

In The
Supreme Court of the United States

—◆—
RICHARD ROE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

—◆—
**BRIEF *AMICUS CURIAE* OF THE NATIONAL
ORGANIZATION FOR VICTIM ASSISTANCE
IN SUPPORT OF PETITIONERS**

—◆—
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QUESTIONS PRESENTED

Petitioners presented four questions in their petition for certiorari. *Amicus* will address the first question, which it would reframe as follows:

May the Government avoid the requirements of the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, and the Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771, by placing a case under seal?

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INTERESTS OF *AMICUS CURIAE*¹

Amicus National Organization for Victim Assistance (NOVA) has been serving victims of crime and crisis since 1975. As the oldest victims' rights and services organization in the world, NOVA promotes training for victim advocates, provides direct services to victims and seeks to educate legislative, political, law enforcement and community leaders on issues associated with victimization so that appropriate and effective policies can be implemented.

As one of its services, NOVA provides a nationwide toll-free number (800-TRY-NOVA) for victims to call directly for referrals, resources and information to enhance their awareness for making choices in the course of seeking justice, remedy and recovery. It is common that, along with the physical and emotional impact of crimes, victims suffer significant financial harms, which create pressing monetary needs for them and their loved ones. NOVA accordingly has been actively involved in efforts to expand restitution for crime victims.

¹ The parties were notified ten days prior to the due date of this brief of the intention to file. Richard Roe, the Government and John Doe have all consented to the filing of this brief. *Amici Curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief, other than the Salt Lake City law firm of Parr, Brown, Gee and Loveless, which has generously provided financial support for the Utah Appellate Clinic.

NOVA has participated in litigation protecting the rights of crime victims, including cases such as *Payne v. Tennessee*, 501 U.S. 808 (1991) (affirming right of crime victim's to deliver victim impact statements). NOVA is participating in this case because of the important issues it raises surrounding the treatment of crime victims in sealed cases.



STATEMENT OF THE CASE

NOVA adopts the statement of the case of petitioner Richard Roe.

NOVA would also point out that it has additional record citations that would support its argument that the Government has acted illegally, specifically evidence contained in the docket sheet from the U.S. District Court for the Eastern District of New York for this case (1:98CR01101). NOVA downloaded this docket sheet from Westlaw and contacted the Government to confirm that it could use this public record information in its brief. The Government, however, pointedly responded to NOVA that it “cannot advise” NOVA on whether using this publicly-available Westlaw docket sheet would violate any of the sealing orders that the Government has obtained from the district court and that the district court has “reserved decision” on the Government’s argument that such use would be impermissible. NOVA believes that the Government’s suggestion that sealing orders (entered by the court on the Government’s motion) might

somehow prohibit using a Westlaw document is nonsensical.² Nonetheless, to avoid any question of non-compliance with court orders, NOVA has not made any use of the docket sheet in preparing its brief.

NOVA feels duty bound, however, to alert this Court to what may well be improper *ex parte* contacts between the district court, the Government, and defense counsel over the last 24 months in which the merits of the crime victims' rights and other issues raised by Petitioner Roe were apparently discussed – all without notice to Roe (or the affected crime victims). For example, NOVA respectfully calls to this Court's attention the secret "status conference" held on January 10, 2012, and the Government's secret August 24, 2011, motion to withdraw an earlier-publicly filed motion (docket #119), which the district court then approved without notice to the public.



SUMMARY OF THE ARGUMENT

Based on the information contained in the redacted certiorari petition filed in this case, the Government is taking the position that it has no obligation to adhere to federal statutes designed to protect crime victims in sealed cases. Instead, the Government appears to believe that through the simple expedient of securing an *ex parte* sealing order, it can obviate any

² News media sources have also already published articles relying on the docket sheet.

need to follow restitution laws and crime victims' rights statutes. The Government's stark position presents a fundamental question, which this Court should review. The Court should summarily reject the Government's claim that it can defeat congressional protections for crime victims by proceeding in secret.

