IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:	)	
	)	
	)	
Sue Antrobus and Ken Antrobus	)	**No. 08-4002**
	)	**(D.C. No. 2:07 CR 307 DAK**
Petitioners.	)	**(D. Utah)**
	)	
	)	

EXHIBITS FOR

MACKENZIE GLADE HUNTER'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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RESPONSE TO PETITIONERS' STATEMENT OF FACTS

Relevant facts: Whether Vanessa Quinn was shot and killed by the handgun sold by Mackenzie Glade Hunter and did Hunter have reason to believe when he sold the gun to Talovic eight months earlier that it would be used in a crime

This Court need not go further than the Petitioners' Statement of Facts in order to affirm the District Court's Memorandum Decision & Order. Even under Petitioners' proposed theory that Vanessa Quinn should be recognized as a victim of Mackenzie Glad Hunter's crime, they would necessarily be required to establish that the gun Mr. Hunter sold to Sulejman Talovic is the gun that was used to kill Vanessa Quinn. Aside from Petitioners' citation to a newspaper article published in the Salt Lake Tribune on November 2, 2007, Mr. Hunter is unaware of any evidence that was before the District Court that could establish that the Smith & Wesson .38 caliber handgun was the weapon that killed Vanessa Quinn.

Petitioners' relevant fact presuming to establish that Vanessa Quinn was killed by the handgun in question is set out at page 4 of their petition in the last paragraph which states the following:

> As the defendant had accurately foreseen, Talovic used the gun to commit a violent crime. On February 12, 2007, Talovic entered the Trolley Square Shopping Center in Salt Lake City intending to kill as many people as possible. He murdered five people and seriously injured four more with the handgun sold to him by the defendant and with a 12-gauge shotgun. A bullet from the defendant's Smith and Wesson killed Vanessa Quinn. An

> off-duty police officer ultimately ended Talovic's rampage by shooting and killing him. (Emphasis added)

Petitioners give no citation for this last paragraph in their Statement of Facts. This fact was presented to the District Court in Petitioners' memorandum supporting their motion to have Vanessa Quinn recognized as a victim, provided to this Court by Petitioners in their Exhibit 5, page 4, relevant fact number 4. That statement appears to be set out with the exact language as the statement of fact above. The citation which Petitioners cited before the District Court is "S.L. Trib., supra, at A4." Petitioners' Exhibit 5, page 5. That citation relates to an earlier citation: "*Man Who Sold Gun to Trolley Killer Guilty*, S.L. Trib., Nov.2, 2007 at A4." Petitioners' Exhibit 5, page 4, end of relevant fact number 1. The actual newspaper article was not provided in the Petitioners' memoranda before the District Court. The actual article is attached hereto as Exhibit A in original newspaper form and as Exhibit B from the Salt Lake Tribune archives. The articles in Exhibit A from the newspaper form and B from the archives web site are identical aside from a photograph of Mr. Hunter.

The newspaper article cited by the Petitioners does not relate what is set out in Petitioners' statement of facts before this Court and before the District Court. The Salt Lake Tribune article cited has a reference to the handgun killing one

person but does not relate who was shot by the handgun. It states:

> Armed with a handgun and a pistol-grip shotgun, Talovic killed five people - one of them with the handgun. Four others were shot and injured before Talovic was killed by police.

Man who sold gun to Trolley killer guilty, S.L. Trib., November 2, 2007, Hunter's Exhibit B at paragraph 7. It does not cite anyone as a source.[1]

Counsel for Mr. Hunter is unaware of any evidence that was ever brought before the District Court in this case upon which the District Court could rely to find that Vanessa Quinn was killed by the handgun sold by Mr. Hunter. The only court documents that have related facts in them associated with Mr. Hunter's case are the Indictment, Change of Plea form and Presentence Report. A copy of the relevant portion of the Presentence Report is attached hereto for this Court's convenience as Exhibit D. These are the only portions of the Presentence Report that discuss the facts of the offense.

The Indictment, Information and Statement in Advance of Plea Form are attached as the Petitioners' Exhibits 1, 2 and 3. There are no other court documents that relay facts of the case and there was never any evidentiary hearing

[1] Counsel for Hunter was able to find another Salt Lake Tribune article for November 2, 2007 with the headline "For Trolley Victims, No Day In Court." That article is attached hereto as Exhibit C. Although not cited or produced for the District Court, that article starts in the first paragraph with a claim that Vanessa Quinn was the only one shot with the handgun. It also cites no source for the information.

in Mr. Hunter's case. There simply was no evidence before the District Court, other than the newspaper article cited, that established the fact that the gun sold by Mr. Hunter killed Vanessa Quinn.[2] The Petitioners certainly did not provide any other evidence and it would seem that a Petitioner's request to be recognized as a crime victim under the Crime Victims' Rights Act would necessarily begin with a requirement to present a modicum of evidence greater than an unsubstantiated newspaper article with no cited source.

