Nos. 11-12707-G & 11-12708-G

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

IN RE: INSTITUTO COSTARRICENSE DE ELECTRICIDAD, S.A.,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT FLORIDA, Nos. 10-cr-20906 & 10-cr-20907
The Honorable Marcia G. Cooke, *United States District Judge.*

COURT-ORDERED RESPONSE OF THE UNITED STATES OF AMERICA TO PETITIONS FOR WRITS OF MANDAMUS

MYTHILI RAMAN
Acting Assistant Attorney General

CHARLES E. DUROSS
ANDREW GENTIN
Attorneys
United States Department of Justice
Criminal Division, Fraud Section

GREG D. ANDRES
Acting Deputy Assistant Attorney General

MICHAEL A. ROTKER
Attorney, Appellate Section

United States Department of Justice
Criminal Division
950 Pennsylvania Avenue, NW, Suite 1264
Washington, DC 20530
(202) 514-3308

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INTRODUCTION

Petitioner Instituto Costarricense de Electricidad, S.A. ("ICE") has filed two petitions for writs of mandamus, pursuant to the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771.[1/] The petitions arise from two

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[1/] The CVRA provides that a court of appeals "shall take up and decide" a mandamus application "forthwith within 72 hours after the petition has been filed," 18 U.S.C. § 3771(d)(3), and it further provides that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." *Id*. The government was alerted to these petitions by the Clerk's Office at 9:51 a.m. on June 16, 2011, the day after the petitions were filed. An hour later, ICE provided copies of the petitions to government counsel via email. The Court thereafter directed the government to respond to the petitions by 12:00 p.m. on Friday, June 17, 2011. ICE has separately filed a motion to "waive" the 72-hour time limit, and the government filed a written response to it.

separate but related criminal cases: *United States* v. *Alcatel-Lucent France, S.A.,* et al., No. 10-cr-20906 (S.D. Fla.), and *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.). Pursuant to the Court's request, the United States of America, a respondent herein, see Fed. R. App. P. 21(a)(1), hereby files this single consolidated answer to these two materially-indistinguishable mandamus petitions filed by ICE.[2/]

The district court (Cooke, *J.*) found, as a factual matter, that ICE was not a "victim" of the defendants' offense, relying in part on the fact that profound corruption existed at the highest levels of ICE during the relevant period. Even if ICE was a victim, however, the district court still correctly found that ICE was accorded the rights of a victim, including the right of full participation throughout the court proceedings. Indeed, ICE's counsel was provided notice of each court hearing, attended them all, filed numerous pleadings, and addressed the district court at each and every hearing over the course of several hours. ICE was also invited to and did, in fact, make submissions to the U.S. Probation Office and even met with the probation

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[2/] The petition was originally filed in *In re Instituto Costarricense de Electricidad, S.A.*, No. 11-12707, and a copy of it was filed in *In re Instituto Costarricense de Electricidad, S.A.*, No. 11-12708. While these cases do not appear to have been formally consolidated, a single response to these identical petitions appears to be warranted.

officer. Lastly, the district court was correct that, regardless of whether ICE was a victim, an award of restitution was inappropriate as the loss, if any, was unclear and the proceedings to determine such loss, if any, would have unduly prolonged and complicated the sentencing process.

Because the district court did not err – much less clearly and indisputably err – in finding that ICE was not a "crime victim," and in declining ICE's invitation to speculate about ICE's losses, if any, during what would have been an unduly complex and lengthy restitution process, the petitions for extraordinary mandamus relief should be denied.

STATEMENT OF THE ISSUE

The district court found, as a factual matter, that ICE was not a victim of the defendants' offense conduct, and that even if ICE was a victim, restitution would not be appropriate because the loss amount, if any, was unclear and the process of determining the loss amount would unduly delay and complicate the sentencing process. ICE has now filed petitions for writs of mandamus pursuant to 18 U.S.C. § 3771(d)(3). The issue presented is whether the district court clearly and indisputably erred in finding that ICE was not a "crime victim" and was not entitled to restitution.