At a minimum, this Court should call on the Government to respond to the allegations in the certiorari petition. In the face of the petition's serious and well-supported allegations of violations of federal crime victims' laws, the Government should explain what it has done. The public can have no confidence that the legal system is operating properly in sealed cases such as this one if the Government is able to dodge any questions about its behavior by waiving its right to respond.

Finally, the certiorari petition makes it clear that not only has the Government violated crime victims' rights in the past, but that it is continuing to do so in the current proceedings. In particular, it appears that the Government has failed to notify dozens of crime victims about the pendency of this petition – notice that is required by the Crime Victim's Rights Act. Accordingly, to prevent continuing CVRA violations, this Court should order the Government to promptly comply with the CVRA in this case.



ARGUMENT

I. THIS COURT SHOULD REVIEW THE IMPORTANT AND RECURRING QUESTION OF WHETHER THE GOVERNMENT CAN IGNORE CRIME VICTIMS' RIGHTS IN SEALED CASES.

The petition before the Court presents an important crime victims' rights issue – namely, whether the Government is relieved of its obligation to follow crime victims' rights laws in sealed cases. The Court should review this important issue and summarily reject the Government's position.

A. The Petition Presents Fundamental Issues Regarding Whether the Mandatory Victim Restitution Act Is Truly Mandatory.

The first crime victims' issue that is at stake in this case involves restitution. John Doe should have been ordered to pay millions of dollars in restitution to the victims of his crimes, but he was not.

While some of the details are purportedly under seal, the denial of mandated restitution is clear in this record. As recounted in the certiorari petition, in 1998 Doe pled guilty to racketeering for running a stock fraud that stole tens of millions of dollars from victims. Cert. Petn. at 4-6. Doe then provided unspecified cooperation to the Government. In 2004, he came up for sentencing. According to the certiorari petition, the Government declined to provide the list

of Doe's victims to the probation office, preventing the probation office from contacting the victims. *Id.* at 7. As a result, the pre-sentence report did not include any restitution. In any event, the certiorari petition alleges that when he was ultimately sentenced five years later, Doe escaped paying to his victims any restitution for the tens of millions of dollars that he pilfered. *Id.* at 22. The petition finally alleges that the Government concealed what it was doing by keeping the entire case under seal.³

In light of these facts, the petition presents the critical question of whether the Government can ignore the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, in cases under seal. Congress enacted the MVRA in 1996. Pub. L. No. 104-132, Title II, § 204(a), Apr. 4, 1996, 110 Stat. 1227. As the title indicates, the specific purpose of the MVRA was to make restitution "mandatory." The congressional action was designed to insure that victims *always* receive restitution in cases covered by the MVRA.

Congress enacted the MVRA specifically to eliminate any judicial discretion to decline to award

³ As to whether the case was ever actually sealed, the petition alleges that the district judge never actually entered a formal sealing order, much less made the numerous demanding findings that would be required to overcome the presumptive openness of criminal cases. Moreover, according to the petition, the Government moved to unseal the case on March 17, 2011 – a motion that the district court has apparently failed to rule on. Cert. Petn. at 13.

restitution. The MVRA amended the Victim and Witness Protection Act of 1982 (VWPA), which had provided for restitution to be ordered in the court's discretion. Congress was concerned that leaving restitution to the good graces of prosecutors and judges resulted in few victims recovering their losses. As the legislative history explains, "Unfortunately, . . . while significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution." S. Rep. No. 104-179 at 13, 104th Cong., 1st Sess. (Dec. 6, 1995). Congress noted that despite the VWPA, "federal courts ordered restitution in only 20.2 percent of criminal cases." *Id.* (citing United States Sentencing Commission Annual Report 1994, table 22).

To fix the problem of inadequate restitution to victims, Congress made restitution for certain offenses – including the racketeering crime at issue here⁴ – mandatory. As this Court recently explained:

Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled "The Mandatory Victims Restitution Act of 1996") says

⁴ The MVRA covers crimes of violence and any offense against property under Title 18, including crimes of fraud and deceit. 18 U.S.C. § 3663A(c)(1)(A). The Second Circuit (along with many other courts) has held that RICO offenses, including "pump and dump" stock frauds, are covered by the MVRA. *See, e.g., United States v. Reifler*, 446 F.3d 64 (2d Cir. 2006) (noting that MVRA applies to "pump and dump" stock frauds and collecting supporting cases).