The District Court's Memorandum Decision & Order filed January 8, 2008 (attached hereto as Exhibit E), clarifies that the District Court simply accepted the Antrobuses factual proffers, despite presenting no evidence, in ruling on its first Memorandum Decision & Order filed January 3, 2008 (attached to Pettitioner's Exhibits as Exhibit 8). In its January 8 ruling, the District court stated:

> The Antrobuses prior motion claimed that Hunter had stated that thought Talovic would use the gun to commit a bank robbery. They did not, however, provide any support for that alleged statement and the court is unaware of its origin or the context in which it was made. The court ruled on the assumption that the alleged statement actually was made but there was no evidence provided to the court to support it. That statement, with unknown foundation or context, appears to be the only evidence related to Hunter's speculation as to a future crime.

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[2] Counsel for Mr. Hunter can also represent to this Court that he is not aware of any evidence in the discovery provided by the United States that the handgun provided by Mr. Hunter killed Vanessa Quinn.

District Court's Memorandum Decision & Order, filed January 8, 2008, Exhibit E at page 3. The statement of fact in the Antrobuses prior motion referred to by the District Court is found, again as a citation to the same newspaper article as above, as relevant fact number 3 in Petitioners' supporting memorandum in Petitioners' Exhibit 5. It also appears as a statement of fact in the Petition at page 4, paragraph 2. The Petitioners stated in their memorandum: "3. The defendant later told law enforcement agents that he though[sic] Talovic might rob a bank with it. S.L. Trib., supra, at A4 (citing law enforcement sources). In reference to that statement, the article stated:

> Hunter originally faced the more serious felony charge, prosecutors said, because he had reason to believe Talovic would commit a crime with the handgun. He told investigators he thought the Bosnian immigrant may rob a bank with it, according to court documents.

Hunter's Exhibit B at paragraph 4. Paragraph 5 of that article states: "Hunter's attorney, David Finlayson, said Thursday Hunter heard Talovic make jokes about robbing a bank and that prosecutors would have had a difficult time proving it was a serious threat." *Id*. at paragraph 5. There is no court document that counsel for Mr. Hunter is aware of that mentions that Hunter told investigators he thought Talovic may rob a bank. Again, the Petitioners did not provide any evidence of this fact but merely cited to an unsubstantiated news article. As the District Court

stated, it was merely assuming these facts for purposes of making its rulings. Therefore, evidence of the above two facts, obviously the most important for the Petitioners' position, has never been provided to the District Court. There simply is no reliable evidence before the District Court or before this Court that Mr. Hunter sold a gun to Talovic that was used to kill Vanessa Quinn or that he had any knowledge when he sold it that it would be used in a crime. This court should not consider press articles as evidence supporting a finding that the gun from Mr. Hunter's crime is the gun that killed Vanessa Quinn. *See Carter v. District of Columbia*, 795 F.2d 116, 123 (C.A.D.C. 1986) (news articles considered hearsay and not allowed for evidence of the truth of the allegations stated). In fact, even the press articles do not claim as much.

While the CVRA does not in itself set out the burden of proof a petitioner must establish, if there were no requirement other than a proffer based upon a news article, the courts would soon be inundated with requests by the most attenuated of people claiming to be a victim. The CVRA grants substantial rights to a person that is legally and properly considered a victim. Those substantial rights could easily be manipulated by individuals with some attenuated connection to a case. Therefore, a requirement that a petitioner provide reliable evidence that they are "directly and proximately harmed" to the district court for proper review

is a necessity.

Other statements of fact by the Petitioners beginning with the first paragraph fail in any way to provide evidentiary support for the Petitioners' position for the same reasons as above. They are mere conclusory statements taken from the same newspaper article. The Petitioners in this case filed their demand in two motions on December 13, 2007 and December 20, 2007 in the District Court one month before Mr. Hunter's sentencing set for January 14, 2008 and just before the holidays. The Indictment in this case was filed on May 16, 2007. *See* Petitioner's Exhibit 1. Two other co-defendants that also pled to supplying the handgun to Talovic had already been sentenced. The Petitioners also demanded that the case be heard on an expedited basis. Yet the Petitioners, represented by competent counsel, supplied noevidence, other than newspaper articles and an Indictment Count to be dismissed, that established that the gun in question killed Vanessa Quinn and that Mr. Hunter had some cause to believe, eight months earlier when he sold the gun, that Talovic would use. Without those facts, even under the Petitioners' view of the law, Vanessa Quinn could not be a victim.

