean agreement. We did confer,
20 we did listen, we have considered what they had to say. We
21 think that that is what the Crime Victims' Rights Act entitles
22 a victim to do and requires us to do, and we certainly have
23 done that, even notwithstanding the fact that we do not concede
24 in any way that the petitioners in this case are victims of
25 this crime.

1 So we were a little surprised to see in this paper that
2 the -- to reassert the failure on our part to confer with the
3 victims in this case. In some ways it is an inexorable
4 opportunity for them to continue to argue, because we signed a
5 plea agreement. We signed a plea agreement; we then conferred
6 with them. Factually that will never change. We did listen to
7 what they had to say. As a result of what they had to say, we
8 ensured -- and we took great order of time, of the Court's
9 time, and we apologize -- to ensure that probation was a
10 portion of the plea agreement, which as Your Honor indicated at
11 the time of the hearing, you did not believe was a part of it.
12 That was a critical issue on the part of the petitioners in
13 this case: to ensure that probation was established.

14 And great effort, myself and Mr. Majoras ensured that
15 probation was available to Arctic Glacier in this case. So to
16 say that we weren't conferring with them I think does not lend
17 credence to the -- the facts do not lend credence to that.

18 The other issue is the declining of the -- declining to
19 recognize them as victims. Your Honor chose not to define
20 whether they were victims or not, and you were perfectly
21 entitled to do so. And I thought that what your bigger point
22 was, that you gave them the rights -- whether they're victims
23 or whether they're not, they were given the opportunity under
24 the Crime Victims' Rights Act to do the various things that
25 were accorded them, and you made sure that it was on the record

1 that those rights were conferred regardless of whether they're
2 a victim or not. To you it seemed like it was an irrelevant
3 fact. You wanted to make sure that these petitioners were
4 accorded what you believed were what the statute provides. So
5 in some ways it's irrelevant whether you decline to recognize
6 them or not.

7 And then the final issue, denying them access to the
8 presentence investigative report, I am not an expert on the
9 time, the various procedural time things on the Crime Victims'
10 Rights Act, but as I read it, it says, "In no event shall
11 proceedings be stayed or subject to a continuance of more than
12 five days for purposes of enforcing this chapter" as it relates
13 a particular proceeding.

14 You, Your Honor, denied turning over the PSR far more than
15 five days ago. It was -- and I don't have the date in front of
16 me, but I know that the Court will remember. It was, I
17 believe, like February 2nd or so. And I think that there is no
18 standing that -- to even seek review of that at this point,
19 because certainly more than five days have transpired since you
20 denied them the PSR.

21 If that was something that they felt they were entitled to
22 under the Crime Victims' Rights Act, it seems to me that they
23 should have acted at that time. They chose not to. I don't
24 think that they should be allowed at this point to continue to
25 reassert that issue. The water has passed under that bridge.

1 So the three issues that they sought, one is the
2 declination, I think that Your Honor gave them all the rights
3 regardless of whether they're victims or not, which we would
4 argue -- and as I said in court, and you refused to -- that we
5 specifically say they are not victims.

6 The second issue is they have not -- they seem to have
7 waived or abandoned the argument about the conferring. And I
8 would argue that, in point of fact, the probation, that we
9 sought probation and suggest how strongly we did confer with
10 them and how we did take their concerns into light.

11 And then the third thing is the denial of the PSR. I think
12 that they've abandoned that and they've waived it. So for all
13 those reasons I think that it is unnecessary to grant them a
14 stay or additional time, but we certainly defer to your
15 judgment, Your Honor.

16 THE COURT: Mr. Majoras?

17 MR. MAJORAS: Thank you, Your Honor.

18 Arctic opposes any delay in this case. We think that the
19 arguments that the government just made are the appropriate
20 responses to the substantive allegations they make. As we have
21 made clear from the very time I appeared before you in
22 chambers, certainty is a very important issue to our company.
23 We have been trying to resolve this matter, working toward
24 ultimately reaching a plea and then getting to the sentencing
25 date.

1 Now, as I mentioned when I started, at least in our hearing
2 the other day, the company has received refinancing. That was
3 announced publicly that evening. So I'm not going to sit here
4 and tell you that there is any particular thing that will
5 happen if there is delay. A delay is a very important issue to
6 the company as we seek certainty in moving forward trying to
7 put this behind us.