STATEMENT OF THE FACTS AND OF THE CASE

This case involves the payment of bribes to foreign officials by a large international telecommunications company, Alcatel-Lucent, S.A. ("Defendant Alcatel-Lucent"), and a number of its wholly owned subsidiaries, Alcatel Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (collectively, the "Defendant Subsidiaries"), in violation of the Foreign Corrupt Practices Act, as amended, Title 15, United States Code, Section 78dd-1, *et seq*.[3/] The bribes were paid by various employees and agents of the defendants in numerous countries around the world between 1998 and 2007. One of the countries in which bribes were paid was Costa Rica, where the bribes were solicited by and eventually paid to nearly half the Board of Directors (among others) at ICE, which is a state-owned electrical and telecommunications company.

[3/] Defendant Alcatel-Lucent and the Defendant Subsidiaries when referred to collectively will be referred to as the "defendants."

I. The Charges, Proposed Plea Agreements, and Deferred Prosecution Agreement.

After a lengthy investigation, on December 27, 2010, a criminal Information was filed against the Defendant Subsidiaries charging them with conspiracy to commit offenses against the United States, to wit: violating the anti-bribery provisions, the books and records provisions, and internal controls provisions of the FCPA, Title 15, United States Code, Section 78dd-1, *et seq.*, all in violation of Title 18, United States Code, Section 371 (DE 1).[4/] On the same day, a criminal Information was also filed against Defendant Alcatel-Lucent, the parent company of the Defendant Subsidiaries (ALU DE 1). The Information charged Defendant Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA, Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78ff(a) (*id.*).

[4/] Because of the expedited response time, all "DE" citations will refer to the docket entries in the case against the Defendant Subsidiaries in *Alcatel-Lucent France, S.A.,* et al., No. 10-cr-20906. For ease of reference, citations to the related case against the parent company, Defendant Alcatel-Lucent, in *Alcatel-Lucent, S.A.*, No. 10-cr-20907, will be cited as "ALU DE."

On February 22, 2011, plea agreements for each of the Defendant Subsidiaries were filed in which each agreed to plead guilty to conspiring to violate the FCPA, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (DE 10-12). Also on February 22, 2011, the government filed a deferred prosecution agreement in the case against Defendant Alcatel-Lucent (ALU DE 10). The proposed overall resolution with the defendants included a $92 million criminal penalty,[5/] the implementation of an enhanced compliance program, and the retention of an independent compliance monitor to review and ensure the effective implementation of the enhanced compliance program to prevent, detect, and deter future violations of the FCPA.

[5/] Defendant Alcatel-Lucent has also paid $45,372,000 in disgorgement of profits and prejudgment interest as part of a civil FCPA resolution with the U.S. Securities and Exchange Commission. The civil resolution did not include civil penalties in light of the parallel criminal action and $92 million criminal penalty. The civil complaint and proposed consent order was filed on December 27, 2010, and a consent order was signed on December 29, 2010. *Securities and Exchange Commission v. Alcatel-Lucent, S.A.*, No. 10-24620-cv-GRAHAM.

II. The Initial Proceedings Before the District Court.

The case against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent were eventually consolidated before the district court. On March 9, 2011, after hearing from the government, the Defendant Subsidiaries, and counsel for ICE, the district court directed the U.S. Probation Office to prepare a memorandum, which would review the proposed plea agreements with the Defendant Subsidiaries and address the victim and restitution issues raised by ICE (DE 20 at 19-21). On May 2 and 3, 2001, ICE filed a petition and memorandum of law which, in part, objected to the proposed overall resolution and sought protection of its rights as a purported victim, including the right to restitution (DE 22, DE 24). ICE alleged losses that it vaguely estimated at approaching $400 million (DE 24 at 18).

On May 11, 2011, the district court heard further from the government, counsel for ICE, and counsel for the defendants. The district court then set June 1, 2011, for a change of plea and sentencing hearing for the Defendant Subsidiaries at which time the district court indicated that it would hear further from the parties on victim and restitution issues. The district court invited responses to ICE's petition from both the government and the

defendants.

III. The Government's Response to ICE's Petition Before the District Court.

On May 23, 2011, the government filed its response to ICE's petition (DE 45), as well as a memorandum in support of the proposed plea agreements and deferred prosecution agreement (DE 44). In its response to ICE's petition, the government argued that:

(a) ICE was not a victim as the facts and circumstances showed that ICE as an organization was complicit in the pervasive corruption that provided high-ranking ICE officials the very platform from which to demand the bribes in the first instance (DE 45 at 6-13);

(b) even though ICE was not a victim, it was still accorded all of the rights of a victim under the CVRA and thus there had been no violation of the CVRA in any event (*id*. at 13-21);

(c) the amount of loss, if any, caused to ICE by the defendants was not subject to a reasonable approximation, and because speculation is insufficient to meet to the burden of proving actual loss, a restitution award was not appropriate (*id*. at 24-26); and

(d) trying to determine restitution under these circumstances would so prolong and complicate the sentencing proceedings that any need for restitution was outweighed by the burden on the sentencing process (*id*. at 26-33).