“*[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a specified] offense . . . , the court shall order . . . that the defendant make restitution to the victim of the offense.*” § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court “may” order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the “full amount of each victim’s losses” and “without consideration of the economic circumstances of the defendant.” § 3664(f)(1)(A).

Dolan v. United States, 130 S.Ct. 2533, 2539 (2010).⁵

To help implement restitution for crime victims, the federal judiciary has also acted. The Federal Rules of Criminal Procedure provide that the pre-sentence report “must” contain “information that assesses any *financial*, social, psychological, and medical impact on any victim.” Fed. R. Crim. P. 32(d)(2)(B) (emphasis added). And specifically with regard to cases where the law provides for restitution, the pre-sentence report “must” contain “information sufficient of a restitution order.” Fed. R. Crim. P. 32(d)(2)(D).

⁵ Congress did allow courts to dispense with restitution in cases where it would be impracticable to order, due either to the large number of victims or the difficulty of calculating restitution. 18 U.S.C. § 3663A(c)(3). Nothing in the certiorari petition suggests any such findings were made here. Nor does it seem plausible that such findings could have been made, since Doe’s co-defendants were apparently ordered to pay restitution without difficulty. Cert. Petn. at 5-6.

It is ancient law that Congress has the power to fix the sentence for federal crimes. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Indeed, it is well settled that “Congress has the power to define criminal punishments without giving the courts any sentencing discretion.” *Chapman v. United States*, 500 U.S. 453, 467 (1991) (citing *Ex Parte United States*, 242 U.S. 27 (1916)). In this case, the Government has decided that it can override Congress’ command that restitution is mandatory in the name of securing cooperation from Doe – and then conceal what it is doing from public scrutiny. It did this first by refusing to provide victim information to the probation office, in clear contravention of the Federal Rules of Criminal Procedure. And then it asked for – and received from the district court – a sentence without restitution. In doing so, the Government defied the MVRA.

While the MVRA mandates restitution in cases such as this one, it is important to understand that the MVRA does not require disclosure of the names of confidential informants. Rather, the MVRA only requires that convicted defendants pay full restitution. Any legitimate Government interest in keeping the defendant’s name confidential does not interfere with requiring that defendant to pay restitution to his victims. Restitution payments can, of course, be made through intermediaries, such as the U.S. Attorney’s Office or the Probation Office, which could screen out any locating information about a defendant. The Government is also free to pursue its interests through

other means, such as placing an informant into the witness protection program, *see* 18 U.S.C. § 3521 *et seq.*,⁶ or by limiting disclosure of only the fact of his cooperation.

The one thing the MVRA clearly precludes, however, is the Government buying cooperation with crime victims' money. The Government is not free to tell a bank robber, for example, that he can keep his loot bag if he will testify in other cases. And in this case, the Government was not free to tell Doe that he could keep millions of dollars that he had fraudulently obtained from crime victims, rather than requiring him to pay the money back.⁷

The questions presented by the petition are important and recurring. The Government frequently requires cooperation to solve cases and, if this case is any guide,⁸ is routinely allowing defendants to keep

⁶ The Witness Protection Program statutes provide ways in which civil judgment creditors can pursue actions against persons in the witness protection program. *See* 18 U.S.C. § 3523.

⁷ The Government actions not only violated the MVRA, but also another important provision of law: 18 U.S.C. § 1963(a)(3). This provision requires a court to order a convicted RICO defendant to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity."

⁸ As explained in the next section, this Court should direct the Solicitor General to explain the frequency with which this practice is occurring in the lower courts. Amicus, of course, has no way of determining the number of cases in which crime victims have been illegally deprived of restitution in sealed cases –

(Continued on following page)

their ill-gotten gains in order to secure testimony. This Court should accordingly review the Government's actions and rule that allowing defendants to keep stolen money rather than pay mandatory restitution is not among the lawful incentives that the Government can offer for cooperation.