8 And I think, in particular if you look at the arguments
9 that Mr. Axelrod is making here, most of these arguments are
10 the same ones that he has made since the first time he appeared
11 before the Court. In addition to that, merely by fortuitous
12 circumstances -- he had a federal holiday; the fact that the
13 Court was unable to look at this matter again on Friday after
14 entering the judgment -- he had a four-day window in which to
15 make an argument on mandamus.

16 So if he wants to bring a mandamus motion, he should bring
17 it in the time in which it's prescribed, but we think delay
18 here is unnecessary and also would be harmful to the company.

19 THE COURT: Mr. Low?

20 MR. LOW: Your Honor, Mr. McNulty and Mr. Mowery are
21 also considering filing a mandamus petition. Right now we're
22 leaning in favor of it, not having made the final decision.

23 We read the statute to provide 14 days within which to file
24 such a petition, although I do recognize that a stay can only
25 be for five days. I don't necessarily see that as an obstacle,

1 as Mr. Axelrod noted in his filing.

2 One of the rights that he seeks to appeal on is the denial
3 of access to a presentence investigation report. To the extent
4 that that is a right that crime victims are entitled to --

5 THE COURT: When did you request that, Mr. Low?

6 MR. LOW: I have not.

7 THE COURT: Okay. I thought I might have missed it.
8 Go ahead. I'm sorry. I didn't mean to interrupt.

9 MR. LOW: Sure. No problem.

10 You said that that's a right that crime victims are
11 entitled to that we now move for that right under the Crime
12 Victims' Rights Act, Your Honor.

13 THE COURT: Well, I don't think you've shown any
14 compelling need at this point. Unless you want to start a new
15 issue on that. I'll give you a chance to file your motion and
16 demonstrate compelling need if that's what you wish to do.

17 MR. LOW: Your Honor, I think that would be something
18 that would be helpful for seeking restitution in filing a
19 mandamus petition. I was hoping that, given that it's already
20 been briefed by Mr. Axelrod, that no formal filing would be
21 necessary.

22 THE COURT: Well, you can join in with him if you
23 wish. But as I say, I want to specifically note that you made
24 no request for, have shown any compelling need for that
25 presentence report, because you know what your claim is. Your

1 claim is before the Court. And Mr. Axelrod has never made a
2 claim, at this point, of any specific restitution amount, that
3 I know of, so there's a difference between the two approaches
4 to the matter.

5 In fact, I think your one client -- Mr. Mowery -- even went
6 into state court and then federal court and then even entered
7 into a settlement agreement with the perpetrator of his wrong,
8 from his point of view.

9 Now, I don't want to diverge our attention away from the
10 important issue that Mr. Axelrod has presented me, but if
11 you --

12 MR. LOW: Yes, Your Honor, and I take no position on
13 whether a stay is necessary.

14 THE COURT: I'm sorry. I didn't hear the last. I'm
15 sorry.

16 MR. LOW: I take no position on whether a stay is
17 necessary.

18 THE COURT: There's something wrong. You're cracking
19 up on the phone here.

20 MR. LOW: Let me try that one more time. I take no
21 position on whether a stay is necessary pending the mandamus.

22 THE COURT: I heard it that time. Thank you.

23 MR. LOW: Thank you.

24 THE COURT: Let's see now. Mr. Axelrod, as I
25 understand it, your concern is that there might be some

1 disadvantage to putting on the judgment entry before you file
2 your mandamus petition because of some anticipated argument by
3 the -- by the government, I guess, or someone.

4 I think the way you phrase it is, "A brief stay may be
5 necessary, however, because the government and defendant may
6 contend that entry of the judgment extinguishes petitioners'
7 rights under the CVRA and otherwise (although the Victims argue
8 that it would not do so)."

9 And I tend to agree with you, because the statute
10 specifically gives you ten days to file your mandamus, if I
11 recall, but that's neither here nor there.

12 MR. CULUM: Your Honor, the ten days -- just to
13 clarify, because there are many different -- that's only under
14 certain circumstances that I don't think in this case are
15 appropriate. I think the governing law here is 3771(c) -- or
16 (d), excuse me.

