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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE JANE DOE, _____ JANE DOE, *Petitioner*, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, LAS VEGAS, *Respondent*, VONTEAK ALEXANDER; UNITED STATES OF AMERICA, *Real Parties in Interest*.	No. 22-70098 D.C. No. 2:17-cr-00072-RFB ORDER AND AMENDED OPINION

Petition for a Writ of Mandamus

Submitted to Motions Panel May 24, 2022*
San Francisco, California

Before: Jay S. Bybee, Andrew D. Hurwitz, and Ryan D. Nelson, Circuit Judges.

Order;
Opinion by Judge Bybee

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY[**]

Mandamus/Crime Victims' Rights Act

In proceedings on a petition for a writ of mandamus in which Jane Doe seeks to vindicate her right under the Crime Victims' Rights Act (CVRA) to "full and timely restitution as provided in law," a motions panel granted Real Party in Interest Vonteak Alexander's petition for rehearing, and filed an amended opinion correcting a factual issue.

In the amended opinion, the panel granted a joint motion, filed by Doe and Alexander, the defendant in the underlying criminal action, stipulating to an extended period for this court to consider Doe's petition beyond the 72-hour deadline imposed by the CVRA.

Under 18 U.S.C. § 3771(d)(3), the court of appeals "shall take up and decide a mandamus petition seeking relief under the CVRA within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. . . . In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing" rights under the Act.

The panel held that these deadlines are not jurisdictional.

The panel also resolved a question of first impression regarding whether the "proceedings" referred to in § 3771(d)(3) are those of the district court or appellate court. The panel held that the parties can agree to an extension of the 72-hour deadline with the appellate court's approval, so long as the extension does not involve a stay or continuance of the underlying *district court* proceedings for more than five days.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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Elizabeth O. White (argued), Appellate Chief and Assistant United States Attorney; Christopher Floyd Burton, Assistant United States Attorney, Jason M. Frierson, United States Attorney, United States Attorney's Office, Reno, Nevada, for Real Party in Interest United States of America.

Amy B. Cleary (argued), Rene L. Valladares, and Wendi L. Overmyer, Assistant Federal Public Defenders, Federal Public Defender's Office, Las Vegas, Nevada; Christopher Oram, Law Office of Christopher R. Oram LTD, Las Vegas, Nevada, for Real Party in Interest Vonteak Alexander.

ORDER

The panel judges have unanimously voted to grant Real Party in Interest Vonteak Alexander's petition for rehearing. Accordingly, the panel will file an amended opinion correcting the factual issue Alexander has raised.

Alexander's petition for rehearing, filed September 28, 2022 (Dkt. No. 26), is **GRANTED**.

No subsequent petitions for rehearing or rehearing en banc will be permitted in this matter.

OPINION

BYBEE, Circuit Judge:

Under the Crime Victims' Rights Act (CVRA), a crime victim has "[t]he right to full and timely restitution." 18 U.S.C. § 3771(a)(6). A victim denied restitution by the district court may petition the court of appeals for a writ of mandamus. § 3771(d)(3). Once a petition for mandamus is filed,

> [t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. . . . In no event shall proceedings be stayed or subject to a continuance of more than five days . . . .

Id. Crime victim Jane Doe filed a petition for a writ of mandamus in this court; she and the defendant in the underlying criminal action also filed a joint stipulation requesting that we "resolve the case on a schedule that parallels a normal appellate process." We granted the motion and issued an order setting a briefing schedule.

In this opinion in support of that order, we address two questions raised by this process. First, is the deadline in § 3771(d)(3) jurisdictional? Second, if the deadline is not jurisdictional and if the parties have stipulated to an extension, do we have the power to extend the time for decision and, if so, for how long? We conclude that the deadline is not jurisdictional and that we have the power, with the

consent of the parties, to extend the deadline so long as the extension does not stay or continue proceedings *in the district court* by more than five days.

I. BACKGROUND

Vonteak Alexander pled guilty to two counts of Interstate Travel in Aid of Unlawful Activity in violation of 18 U.S.C. § 1952(a)(3)(A) for transporting Jane Doe, an individual he "knew or should have known . . . was a vulnerable victim by virtue of being a missing person," to engage in unspecified unlawful activity. Alexander entered the plea in exchange for the dismissal of multiple counts of sex trafficking and related conspiracy. Nevertheless, Alexander acknowledged in the plea agreement "that [his] conduct . . . gives rise to mandatory restitution to the victim[]" for the dismissed sex-trafficking counts and "agree[d] to pay the victim[] the 'full amount of the victim's losses' as defined in 18 U.S.C. § 2259(b)(3)."