Mr. Hunter understands that the Petitioners have requested that the District Court order that information be provided them that they believe will support their

position in establishing themselves as crime victims. However, under the CVRA, there is no such provision. The CVRA is not set up as a process by which people who believe they might be victims are assisted in collecting evidence to be used to determine whether they are victims. The CVRA establishes the rights that a person has who can already provide this information. Here, the Petitioners supplied no information such as affidavits, medical examiner information or the like that the District Court could rely on to make a decision. Instead, they attempt to use the CVRA to collect information without the supporting evidence to demonstrate they may be victims. Press articles are the sole for this belief, but as noted above, are not reliable to prove their point. The Freedom of Information Act, Federal and State victims rights representatives would all be helpful in obtaining this type of information. Those are the resources that need to be used instead of this mandamus process. There is nothing in the CVRA which would indicate that its "emergency" type provisions are to be used in this way.

The Petitioners' Statement of the Reasons Why the Writ Should Issue, Petition at page 11, states in pertinent part: "The defendant's criminal sale of a handgun harmed Vanessa Quinn when she died from a bullet from that gun. The defendant's crime also proximately harmed her, as the defendant had good reason to foresee that the gun would be used in a crime of violence." Those are asserted

throughout the Petition. Based upon the utter lack of any evidence presented before the District Court as to either of those assertions, this Court need look no further to the legal analysis submitted by the Petitioners, based primarily on the press articles, and should affirm the District Court's ruling.

STANDARD OF REVIEW

The Petitioners admit that mandamus petitions are reviewed under an abuse of discretion standard and under a "higher standard" because of the nature of mandamus relief. *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995). However, in the cases following that cite, they claim that cases reviewing the MVRA applied a de novo review standard. This is not correct. In *United States v. Foley*, 508 F.3d 627 (11th Cir. 2007), that court stated: "We review for clear error the underlying finding that the defendant's conduct was the proximate cause of the harm suffered by the victim." In *United State v. DeLaFuente*, 353 F.3d 766 (9th Cir. 2003), the court stated the following:

> We review de novo the district court's application of the MVRA and its conclusion that USPS, LA HazMat and LAHD are victims of De La Fuente's crime. United States v. Hackett, 311 F.3d 989, 991 (9th Cir.2002) (he legality of an order of restitution is reviewed de novo.) (quoting United States v. Stoddard, 150 F.3d 1140, 1147 (9th Cir.1998)); United States v. Sanga, 967 F.2d 1332, 1334 (9th Cir.1992) (reviewing de novo victim determination made pursuant to the VWPA). Factual findings made in support of that conclusion are reviewed for clear error, including factual findings regarding causation.

This appears to be in line with this Circuit in Watson v. United States, 485 F.3d 1100 (10th Cir. 2007): "we will disturb a district court's factual finding only when it is clearly erroneous-that is, a finding must be more than possibly or even probably wrong; the error must

be pellucid to any objective observer."

Under the clear error analysis required, the proximate cause ruling by the District Court in this case should stand. All factual ambiguities should be resolved in favor of the ruling and this Court should defer to the District Court's evaluation of the significance of the time delay (eight months), lack of evidence that the gun in question killed Vanessa Quinn, and the lack of evidence that Mr. Hunter had any reason to believe any violent crime would be committed by Talovic.

THE DEFINITION OF A CRIME VICTIM AS ANYONE WHO HAS BEEN DIRECTLY AND PROXIMATELY HARMED BY A CRIME AND REASONS ASSERTED FOR WHY THE WRIT SHOULD ISSUE

The District Court's analysis of the definition of a crime victim for purposes of the CVRA and discussion of direct and proximate harm in its Memorandum Decision & Order filed January 3, 2008 (Petitioners'Exhibit 8), was exhaustive, thorough and dealt with the issues presented in the Petition. However, Mr. Hunter would like to highlight the following.