17 THE COURT: Who is speaking now?

18 MR. CULUM: That's Mr. Culum. I apologize, Your
19 Honor.

20 THE COURT: Okay. Thank you. Go ahead.

21 MR. CULUM: The ten days I think is only in the
22 situation where a victim has asserted the right to be heard
23 before or during the proceeding at issue and such right was
24 denied. I don't think anyone on the phone believes that Mr.
25 Low or Mr. Axelrod was denied the opportunity to speak at the

1 sentencing hearing. So it's only in those situations is the 14
2 days available, as I read the statute.

3 THE COURT: Well, then, in other words, you're saying
4 that if the judgment entry goes on, then that cuts off the
5 victims', alleged victims' right to mandamus.

6 MR. CULUM: No. I believe -- I believe they have five
7 days, as I read it. And it is not a model of clarity, but as I
8 read it, they have five days to do something. And I believe
9 that five days began on Thursday, but I'm not clear. It's not
10 clear to me how long they have, and I defer to other people.

11 But when I saw the 14 days, I thought that it was in
12 reference to the situation where someone was not allowed to
13 speak, which clearly did not occur in this case.

14 MR. AXELROD: Your Honor, this is David Axelrod. I
15 happen to be actually looking at the statute, and the five days
16 to which Mr. Culum refers is simply that a stay can't last more
17 than five days. But the statute is quite clear in
18 3771(c)(5)(B) that we have ten days to file for a petition, to
19 file a petition for a writ of mandamus.

20 MR. CULUM: David, I'm looking at the statute too.
21 That's (d). And just as an FYI, there is no (c)(5).

22 MR. AXELROD: You're right. You're absolutely right.

23 THE COURT: You gentlemen are starting to talk like
24 patent attorneys.

25 MR. AXELROD: Well, we're not going to talk about

1 non-obviousness, Your Honor, nor synergistic effect.

2 There are a couple of other points that I think are
3 important. First, I know that it was inadvertent, but Mr.
4 Culum has missed that in our objections to the plea agreement
5 we did, in fact, very specifically raise the government's
6 failure to contact the victims and confer before the agreement
7 was reached as an independent ground for rejecting the plea
8 agreement. That's on page 2, and admittedly it's in Footnote
9 3. Because as I mentioned, we had hoped that the Court would
10 see the merit in our substantive arguments and would have
11 preferred to win based on substance, but nonetheless we did
12 very specifically raise again the procedural point that the
13 government didn't meet with us before entering the plea
14 agreement. So we believe that it was more than adequately
15 preserved.

16 Mr. Culum says that it wouldn't make any difference because
17 they're going to do the same thing over again, and indeed that
18 may occur, it may not occur. The same argument was made in the
19 *Dean* case, which was cited in our papers, and it is at 527 F.3d
20 391, and the *Dean* court said that that's not the point. The
21 point is that there are certain procedural rights and certain
22 procedural niceties that have to be endured, and if it winds up
23 not changing the outcome, then so be it, but victims under the
24 CVRA are still entitled to those procedural rights.

25 Third, Your Honor, as you know, didn't formally decide our

1 status as victims, and this is an important matter to us
2 because this is not the only case and this creates a precedent,
3 and we think it's important that it be recognized that our
4 rights as victims are measured not by the antitrust laws and
5 not by *Illinois Brick* but by 18 U.S.C. 3771, and so that is an
6 important point that we wish to pursue.

7 Finally, Mr. Culum raised the issue of access to the
8 presentence investigation report. There is apparently some
9 confusion about this, because for that we don't rely on the
10 Crime Victims' Rights Act. We rely on the case law over which
11 the issue was fought out on our papers and in our various
12 conferences, and we had no right to appeal that until the
13 proceeding was over. So this is our first opportunity to raise
14 that issue in the court of appeals, and we hope to do so.

15 So for those reasons this is all brought timely, all
16 properly preserved, and the Court has the authority to grant a
17 stay for five days. We will file the petition within the time
18 period provided in the statute. And for those reasons we ask
19 that the Court stay the proceedings for a very brief time to
20 let our petition be filed.