B. The Petition Also Presents Important Issues Regarding Whether the Government Is Free to Ignore the Crime Victim's Rights Act.

The Government illegality in this case is not confined to violating the MVRA. The Government has also disregarded another important crime victims' rights statute: The Crime Victim's Rights Act (CVRA).

In 2004, Congress passed the CVRA because it found that, in case after case, "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have a place for them." 150 CONG. REC. 4262 (Apr. 22, 2004) (statement of Sen. Kyl). *See generally* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victim's Rights Act*, 9 LEWIS &

that information lies solely within the control of the Government.

CLARK L. REV. 581 (2005). To avoid having crime victims “kept in the dark,” Congress enacted a bill of rights for crime victims. Pub. L. No. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 2261. The CVRA extends to crime victims rights throughout the criminal justice process, including the rights to:

- “reasonable, accurate, and timely notice of any public court proceeding”;
- “be reasonably heard at any public proceeding in the district court involving . . . sentencing”;
- “confer with the attorney for the Government in the case”;
- “full and timely restitution as provided in law”;
- “be treated with fairness and with respect for the victim’s dignity and privacy”; and
- “notice of these rights.”

18 U.S.C. § 3771(a)(2), (4), (5), (6), (8), (c)(1). To ensure that victims are afforded these rights, the CVRA directs that government prosecutors “shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA].” 18 U.S.C. § 3771(c)(1).

In this case, the Government plainly violated the CVRA at the 2009 sentencing of John Doe, if not

much earlier in the process.⁹ It is not clear from the record whether Doe was sentenced in public or not. According to the certiorari petition, the Government has taken the position that “Doe was sentenced in public, though under the name Doe. . . .” Cert. Petn. at 9. If Doe truly was sentenced in public, then his sentencing was a “public court proceeding” and Doe’s crime victims were entitled to (among other rights) accurate and timely notice of that proceeding, as well as notice of their right to make a statement at sentencing. 18 U.S.C. § 3771(a)(2) & (4). So far as appears in the record, the Government never gave the victims that notice of any public hearing.

On the other hand, if Doe was properly sentenced in secret,¹⁰ then other provisions of the CVRA would have been in play. At a minimum, the Government

⁹ While John Doe was indicted before the CVRA’s 2004 enactment, he was sentenced in 2009 – five years after the Act was in place. At his sentencing, the CVRA’s procedures plainly applied. *See United States v. Eberhard*, 525 F.3d 175, 177 (2d Cir. 2008) (rejecting defendant’s Ex Post Facto challenge to application of the CVRA to a sentencing for a crime committed before the Act’s passage).

¹⁰ The certiorari petition strenuously argues that any such secret sentencing would have been illegal in its own right, even if victims’ rights had been fully protected. This question is clearly certworthy in its own right, as the lower courts are in a “chaotic state” regarding the public’s right of access to court proceedings. Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1742 (2006). *See generally id.* at 1758-91 (comprehensively collecting numerous conflicting lower court decisions on the public’s right to access court proceedings).

would have been obligated to notify the victims in this case of the rights that they possessed under the CVRA. *See* 18 U.S.C. § 3771(c)(1). Moreover, the Government would have been obligated to provide crime victims' rights that were not connected to public proceedings, such as the right to confer with prosecutors and the right to receive full restitution. 18 U.S.C. § 3771(a)(5) & (6). Here again, nothing in the record shows that the victims received any of these rights – or, indeed, that the Government gave even a second's thought to crime victims' rights.

To be clear, NOVA is not arguing that crime victims' rights require public disclosure of everything in the criminal justice process. In some situations, secrecy can serve important interests, including the interests of crime victims. *See* TIM REAGAN & GEORGE CORT, FED. JUDICIAL CTR., SEALED CASES IN FEDERAL COURTS 19-20 (2009) (discussing sealing of cases to protect victims of sexual offenses).¹¹ *See also* *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 608 (1981) (“A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim” during a sex offense trial). And strategies no doubt exist for accommodating both crime victims' interests in knowing what is happening in the criminal justice process and the Government's legitimate need for

¹¹ Available at [http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\\$file/sealcafc](http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc).

secrecy. The limited point here is that the Government cannot use its interest in securing cooperation as a basis for completely disregarding the CVRA.