When Doe moved for restitution before the district court, however, Alexander contested the amount requested, and the district court set a restitution hearing. At the restitution hearing, the district court held that Doe was entitled to restitution under § 2259 and ordered her to submit calculations accordingly. At a second restitution hearing, Alexander changed course and argued that the district court lacked the authority to order restitution under § 2259 because he had not pled guilty to the conduct covered under that section. In its final restitution order, dated

May 10, 2022, the district court agreed. The court determined that, although "Alexander committed egregious acts by which Jane Doe suffered and will continue to suffer," it nevertheless lacked the authority to order restitution under § 2259 because Alexander had not pled to an offense under Chapter 110 of Title 18. The district court therefore denied Doe all restitution.

On May 23, 2022, Doe filed a timely petition for a writ of mandamus under § 3771(d)(3), seeking to vindicate her right under the CVRA to "full and timely restitution as provided in law." § 3771(a)(6). Doe and Alexander simultaneously filed a joint motion stipulating to an extended period for us to consider her petition beyond the 72-hour deadline imposed by the statute. The parties advised us that "the interests of justice will best be served by an appellate process that moves expeditiously—but over a period [of] several months rather than a period of hours." We granted the joint motion and adopted the parties' proposed briefing schedule on May 25, 2022.[1] This opinion explains our reasoning.

II. JURISDICTION TO ISSUE THE WRIT

The CVRA requires a district court to decide a motion asserting a victim's rights, including an application for restitution, "forthwith." § 3771(d)(3). A victim

[1] Our May 25 Order, issued with an opinion to follow, vacated a prior May 24 Order in which we, *sua sponte*, extended our time to consider the petition by five days.

denied restitution by the district court may seek review of that decision in the court of appeals through a petition for a writ of mandamus. *Id.* We must ordinarily rule on that petition within 72 hours "unless the litigants, with the approval of the court, have stipulated to a different time period for consideration." *Id.* The CVRA also states that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing" rights under the Act. *Id.*

Since the CVRA provides for our jurisdiction over this petition, we first must consider whether the deadlines it imposes are jurisdictional. This is a novel issue for us, but the Supreme Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), directs our analysis. In *Dolan*, the Court considered a ninety-day deadline for "the final determination of [a] victim's losses" under the Mandatory Victims Restitution Act. 18 U.S.C. § 3664(d)(5). The district court in *Dolan* had ordered restitution after the expiration of the ninety days, and Dolan argued that the district court had no authority to order restitution. The Court concluded that the deadline in § 3664(d)(5) was not jurisdictional: the deadline was "legally enforceable but does not deprive a judge . . . of the power to take the action to which the deadline applies." *Dolan*, 560 U.S. at 611. The Court addressed six factors that demonstrated that § 3664(d)(5) was not jurisdictional. First, the statute did "not specify a consequence for noncompliance." *Id.* at 611–12 (quoting *United*

States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)). Second, the statute placed an affirmative burden on the court to issue an order in the case. *Id.* at 612. Third, the statute's reason for requiring expediency was primarily to benefit the victim and only secondarily to protect the defendant. *Id.* at 612–13. Fourth, depriving the court of the power to decide the case "would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Id.* at 613–14. Fifth, holding that the deadline was not jurisdictional was consistent with other decisions by the Court that had "interpreted similar statutes similarly" as well as "numerous similar decisions made by courts throughout the Nation." *Id.* at 614–615. And sixth, the parties could mitigate the harm of a missed deadline by informing the court, "which will then likely set a timely hearing or take other statutorily required action," or, in the event of deliberate failure to meet the deadline, by seeking mandamus. *Id.* at 615–16.

All six factors favor finding that the deadlines here are likewise not jurisdictional. *See United States v. Monzel*, 641 F.3d 528, 532 (D.C. Cir. 2011) (reaching a similar decision under § 3771(d)(3) by applying *Dolan*). First, as with § 3664(d)(5), § 3771(d)(3) imposes no consequences for missing its deadlines. § 3771(d)(3). Second, the section commands that "[t]he court of appeals *shall take*