21 I might also add parenthetically that this isn't going to
22 go on very long, because the court of appeals, as Your Honor
23 knows, is directed to decide the matter within 72 hours. So
24 this is not as if it's going to create a lengthy delay.

25 THE COURT: Well, as I pointed out, this isn't a usual

1 mandamus, that is, this specific provisions of the Crime Victim
2 Recovery Act, and it's a unique procedure in law, and I agree
3 with you that the procedure is important and that's what
4 Congress was trying do.

5 I have before me the case *In Re W*, point -- *W. R. Huff*
6 *Asset Management Company LLC*. It's *In Re*, and it's 409 F.3d
7 555, and it has some advice in there for me that answers one of
8 our problems, but I wonder if anyone has any information about
9 whether that case is still good law or not or whether that
10 issue has been discussed. And the issue is this, and I'm
11 quoting from page 564. The judge there says, "Nothing in the
12 CVRA requires the Government to seek approval from crime
13 victims before negotiating or entering into a settlement
14 agreement. The CVRA requires only that the court provides
15 victims with an opportunity to be heard concerning a proposed
16 settlement agreement."

17 And the way the objection is referred to in the memoranda
18 in support of the motion to stay is the -- let's see, let me
19 read it -- "accepting the plea agreement despite the
20 government's failure to offer the Victims an opportunity to
21 confer before its entry."

22 And it seems that the Circuit -- and this, I think, was the
23 Second Circuit; I didn't read the Ninth Circuit case. But the
24 Second Circuit evidently said that that's within the
25 prosecutorial discretion of the government. And I just point

1 that out, and that would -- therefore, I would try to follow
2 that case, and that would not be my reason for granting a stay.

3 However, you are absolutely correct in that I held as
4 definitely as I could that the victims in this case must be
5 victims of the -- to gain restitution, must be victims of the
6 crime of conviction. And as I understood, the Baron Ice House
7 was in Texas, and that if any of these -- there may have
8 been -- at one time there was one victim. There was another
9 time I read that there were three victims alleged by Mr.
10 Axelrod as buying ice in southern Michigan.

11 Is that right, Mr. Axelrod?

12 MR. AXELROD: That's correct, Your Honor.

13 THE COURT: And I don't know which victims they --
14 which alleged victims they were.

15 MR. AXELROD: Your Honor, I would have to go back
16 to --

17 THE COURT: Well, I don't -- I'm sorry. But in other
18 words, that's why I said customers are victims, in my opinion.
19 Now, whether they're direct or indirect, that's for someone
20 else to decide, but the others that were mentioned, and
21 particularly the Baron Ice House, from my definition would not
22 be considered a victim.

23 And if that is an error on my part, I accept the
24 responsibility, but I am convinced that, to be a victim, you
25 must -- and have the right to restitution, you must be a victim

1 of the crime of conviction.

2 MR. AXELROD: Your Honor, I understand the ruling with
3 respect to the right to restitution. And I, frankly, am not
4 certain that I agree with it, but I understand it and would
5 need to research further to have a really informed opinion on
6 it. But I don't think that limitation necessarily applies
7 under the Crime Victims' Rights Act. The 3006 and 3771 are
8 very different statutes, and I don't think it necessarily
9 follows that one must have a right to restitution.

10 THE COURT: Well, you can argue that in the court of
11 appeals.

12 MR. AXELROD: Yes, sir.

13 THE COURT: Now, the next point was access to the
14 presentence investigation report, and I basically held that I
15 would share at the time of sentencing any part of the report
16 that I thought was material to the -- to my understanding of
17 what the sentence ought to be in this case, that there was no
18 compelling reason to submit the entire report to anyone. And
19 the parties couldn't agree on a redaction, and so I redacted it
20 myself to the point of stating that I would only -- that I
21 would at the time of sentencing display on the record those
22 parts that I thought were important.

23 And the important part was that this fine was not -- that
24 \$9 million fine was not within the Guideline fine range in this
25 case, and I so held on the record. And, therefore, it is

1 suspect from the point of view of anyone that disagrees with
2 the amount of the fine. I understand that.

3 And, therefore, for those two items I will give you an
4 opportunity to consult with the court of appeals to see if you
5 want to go further.

