

**Tymkovich, J., concurring.**

We live in a post-Columbine High School massacre world. In that world, juveniles are willing to procure guns and use them to commit violent, horrific crimes. In this case, the previously unthinkable act of random killing took place in a mall in Salt Lake City. Sulejman Talovic was the shooter and he used a handgun and shotgun to kill five people. One of the murder weapons was procured from Mackenzie Hunter, and used to kill Vanessa Quinn. I write separately because the process in this case failed to adequately support the rights of crime victims such as Ms. Quinn as guaranteed by the CVRA.

Two issues are presented for review. The first is the standard of review. The Second and Ninth Circuits have applied a relaxed standard for resolving appeals under the CVRA. The Ninth Circuit, for example, would “issue the writ whenever [it] find[s] that the district court’s order reflects an abuse of discretion or legal error.” *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006). The Second Circuit holds that in reviewing a petition under the CVRA, we should review factual determinations for clear error, legal issues de novo, and the resolution of the application for a writ for abuse of discretion. *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005). We part company with these circuits and apply the traditional standard of review for petitions of mandamus.

Whatever the mandamus standard, the central issue is whether Vanessa Quinn's parents may seek to have her declared as a "crime victim" under the CVRA. Applying traditional rules of "but-for" and "proximate" causation, they argue that the district court should have concluded that she was a victim. In my view, the district court and the government erred in failing to permit the Antrobuses reasonable access to evidence which could support their claim. With this information, the Antrobuses may have been able to demonstrate the requisite causal connection between Hunter's crime and Ms. Quinn's murder. The government's cooperation is mandated by the CVRA, which requires the government to "make their best efforts to see that crime victims are notified of, and accorded, the rights" set forth in the Act. 18 U.S.C. § 3771(c)(1).

Here is what the Antrobuses might have demonstrated given the government's cooperation. First of all, the victim must be "directly" harmed by the crime. This encompasses a "but-for" causation notion that is met here.

In addition, the harm must "proximately" result from the crime. That is the more difficult issue, but the record suggests that the following evidence could be developed to show that Talovic's crime was a reasonably foreseeable result of the illegal gun sale. (1) Hunter knew Talovic was a minor and could not legally purchase a gun in the first place; (2) the murder weapon was previously stolen; (3) Hunter heard Talovic's intent to commit bank robbery, a crime of violence where the use of a gun could reasonably result in a shooting; and, finally; (4) the shooting was not so remote in time as to be unforeseeable. I do not think it matters that Talovic committed a crime that is different

from what he told Hunter; only that the crime could obviously and likely lead to violence. The language included in the indictment in fact makes clear that the government believed Hunter knew that Talovic “intended to carry or otherwise possess, or discharge or otherwise use the handgun in the commission of a crime of violence.” If the intervening cause was foreseeable then proximate cause can be established.<sup>1</sup>

Taken together, these facts could establish that Ms. Quinn was a crime victim for purposes of the CVRA. This evidence may well be contained in the government’s files. Sadly, the Antrobuses were not allowed a reasonable opportunity to make a better case.

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<sup>1</sup> The CVRA limits its causal nexus to traditional standards. *See, e.g., Restatement (Second) of Torts* §§ 302, 390, 449; and *see McDermott v. Midland Management, Inc.*, 997 F.2d 768, 770 (10th Cir. 1993) (“[L]iability will still attach despite the existence of an intervening cause where the intervening cause was foreseen or might reasonably have been foreseen.”).