Intervention by this Court is warranted because the lower courts appear to be unwilling to require CVRA compliance. According to the certiorari petition, the petitioner in this case filed for a petition for a writ of mandamus with the Second Circuit, asking that Court to direct the Government to comply with the CVRA. The Second Circuit studiously avoided discussing the CVRA and, indeed, any crime victims' issue surrounding the case.

As with the restitution issue, the CVRA issue is recurring and important. While exact statistics are hard to come by, it appears that courts are increasingly sealing criminal cases. See Hannah Levin, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1744 (2006) ("The courts seem especially willing to bow to pro-closure interests in . . . highly controversial and contentious criminal proceedings. The result is that the proceedings in which the public has the most interest are most often the ones that are closed."). According to a 2006 study by the Federal Judicial Center, federal district courts handle thousands of sealed cases. TIM REAGAN & GEORGE CORT, FED. JUDICIAL CTR., *SEALED CASES IN FEDERAL COURTS* (2009). They found that 1,077 of the 66,458 criminal cases filed in 2006 were sealed (1.6%). *Id.* A total of 241 of those cases were sealed because of cooperation or ongoing investigations. *Id.* And at least 23 of the cases should not have been sealed. *Id.* Similarly, in

2006, the Reporters Committee for Freedom of the Press's study of gaps in the sequence of docket numbers revealed that the District Court for the District of Columbia conducted 469 criminal cases in complete secrecy between 2001 and 2005. Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 178 (2009) (citing Kirsten B. Mitchell & Susan Burgess, *Disappearing Dockets: When Public Dockets Have Holes, the Public's Right to Open Judicial Proceedings Is Jeopardized*, THE NEWS MEDIA & THE LAW, Winter 2006, at 4, 4-8).¹²

Despite this growth in the number of sealed cases, the Government does not appear to be making any effort to comply with the CVRA in sealed cases. For example, the Attorney General has promulgated detailed guidelines for CVRA compliance. See U.S. DEPT. JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (May 2012). Yet those Guidelines discuss confidentiality only in passing, noting that the crime victim's right to attend a proceeding extends only to "public" proceedings. *Id.* at 39-40. The Guidelines, for example, contain no discussion of how prosecutors should extend to victims their right to confer about, for example, a plea bargain when the plea bargain is itself being kept secret. *Id.* at 41-42.

In this particular case, the Government's willingness to ignore the CVRA has a "business as usual"

¹² Available at <http://www.rcfp.org/news/mag/30-1/cov-disappea.html>.

feel to it – suggesting that many other victims are having their rights cavalierly violated by the Government through the simple expedient of a sealing order. Just as pirates think that “Dead Men Tell No Tales,” the Government seems to believe that sealed cases will never be subject to public scrutiny. This defiance of law must stop. The Court should review this case and hold that the Government is obligated to comply with applicable provisions of the CVRA in both sealed and unsealed cases.

II. AT A MINIMUM, THIS COURT SHOULD REQUIRE THE GOVERNMENT TO EXPLAIN HOW IT HAS TREATED CRIME VICTIMS’ RIGHTS IN THIS CASE.

For all the reasons just explained, the existing record warrants this Court granting review in this case. It is readily apparent, however, that the Government possesses information that could help NOVA demonstrate the need for granting certiorari in this case – such as information about its failure to protect crime victims in this case. More generally, the Government has information bearing on the certworthiness of this case, such as statistics about how often it seeks to seal criminal cases and how it has treated crime victims in those cases. The Government should at least be required to file a response to the certiorari petition, addressing the important issues it raises.