6 And that goes for you too, Mr. Low, I assume.

7 And now then the question is how long. I don't see any
8 prejudice to anyone if I grant a -- well, let's see. The five
9 days would end up on a -- well, let's see. When would it be?
10 You don't count the first, I guess. Or do you count the first
11 under this new setup? I know, when it's hours, you count all
12 the hours. But when it's days, I don't know whether you count
13 the first or not.

14 But anyway, for the sake of argument, let's say Wednesday,
15 Thursday, Friday, Saturday, Sunday. It would fall on the fifth
16 day, and that would be beyond my kin.

17 So I am going to, in my discretion, grant a stay until,
18 let's see, Thursday at 3:00 o'clock, this Thursday at 3:00
19 o'clock.

20 And that is what date, Darlene?

21 COURTROOM DEPUTY: Thursday is the 18th.

22 THE COURT: The 18th. Now, does someone have
23 something they wish to add to the record on that point?

24 Mr. Culum?

25 MR. CULUM: Your Honor, just for the record, I did

1 find the footnote that Mr. Axelrod referred to and,
2 surprisingly, I had missed it before, and I apologize for that.
3 It was inadvertent on my part.

4 The other issue is that we agree with your analysis on the
5 *Huff* case. We've looked at it and we completely concur with
6 your analysis.

7 And then the third issue is if Mr. Axelrod is correct in
8 his analysis that access to the PSR is something that allows --
9 that he is not part of the Crime Victims' Rights Act, then I
10 would suggest and submit that it is not subject to any writ of
11 mandamus. Because if it's not within the Crime Victim Rights
12 Act, any access to the PSR is independent of it and can be
13 brought up independently and should not be part of the writ of
14 mandamus.

15 THE COURT: Well, we are in a relatively new area
16 here. I know that that is true from the various -- or the lack
17 of any definitive case citings to me, at least from the Sixth
18 Circuit.

19 I do have this question. I know "of counsel." Now, are
20 all these lawyers that you listed, Mr. Axelrod, are they of
21 your firm?

22 MR. AXELROD: No, Your Honor. Those are lawyers that
23 also represent the individuals whom I do but in the class
24 action in Detroit and are folks that have consulted with me and
25 given me advice.

1 THE COURT: Well, how many clients do these one, two,
2 three, four, and you, have, for goodness? Five, I guess.

3 MR. AXELROD: I think eight, Your Honor.

4 THE COURT: I see. And they all represent the same
5 eight?

6 MR. AXELROD: No. There's overlap, Your Honor.
7 There's one individual who represents the Baron's Ice group or
8 Baron's Ice House. There are two lawyers who represent the
9 remainder of the victims whom I also represent. There's a
10 third lawyer who serves as local counsel for the group.

11 THE COURT: Oh, okay.

12 MR. AXELROD: So there are various combinations of
13 lawyers who are involved in the class action. It's much more
14 complicated than anything I'm able to figure out.

15 THE COURT: Well, I was just wondering the
16 relationship there. I do see there is one lawyer from
17 Michigan.

18 MR. AXELROD: Yes. That's -- that's the local
19 counsel.

20 THE COURT: Okay.

21 MR. AXELROD: Your Honor, may I make a couple of
22 additional points?

23 THE COURT: Sure.

24 MR. AXELROD: One --

25 THE COURT: Now, tell me who's speaking, please.

1 MR. AXELROD: I'm sorry. This is David Axelrod.

2 You know, I understand Mr. Culum's point about the -- about
3 the right to the presentence investigation report arguably not
4 being embraced by the petition for writ of mandamus, which, of
5 course, we can fight about in the court of appeals, but the
6 application was not, in our understanding, finally denied until
7 we got to the sentencing hearing, and we intend to file a
8 notice of appeal to cover that as well. So we will use
9 multiple procedural devices to be sure we're properly before
10 the court of appeals.

11 THE COURT: Well, you've got to have a judgment entry
12 before you can go on an appeal, don't you?

13 MR. AXELROD: That's correct, Your Honor.

14 THE COURT: Okay.

15 MR. AXELROD: That's correct.

16 THE COURT: And I wish that's what you were doing, but
17 we're not. We're understanding what the length and breadth of
18 this statute that is so beautifully drawn by Congress is.