A. ICE Should Not Be Considered A "Victim."

Specifically, the government stated that corruption at ICE appeared to have existed for many years, that the corruption did not just involve some low-level employees (*e.g.*, nearly half of the Board of Directors of ICE received millions of dollars in bribes in just this case alone), that the corruption at ICE was pervasive in the tender process (*e.g.*, ICE officials were receiving large bribes from other companies at the same time), and that the problems appeared to be systemic (*e.g.*, an audit report of ICE at the time indicated "serious deficiencies in internal control mechanisms," pointing to structural problems of the organization as a whole) (*id*. at 7-12). Indeed, one of the corrupt board members later confessed to Costa Rican prosecutors that there was "a kind of culture" that had developed at ICE of accepting bribes (*id*. at 11). Under these facts and circumstances, the government argued that it was difficult to consider ICE to be a crime victim given its apparent complicity in the corruption occurring within the organization. See, e.g., *United States* v. *Lazarenko*, 624 F.3d 1247, 1250-1252 (9th Cir. 2010); *United States* v. *Ojeikere*, 545 F.3d 220, 222-223 (2d Cir. 2008); *United States* v. *Reifler*, 446 F.3d 65, 70 (2d Cir. 2006); *United States* v. *Sanga*, 967 F.2d 1332, 1335 (9th Cir. 1992).

B. Regardless of Its Status, ICE Was Accorded the Rights of a Victim Under the CVRA.

Moreover, in spite of ICE not being entitled to victim status, the district court, Probation Office, and the government ensured that ICE was afforded the rights of a victim. The government set forth in painstaking detail how each of the rights delineated in the CVRA were accorded to ICE, including timely and accurate notice of every hearing, attending each hearing, being heard at each hearing, conferring with the attorney for the government,[6/] an

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[6/] Principally relying on *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008) (per curiam), ICE claims that the conferral right should have included pre-charging discussions and plea negotiations. ICE overreads *Dean*, however, as that decision was limited to "the specific facts and circumstances of th[at] case," *id*. at 394; indeed, the issue of pre-charging conferral rights was not contested or briefed before the district court or on appeal in *Dean*. Nor is the Fifth Circuit's conclusion not consistent with the operative statutory text. Section 3771(a)(5) of the CVRA provides victims with "[t]he reasonable right to confer with the attorney for the Government *in the case*." 18 U.S.C. § 3771(a)(5) (emphasis added). There is no "case," however, until charges are filed. Cf. *Chavez* v. *Martinez*, 538 U.S. 760, 766 (2005) (holding that a criminal "case" – as distinct from an investigation – "at the very least requires the initiation of legal proceedings"). Accordingly, the most natural reading of Section 3771(d)(5) is that the right of conferral applies only *after* a case has been filed. See, e.g., *In re W.R. Huff Asset Management*, 409 F.3d 555, 564 (2d Cir. 2005) ("Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement."); *United States* v. *Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008) (victims' rights accrue upon filing of the indictment).

opportunity to submit a request for restitution with Probation Office,[7/] and being treated with respect and dignity throughout the process by the district court, Probation Office, and the government (DE 45 at 13-21). Because ICE was afforded these rights, the government argued that the case was similar to *In re Acker*, 596 F.3d 370, 372-73 (6th Cir. 2010), in which the Sixth Circuit, in denying a mandamus petition arising out of a Department of Justice antitrust plea agreement, found that deciding whether the petitioner in that case was a victim was "largely beside the point," because the district court had, in fact, afforded the petitioners the rights of a crime victim under the CVRA as "the petitioners were allowed a full opportunity for participation." In other words, the government argued that, even if ICE was in fact a victim, there had been no violation of the CVRA since it had a full opportunity to participate.