This Court should call for a response from the Government so that it can explain whether, as alleged

in the certiorari petition, prosecutors have violated the MVRA and the CVRA. The certiorari petition alleges that the Government has simply defied Congress' will in mandating restitution in the MVRA and in requiring notice be given to crime victims in the CVRA. In the face of these allegations, the Government has tried to keep in place a shroud of secrecy over what it has done by "waiving" its response.

Sealed proceedings raise concerns precisely because the public cannot scrutinize what the Government is doing. This Court has recognized a First Amendment right of access to criminal trials, for example, because that access "historically has been thought to enhance the integrity and quality of what takes place." *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 578 (1980). As one distinguished jurist put it, "One of the demands of a democratic society is that the public should know what goes on in courts . . . to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari). For these reasons, "What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Hicklin Engineering*,

L.C. v. Bartell, 439 F.3d 346, 348-49 (7th Cir. 2006). This Court should at least require the Government to publicly justify how it has handled crime victims' rights in this case.

It should be clear that NOVA's focus in asking for a Government response is not to force the Government to identify its cooperator, even though the cooperator's name and photograph have been published in the press.¹³ Even proceeding on the premise that the cooperator's name is still secret and in fact under seal,¹⁴ the Government can still obviously respond about the procedural aspects of this case, including whether it has provided notice to crime victims and whether it has attempted to secure mandatory restitution for them.

¹³ Rather than cite the newspaper article with the cooperator's name and photograph in it, NOVA would point out that the Court can confirm this fact by running a Google search with the cooperator's name in it. The Court will quickly see several mass media articles (going back at least five years) discussing his cooperation, along with his photograph.

¹⁴ In March 2011, the Government filed a motion to unseal the proceedings, presumably because it could no longer justify the secrecy in this case. The Second Circuit remanded to the District Court more than a year ago for a ruling on that motion, *Roe v. U.S.*, 428 Fed. Appx. 60 at *8 (2011) (remanding the case to the district court "to rule upon the Government's unsealing motion of March 17, 2011"), yet the district court has not issued any such ruling on the motion (so far as can be determined from the record). In calling for a response from the Government, this Court should ask the Government to state clearly whether it can plausibly justify sealing the cooperator's name.

The Government, however, appears to be intent on preventing the public from learning anything about how it treated crime victims in this case. Through counsel, NOVA asked the Government to inform it briefly of whether it failed to secure congressionally-required restitution for victims in this case and to notify victims of their CVRA rights. The Government declined to do so, contending that it was “unable to answer further questions because doing so would require us either to speculate or to comment on matters that have been sealed by the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York.” E-mail from AUSA Todd Kaminsky to Professor Paul G. Cassell, Aug. 20, 2012.

At this point, the Government is using the alleged sealing orders it may (or may not) have obtained in this case not as a legitimate law enforcement tool but rather as an excuse for obscuring what has happened. Indeed, it may be that the Government has waived its right to respond because it does not want to have to confess error with regard to the handling of this case below. If this Court were to direct the Solicitor General to respond, it would trigger an obligation for him to explain what (if any) factual errors exist in the petition. *See* Sup. Ct. Rule 15.2 (“the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in

opposition, and not later, any perceived misstatement made in the petition.”). Moreover, the Solicitor General might ask that certiorari be denied, because he was going to correct the errors that the prosecutors have committed in this case. Certiorari would then be inappropriate. *See, e.g., Titmus v. Tinsley*, 370 U.S. 964 (1961) (denying certiorari based on representations that errors below would be corrected by the state Attorney General).

For all these reasons, the Court should call for a response to the petition from the Government so that the Government will explain how it treated crime victims in the courts below.

III. THIS COURT SHOULD REQUIRE THE GOVERNMENT TO PROSPECTIVELY COMPLY WITH REQUIREMENTS OF THE CRIME VICTIM’S RIGHTS ACT IN THIS CASE.

NOVA also requests that this Court prevent any prospective violations of the Crime Victim’s Rights by directing the Government to comply with the CVRA forthwith.