19 MR. AXELROD: It is an odd duck. The *Kenna* case
20 specifically talks about this as in the nature of a direct
21 appeal rather than a mandamus action.

22 THE COURT: Well, that's what it is, in my opinion,
23 from just reading briefly and studying it over this past -- how
24 long? -- six months. No, not quite six months.

25 MR. CULUM: David, does that mean that it's a clearly

1 erroneous statute?

2 MR. AXELROD: We can discuss that in the court of
3 appeals.

4 The other point that I wanted to make was just with respect
5 to the *Huff* case, and that is that it, in my understanding --

6 And, frankly, I haven't read the *Huff* case. I'm basing
7 this just on hearing the Court.

8 -- but I think it directly conflicts with the *Dean* case.
9 In *Dean* the Court said, quote, In passing the Act, Congress
10 made the policy decision, which we are bound to enforce, that
11 the victims have a right to inform the plea negotiation process
12 by conferring with prosecutors before a plea agreement is
13 reached, unquote.

14 THE COURT: Is it unusual in our business that
15 circuits disagree?

16 MR. AXELROD: You know, Your Honor, it sometimes
17 happens.

18 THE COURT: That does happen once in a while.

19 MR. AXELROD: But I think the Sixth Circuit is
20 generally right.

21 THE COURT: Then the judge gets to pick and choose,
22 unless you're citing a case from the Sixth Circuit.

23 MR. AXELROD: Your Honor, I can't argue with you.

24 THE COURT: Okay.

25 All right, gentlemen. Well, I appreciate your

1 professionalism, and that includes all of you. I do hope that
2 the situation can be worked out so that it can be ultimately
3 worked to the benefit of all the people that may or may not
4 have been concerned with this rather interesting conspiracy in
5 the Southeastern District of Michigan.

6 And with that brief statement, I heard no objections to the
7 stay expiring at 3:00 o'clock Thursday.

8 MR. AXELROD: Well, Your Honor, I did want to address
9 the timing, just --

10 THE COURT: Okay. All right.

11 MR. AXELROD: I mean, I understand the Court has
12 discretion in this regard.

13 THE COURT: Now, who --

14 MR. AXELROD: This is David Axelrod again.

15 THE COURT: Okay.

16 MR. AXELROD: I understand the Court has discretion in
17 this regard. The statute does not specifically identify the
18 triggering act for when a stay begins. The Court announced at
19 the sentencing that it was the Court's intention to enter the
20 judgment today. Therefore, by my count, the -- or by my
21 understanding of things, the stay or the five days would start
22 today and would, therefore, run into the weekend, and the Court
23 could stay the matter until Monday.

24 It has been our intention to file our petition on Friday,
25 and we've been working on that schedule in the hope that we

1 could get the Court to stay it. But this is a very compressed
2 time period, and so we would ask that the Court give us until
3 the close of business Friday for the filing of our petition
4 before the stay expires.

5 THE COURT: I'm sorry. I've set the time in stone.
6 Your paralegals are just going to have to work overtime.

7 MR. AXELROD: I wish it were the paralegals and
8 associates who worked overtime, but unfortunately it seems to
9 me these days it's the partners.

10 THE COURT: I understand that; I understand that. But
11 I think it's important that we get this moving on, and that
12 gives you -- to me, that gives you time to get your materials
13 to the court of appeals. And hopefully we will have some
14 definitive answers to the procedure that victims, alleged
15 victims, and district judges are entitled to follow in these
16 sets of circumstances.

17 And I'm depending on your professionalism to give us the
18 light at the end of the tunnel on how we should handle these
19 types of cases.

20 MR. AXELROD: Understood, Your Honor. Thank you.

21 THE COURT: Mr. Culum, anything you want to add to the
22 record to protect the interests of your client?

23 MR. CULUM: No, Your Honor. I believe I have.

24 THE COURT: Mr. Majoras, anything you wish to add to
25 the record to protect the interests of your client?

1 MR. MAJORAS: Your Honor, the only thing I would add
2 is that, with respect to their request of a finding that
3 they're a victim or a finding that they're not a victim, I'm
4 not sure exactly what they're asking for, our view of that is
5 that is not part of the CVRA. There's no requirement that they
6 be found or not to be found a victim. The requirement is that
7 they be heard. And regardless of their status, they have
8 adequately been heard, and we would certainly argue and will
9 argue that that is not a subject for mandamus.