[7/] ICE's losses continue to be a bit of a moving target. In its pending civil case in Costa Rica, it claimed losses of $73 million (DE 45 at 28 n.15). In its initial pleadings in this case, it claimed its losses approached $400 million (DE 24 at 18), yet when ICE made a submission to the Probation Office, which it did not provide to the government, it apparently claimed losses of $160 million.

C. Even If ICE Was a Victim, Restitution Should Not Be Awarded.

Finally, the government considered ICE's request for restitution. As an initial matter, the government highlighted that because "'Congress intended that restitution be a compensatory remedy from the victim's perspective,'" *United States* v. *Lange*, 592 F.3d 902, 907 (8th Cir. 2010) (quoting *United States* v. *Petruk*, 484 F.3d 1035, 1038 (8th Cir. 2007)), "[a]n award of restitution must be based on the amount of loss actually caused by the defendant's conduct." *United States* v. *Liss*, 265 F.3d 1220, 1231 (11th Cir. 2001). In other words, "restitution is limited to 'the victim's provable actual loss.'" *Lange*, 592 F.3d at 907 (quoting *United States* v. *Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008)). The burden of proving the amount of the victim's loss must be proven by a preponderance of the evidence. 18 U.S.C. § 3664(e). While the amount of restitution need not be determined with exact precision and a reasonable approximation can pass muster in appropriate circumstances, calculations involving pure speculation will not meet the government's burden. See *United States* v. *Futrell*, 209 F.3d 1286, 1291-1292 (11th Cir. 2000). This is true regardless whether the Mandatory Victim Restitution Act ("MVRA") or the Victim Witness Protection Act ("VWPA")

applies.[8/] The government established that, given the facts and circumstances of this case, the amount of restitution, if any, owed to ICE was not subject to a reasonable approximation, and because speculation is insufficient to meet to the burden of proving actual loss, a restitution award was not appropriate (DE 45 at 24-25). As described above, corruption existed for a long period of time at the highest levels of ICE and was pervasive in the tender process at the organization. Indeed, there is significant reason to believe that the defendants' competitors were likewise paying bribes to the same or different

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[8/] There has been disagreement among the parties as to whether the MVRA or the VWPA applies to an FCPA-related conspiracy case. Since this Court has not directly addressed whether the MVRA or the VWPA is the appropriate restitution statute to apply in domestic bribery cases (the closest domestic functional equivalent of the FCPA), there is no Eleventh Circuit precedent from which to draw a conclusion. See *United States* v. *McNair*, 605 F.3d 1152,1221 (11th Cir. 2010) ("We *sua sponte* note there is a potential issue of whether bribery is 'an offense against property' covered by § 3663A(c) and whether the MVRA applies to bribery crimes. 18 U.S.C. § 3663A(c). Nothing herein should be read as implying the answer to that question."). In another decision issued a month after *McNair*, which involved both bribery and wire fraud, this Court found that the MVRA applied, but conspicuously based that decision upon a conspiracy to commit wire fraud charges – and not the additional charges of bribery in the case. See *United States* v. *Huff*, 609 F.3d 1240, 1247 (11th Cir. 2010). Nevertheless, because the definition of "victim" is the same under the MVRA and VWPA, 18 U.S.C. § 3663A(a)(2) and 18 U.S.C. § 3663(a)(2), and because the same undue delay and complexity exception exists in both the MVRA and VWPA, 18 U.S.C. § 3663A(c)(3) and 18 U.S.C. § 3663(a)(1)(B)(ii), this Court need not decide this issue to resolve this matter.

ICE officials in seeking the same business (*id*. at 9-10). Under those circumstances, the government argued that it was simply not possible to determine which company would have won any particular bid and at what price.[9/] See *Huff*, 609 F.3d at 1247-49 (vacating and remanding restitution award where district court did not make specific factual findings concerning