up and decide" the victim's petition—requiring not only that we consider the petition but that we also carry through to a decision. *Id.* (emphasis added). Third, the statute is explicitly intended to protect the victim's "right to proceedings free from unreasonable delay." § 3771(a)(7). Fourth, the overarching purpose of § 3771, entitled "Crime victims' rights," is to benefit the victims of crime, who are unlikely to be responsible for our delay in deciding their petitions. Fifth, all other circuits that have considered this question directly have found that § 3771(d)(3)'s deadlines are not jurisdictional. *See Monzel*, 641 F.3d at 531–32; *United States v. Aguirre-González*, 597 F.3d 46, 55 (1st Cir. 2010); *see also Fed. Ins. Co. v. United States*, 882 F.3d 348, 364 n.10 (2d Cir. 2018) (stating, in *dicta*, that the deadline is not jurisdictional); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1018 (9th Cir. 2006) (deciding a petition after the deadline). And sixth, the parties may substantially mitigate any harm resulting from delay by notifying us or seeking mandamus from the Supreme Court. Holding the deadlines to be jurisdictional would prejudice the very victims that the statute was meant to protect, and so, absent clear indication from Congress, we will not interpret § 3771(d)(3) to require such a result. *See also Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–62 (2010) (explaining that courts should not treat a statutory requirement as jurisdictional unless the statute's text explicitly states that it is).

III. AUTHORITY TO ISSUE THE WRIT

We must still determine whether, independent of the question of statutory jurisdiction, we have the power to extend the CVRA's statutory deadlines as requested here. As we have pointed out, § 3771(d)(3) requires us to decide petitions within 72 hours, unless the parties stipulate, and we consent, to additional time. And, "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days." § 3771(d)(3). Here, we are faced with a question of first impression regarding the interaction of these provisions: does an agreement between the parties permit a court of appeals to extend the 72-hour deadline for decision beyond five days when doing so does not require a stay or continuance of proceedings before the district court? In other words, are the "proceedings" referred to in § 3771(d)(3) those of the district or appellate court? If "proceedings" refers to *our* proceedings, then we may grant an extension—but only for five days. If "proceedings" refers to district court proceedings, we may grant a longer extension so long as it does not delay or interfere with the district court's proceedings.

We conclude that the statute only prohibits a stay or continuance of *district court* proceedings for more than five days. Read in context, the term "proceedings" most clearly refers to the underlying criminal proceedings in the

district court. *See In re Wild*, 994 F.3d 1244, 1259 (11th Cir. 2021) (reasoning that "Congress envisioned that judicial involvement and enforcement in CVRA matters would occur only in the context of preexisting 'proceedings'" in the district court). Indeed, the first sentence of § 3771(d)(3) divides district court proceedings into two categories: those in which "a defendant is being prosecuted for the crime" and those in which "no prosecution is underway." A stay or continuance of the underlying proceedings would, of course, be an important consideration on those occasions when a defendant was actively being prosecuted below. *See Kenna*, 435 F.3d at 1018 n.5 ("We note . . . that our task in crafting an effective remedy would have been greatly simplified, had the district court postponed [the defendant's] sentencing until the petition for writ of mandamus was resolved.").

Had Congress intended to place a hard cap on our ability to extend the 72-hour deadline, it would have employed different, more appropriate language. A "stay" generally refers to "[t]he postponement or halting of a proceeding, judgment, or the like," and a "continuance" is "[t]he adjournment or postponement of a trial or other proceeding to a future date." Black's Law Dictionary (8th ed. 2004). When we grant an extension of time to file a brief, we ordinarily do not refer to such as a "stay" or a "continuance." But in the context of a petition for a writ of mandamus, a pending petition might well be accompanied by a request that

we stay the district court proceedings pending our decision. Even if we did not issue a stay, the fact of the pending petition for a writ of mandamus might cause a district court to stay or continue its own proceedings until the matter was resolved.[2] But, neither term naturally includes the initial act of scheduling a proceeding. Twice within § 3771(d)(3) itself, Congress employed the phrase "take up and decide" when it wanted to set time limits on the courts' decisions. And, in neighboring, complementary statutes, Congress likewise used much more direct language to indicate scheduling deadlines. *See, e.g.*, 18 U.S.C. § 3664(d)(5) ("[T]he court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing."). Put simply, we do not think that Congress used the legal terms of art, "stay" and "continuance," to refer to the act of setting a hearing and decision schedule in our court.