10 THE COURT: Well, I don't want to continue our
11 argument, but I think -- my thought was the one thing they're
12 entitled to is restitution to an amount claimed if it can be
13 established in the evidence. But that's beside the point.
14 We'll go on to the next.

15 Mr. Axelrod, anything you want -- I'll give you the last
16 shot, Mr. Axelrod.

17 Mr. Low, anything you want to add to the record to protect
18 your clients?

19 MR. LOW: No. Thank you, Your Honor.

20 THE COURT: Mr. Axelrod?

21 MR. AXELROD: Nothing further, Your Honor.

22 THE COURT: Now, I don't want you to lose any sleep
23 over this. I mean, I might be able to extend it till 5:00
24 o'clock on Thursday if that would help.

25 MR. CULUM: Your Honor, we would say 3:00 o'clock is

1 good.

2 THE COURT: Okay.

3 MR. AXELROD: I mean, you know, obviously the problem
4 is we have no transcript, so that is the biggest restraint.

5 THE COURT: Well, we wouldn't have a transcript in
6 five days either.

7 MR. AXELROD: Well, we're attempting to get expedited
8 transcript.

9 THE COURT: Well, I know the expedited transcripts,
10 the arrangements are made before the hearing.

11 MR. AXELROD: Well, I'm --

12 MR. CULUM: Your Honor, this is Mr. Culum.

13 THE COURT: Yes.

14 MR. CULUM: And I'm sorry, but in many ways the
15 transcript only helps us, because we were all there. We heard
16 the concessions on the part of the victims. The reality is, is
17 that if it is a winning argument that we did not confer before
18 the plea agreement, it has nothing to do with the sentencing
19 hearing.

20 In terms of the declining, you have just said again, and
21 I'm sure you'll tell the court of appeals if they ask, you've
22 declined to define them as a crime victim.

23 And the third thing is, there is no debate that they did
24 not get a PSR. So there are three bases for their seeking of
25 mandamus. None of them are required.

1 They're going to get the transcript quickly, but the
2 transcript is not going to -- their arguments, in so many ways,
3 are outside the transcripts. The transcripts are going to help
4 the Court and help us.

5 THE COURT: Well, now my --

6 MR. CULUM: We would like this to move forward so we
7 can move on to other things.

8 THE COURT: All right. Now, in your past experience,
9 who writes the -- who answers the mandamus in the court of
10 appeals? Because I really have no concern one way or the other
11 as to what the result of the court of appeals decision is other
12 than to follow it.

13 Who writes the brief up there? Who represents the trial
14 judge up there?

15 MR. CULUM: I believe we do, Your Honor.

16 THE COURT: Well, then God bless you, but I have no --

17 MR. CULUM: Dog in that fight?

18 THE COURT: Well, all I want to know is to be sure
19 that we're developing a procedure here that we can all live
20 with in the future if it has any precedential value.

21 MR. CULUM: And we would as well, Your Honor.

22 THE COURT: And I hope that that's what we're all
23 striving for.

24 Any -- I'm sorry, Mr. Axelrod. You still get the last bite
25 at the apple.

1 MR. AXELROD: Your Honor, I have nothing further,
2 other than to say thank you again for your graciousness in
3 hearing us.

4 THE COURT: Take care, gentlemen. Thank you. And
5 whatever other service we can be, why, let us know. You know
6 how to get ahold of me.

7 MR. AXELROD: Thank you.

8 MR. CULUM: Thank you, Your Honor.

9 MR. AXELROD: Bye.

10 THE COURT: Bye.

11 (Proceedings concluded at 1:47 PM.)

12 - - -

13 C E R T I F I C A T E

14 I, Luke T. Lavin, RDR, CRR, the undersigned, certify
15 that the foregoing is a correct transcript from the record of
16 proceedings in the above-entitled matter.

17
18 s/Luke T. Lavin
19 Luke T. Lavin
20 Official Court Reporter

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