For all the reasons explained in Part I.B., *supra*, the Government has violated the CVRA in its handling of past proceedings. But the Government’s CVRA violations are not confined to earlier events, but are on-going. Every day that the Government withholds notice from the victims in this case about the continuing proceedings – both before this Court

and the courts below – is a day in which the Government is violating the CVRA.

Regardless of whether or not certain proceedings are sealed, some proceedings are plainly not sealed. For example, the Second Circuit issued a public opinion in this case in 2011 and the vast bulk of the certiorari petition pending before this Court is now unsealed as well. On August 23, 2012, the district court held a public hearing about this case. As to these public, judicial events, the Government has CVRA obligations – specifically, to notify crime victims of the fact that they have protected legal rights in these proceedings, 18 U.S.C. § 3771(c)(1) as well as of their rights to seek legal counsel with respect to these rights, 18 U.S.C. § 3771(2).¹⁵

While the Government is the instigator of these violations, the courts cannot sit idly by. In the CVRA, Congress directed 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 [the CVRA].” 18 U.S.C. § 3771(b)(1) (emphasis added). While other parts of the CVRA are

¹⁵ NOVA has offered to the Government to help refer crime victims to legal counsel. While NOVA does not provide direct representation to crime victims, it does maintain a list of attorneys knowledgeable in crime victims law and could provide referrals to victims desiring legal representation. NOVA also maintains a telephone “hotline” (800-TRY-NOVA) that could be used to facilitate providing information to crime victims. The Government has not responded to NOVA’s offer to provide such assistance.

limited specifically to the district courts, *see, e.g.*, 18 U.S.C. § 3771(a)(4) (providing right to be heard at any proceeding “in the district court”), this part is not so limited. Congress thus directed that all courts – including this Court – were to protect crime victims in the criminal justice system. *See* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (“It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim’s right, while giving meaning to the rights we establish.”).

Because this case is currently before this Court, this Court should direct the prosecutors to provide their standard CVRA notices to the affected crime victims. Nothing in the record suggests that doing so would be unduly burdensome, as the Government appears to have had a list of all the victims in this case when it secured restitution from other defendants.¹⁶ In any event, Congress has commanded that the Government is to provide reasonable notice to crime victims. In view of the Government’s failure to comply with the law in this case, this Court should direct it to do so.

Notice to crime victims is particularly important in this case because of a looming statutory deadline.

¹⁶ Other means of notice are also easily available, such as a website notice.

Because Doe has been sentenced for the crime of racketeering, the victims of his crimes have the right to pursue civil remedies against him. *See* 18 U.S.C. § 1964. Indeed, such a lawsuit would appear to be particularly efficacious for the victims of Doe’s crimes, both because he would be estopped from denying liability, 18 U.S.C. § 3664(1), and because he apparently continues to live the high life off of money that he stole from his victims *See* Cert. Petn. at 8. According to the certiorari petition, Doe was sentenced in 2009 and thus his victims would have to bring civil lawsuits against Doe in 2013. Yet the victims are unaware of this potential cause of action because the Government has failed to notify them of Doe’s conviction.

Notice to crime victims might also permit them to take legal action to secure their interest in restitutions. The courts have been willing to reopen cases to provide restitution to victims, even years after the fact. *See, e.g., United States v. Ageloff*, 809 F.Supp.2d 89 (E.D.N.Y. 2011) (reopening case in 2011 to add restitution to a 2002 judgment and conviction order). Indeed, it would appear that the Government is obligated to help the victims to secure mandatory restitution, as the CVRA requires prosecutors to use their “best efforts” to help crime victims obtain “full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6), (c)(1). But the affected crime victims cannot begin the effort to obtain the restitution to which they are entitled if the Government does not inform them of their rights.

This Court should not allow the Government to conceal from victims the fact that Doe has now been convicted of committing crimes against them. This Court should direct the Government to promptly provide appropriate CVRA notices to Doe's victims.

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the Court should grant the petition for a writ of certiorari. The Court should also call for a response from the Government so that it can explain how it has treated crime victims' rights in this case. Finally the Court should direct the Government to provide notice to the victims in this case of their rights under the CVRA.

Respectfully submitted,

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