Prior to 2015, § 3771(d)(3) imposed a 72-hour deadline but omitted the present language contemplating extension with the consent of the parties; the three-day deadline was a hard deadline for resolution of the petition for a writ of mandamus. *See* 18 U.S.C. § 3771(d)(3) (2004) (amended 2015). This deadline

[2] The Congressional Research Service reasoned that the provision applied only in such circumstances. *See* Cong. Rsch. Serv., RS22518, Crime Victims' Rights Act: A Sketch of 18 U.S.C. § 3771, at 18–19 (2021) ("[Section 3771(d)(3)] contemplates interlocutory appeals with stays or continuances of pending criminal proceedings of no more than five days.").

proved difficult to follow. On one occasion, our court, unable to meet the 72-hour deadline, apologized for our "regrettable failure" to "comply with the statute's strict time limits." *Kenna*, 435 F.3d at 1018. We, nevertheless, ruled on the writ of mandamus, irrespective of the decision's timeliness. *See id.* In a subsequent case, the First Circuit went a step further—although neither of the parties there contested the issue, both having consented to an extension—and held that the deadline was entirely "precatory" because the statute imposed no express consequences for a court's failure to comply. *Aguirre-González*, 597 F.3d at 55. Both of these decisions took place well outside the 72-hour window.[3] In both cases, the circuit court proceedings occurred after sentencing and final judgment, so no stay or continuance of the underlying district court proceedings was necessary, and neither court considered whether the five-day deadline applied. *See Kenna*, 435 F.3d at 1013; *Aguirre-González*, 597 F.3d at 49–50. In a third pre-2015 case, the D.C. Circuit determined that, while the mandatory decision deadline could not be

[3] The petition for a writ of mandamus in *Kenna* was filed on June 13, 2005, Petition for Writ of Mandamus, *Kenna*, 435 F.3d 1011 (No. 05-73467), ECF No. 1, and the opinion was not filed until January 20, 2006, *Kenna*, 435 F.3d at 1011, more than seven months later. Likewise, the appellants in *Aguirre-González* filed their appeal—which the court declined to convert into a petition for a writ of mandamus because it was futile—on January 29, 2008, and the First Circuit did not issue its opinion until March 2, 2010, more than two years later. *See* 597 F.3d at 46, 50 & n.6.

extended unilaterally by a petitioner as a matter of right, neither was it jurisdictional. *See Monzel*, 641 F.3d at 531–32.

In the wake of these circuit court decisions, Congress amended § 3771(d)(3) in 2015, explicitly permitting parties to agree to an extension of the 72-hour window with approval of the court. The 2015 amendment was thus an implicit endorsement of the decisions percolating in the circuit courts, harmonizing much of their reasoning. *See* § 3771(d)(3). The amendment implicitly adopted the D.C. Circuit's reasoning that the original statute did not grant a petitioner the unilateral right to extend the deadline; however, like the First Circuit, it enabled the parties to stipulate to an extension.[4]

The 2015 amendment confirms that the CVRA's bar on stays or continuances beyond five days was not intended to apply to the scheduling of

[4] We do not, however, agree with the First Circuit that the deadline is entirely "precatory." Not only does our caselaw treat the deadline as mandatory, *see Kenna*, 435 F.3d at 1018 ("[W]e were *required* to take up and decide this application forthwith within 72 hours." (emphasis added) (cleaned up) (quoting § 3771(d)(3))), but the statute explicitly commands that its deadlines *shall* be met, and "the word 'shall' is a mandatory term," *see Nat. Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) (cleaned up) (citing *Washington v. Harper*, 494 U.S. 210, 221 (1990)). Moreover, treating the deadline as precatory is inconsistent with the express wording of the amendment, which requires agreement between the parties *and* the consent of the court. § 3771(d)(3).

circuit court proceedings deciding the petition unless the delay would affect proceedings then pending in the district courts. Indeed, the published decisions subsequently applying the 2015 amendment have allowed parties to stipulate to substantially extended decision schedules. *See, e.g.*, *In re Wild*, 994 F.3d at 1244, 1250–51, 1251 n.5 (deciding a petition for a writ of mandamus in April 2021 that had been filed in September 2019 after the parties agreed to an extended schedule under § 3771(d)(3)); *In re Akebia Therapeutics, Inc.*, 981 F.3d 32, 32, 34 n.1 (1st Cir. 2020) (deciding a petition in November 2020 that had been filed in September 2019 (*see* Petition for Writ of Mandamus, *Akebia*, 981 F.3d 32 (No. 19-1929)) after the parties agreed to waive § 3771(d)(3)'s 72-hour deadline).

IV. CONCLUSION

Given the natural reading of the text of § 3771(d)(3) and its history, we hold that the parties can agree to an extension of the 72-hour deadline with our approval, so long as the extension does not involve a stay or continuance of the underlying district court proceedings for more than five days.

MOTION GRANTED.