The Petitioners rely heavily on a case out from the Seventh Circuit for their view of "but for" causation and that it is not limited to the elements of the crime. *United States v. Donaby*, 349 F.3d 1046 (7th Cir. 2003). In that case, a defendant who had committed a robbery led police on a high speed chase following the robbery. He was ordered to pay restitution of $526.14 for damage to a police car that was chasing him during a high speed chase from the robbery in excess of 100 mph.. *Id*. At 1048. However, a high speed chase from a robbery, the flight from the actual crime, while not technically an element of the crime, is essentially a continuation of the actual crime without any break whatsoever. For that reason, it fits within the direct and proximate harm of the crime.[3]

The Petitioners' reliance on *United States v. Hackett*, 311 F.3d 989, 992-93 (9th Cir. 2002) is similarly misplaced. *Hackett* involved a situation where the defendant took part in the manufacture of methamphetamine. He was indicted

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[3] It should be noted that it is not correct that no police officer was near the scene as stated in the Petition. *See* Petition at 15. The Donaby court stated:

Off-duty Police Chief Jim Arrington, who happened to enter the bank as the robbery was ending, immediately pursued the white van in what quickly became a high-speed chase. Arrington lost sight of the van when Tyrone Wingate, driving one of the getaway cars, ran interference for the van by cutting Arrington off and slowing down on a narrow two-lane road. Officer Joshua Donovan, of the Village of Shiloh Police Department ("Shiloh"), responded to an emergency broadcast identifying the white van and spotted the fleeing van within minutes. 349 F.3d at 1048.

with his co-conspirators for endangering human life while manufacturing mehtamphetamine. Chemicals used for that purpose were left out and ended up on a hot plate by another person named at the house named Felch and exploded. *Id*. at 991. The district court had found that Hackett had knowledge of Felch's operation, essentially becoming a co-conspirator, and had actually purchased the chemicals for the operation and therefore Farmer's Insurance could recover restitution from him for the fire. *Id*. at 993. The *Hackett* court also stated: [T]he main inquiry for causation in restitution cases [is] whether there was an intervening cause, and, if so, whether this intervening cause was directly related to the offense conduct.. Thus, the conduct underlying the offense of conviction must have caused a loss for which a court may order restitution.... [A]ny subsequent action that contributes to the loss, such as an intervening cause must be directly related to the defendant's conduct. The causal chain may not extend so far, in terms of the facts or the time span, as to become unreasonable." 311 F.3d at 993(citations omitted). The actions of Mr. Hunter, even assuming the proffer, were "so far" in some causal chain as to be "unreasonable." That is essentially what the District Court found below. The ruling was reasonable and not an abuse of discretion.

The Petitioners rely on *K-Mart Enterprises v. Keller*, 439 So. 2d 283 (Fla.

App. 3 Dist. 1983) from an intermediate appeals court in Florida for the proposition that tort negligence principles should apply to the CVRA direct and proximate harm analysis.[4] While it is an intermediate State appellate court case in the field of tort negligence, and does not appear to be dealing with the direct and proximate harm issue here, it is interesting to note that the court imputed knowledge to K-Mart, the seller of the gun, that the buyer was a marijuana addict. *Id*. at 285-287. When the buyer then lent the gun to his drunken, heroin addict brother, the brother shot someone.

While Mr. Hunter has not had the time in one day to fully address the tort issue presented here, it appears that all of the cases cited by the Petitioners involve a foreseeablility that does not exist in Mr. Hunter's cases.

The mass shooting and mayhem at Trolley Square was an incident that nobody could foresee. It was a terrible tragedy and everyone in the community, including Mr. Hunter, was shocked and feels incredible sympathy for the victims and their families. However, it is undisputed that Mr. Hunter, who provided a gun to a minor that was to turn 18 soon, could not foresee this action eight months later. The District Court's decision was well reasoned and its decision on

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[4] Petitioners cite this case as a Florida Supreme Court case. Counsel for Mr. Hunter could not find under the direct history for this case that it ever went to the Folorida Supreme Court. The history shows that review by that court was denied May 7, 1984.

proximate cause was supported and cannot be clear error. The District Court's ruling on the intervening cause and timing were similarly supported and cannot be clear error.

CONCLUSION

Based upon the foregoing, Mr. Hunter urges this Court to deny the relief sought in this petition and affirm the District Court's ruling.

Respectfully submitted this 9th day of January, 2008.

/s/ David V. Finlayson
David V. Finlayson
Attorney for Mackenzie G. Hunter

CERTIFICATE OF SERVICE

I hereby certify that I have sent the foregoing Mackenzie Glade Hunter's Response to Petition for Writ of Mandamus and accompanying Exhibits by electronic copy and by first class mail prepaid to the following parties below on this 9th day of January, 2008.

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