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[9/] ICE argued before the district court (DE 24 at 6) and argues now (Pet. 27-28) that it is entitled to restitution in the amount of the bribes, which ICE claims is $17,387,405.74. As an initial matter, the government is unaware of the basis for ICE's $17 million figure, as the amount of money actually paid to the ICE officials, who were demanding the money in the first instance, was vastly smaller than $17 million. For example, some of the money was kept by intermediaries and other amounts were kicked by to the defendants' employees. Moreover, in making this argument, ICE misplaces its reliance on *McNair*. The *McNair* court found that the "district court did not clearly err in finding that the contractors essentially recouped their bribe money by adding it back to their . . . contract bills as a cost of doing business with the County." 605 F.3d at 1221. In *McNair*, this Court identified about a dozen instances in which the defendants were adding the cost of some or all of the bribes into the invoices charged to the county. *Id*. at 1170-1173, 1177-1178. Unlike in *McNair*, however, the bribe payments made by the defendants through consultants to ICE were absorbed by the defendants and came out of the profit. As the government explained to the district court, its investigation revealed that for each contract, a form called a Forecast of Sales Expenses ("FSE") was prepared to document approval of the expense of using a sales and/or marketing consultant. The FSE identified the estimated monetary value of the contract and specified the precise amount or percentage to be paid to each consultant or agent (*i.e.*, money that was coming out of the profit). Thus, unlike the evidence that supported district court's assessment in *McNair*, the government's investigation did not reveal that the defendants added the amount of the bribes into the contracts with ICE.

how it calculated exact dollar amount of victims' actual losses).

Beyond the speculative nature of any of ICE's claimed losses, the government showed that even if there was some mechanism by which to calculate restitution, it would so prolong and complicate the sentencing proceedings that any need for restitution would be outweighed by the burden on the sentencing process. See 18 U.S.C. § 3663A(3)(B); 18 U.S.C. § 3663(a)(1)(B)(ii); *see Acker*, 596 F.3d at 372-73 (upholding district court's decision to accept plea agreement with no provision for restitution). Indeed, the first filing by ICE included nearly 1,300 pages of exhibits (many of which were in Spanish and only some of which were translated), and the ongoing civil litigation in Costa Rica brought by ICE against Alcatel-Lucent France, which has been pending for more than six years, resulted in a denial of ICE's claims following a year-long trial with more than 60 witnesses (DE 45 at 30, Ex. 18). The Costa Rican court's findings of fact and conclusions of law issued within the last few weeks exceeded 2,000 pages. ICE's claims for damages involve a series of complex commercial disputes concerning the quality of services and products, which are both complex and broad and have little, if any, nexus to the crime charged (*id*. at 30 (listing various commercial claims for which ICE now seeks restitution)).

To resolve such a restitution claim, the government pointed out that the district court would be required to "make specific findings on how it calculated the exact dollar amount of the victims' actual losses," which would be particularly important here as the district court would need to determine "any value of services or items received by the victim" and offset them against the restitution order. *Huff*, 609 F.3d at 1248. This would require proceedings akin to a trial that could last weeks (if not months), involve countless witnesses (many of whom would be coming from foreign jurisdictions), numerous experts, and scores of exhibits (many of which would have been in Spanish and highly technical in nature). And in the end, given the facts and circumstances, it is likely the loss amount, if any, would be speculative.[10/] For these reasons, the government demonstrated to the district court that determining the complex issues of fact related to ICE's claimed losses would complicate and prolong the sentencing process to a degree that the need to provide restitution to ICE, assuming *arguendo* that

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[10/] Moreover, the government pointed out to the district court that: (1) Alcatel-Lucent France has already paid the Costa Rican Government $10 million in reparations, which marked the first time in Costa Rica's history that a foreign corporation agreed to pay the government damages for corruption; (2) ICE has a civil case against Alcatel-Lucent France for damages; (3) ICE has already pursued damages through an administrative proceeding in Costa Rica; and (4) ICE is pursuing civil remedies in Florida state court (DE 45 at 28 n.15, 31, Exs. 1-2, 16, 17).

ICE is a victim, is outweighed by the burden on the sentencing process. See 18 U.S.C. § 3663A(c)(3); 18 U.S.C. § 3663(a)(1)(B)(ii); see also *Acker*, 596 F.3d at 372-73 (upholding district court's decision to accept plea agreement with no provision for restitution in rejecting mandamus petition); *Reifler*, 446 F.3d at 127-139 (remanding and recommending application of complexity exception because of difficulty in ascertaining whether victims were actually participants ineligible for restitution).

IV. The Change of Plea and Sentencing Hearing.

On June 1, 2011, the district court held a lengthy, multi-hour hearing at which counsel for ICE and the government addressed ICE's objections to the proposed overall resolution and request for victim status and for restitution. ICE's counsel addressed the district court at length (DE 80 at 17-39). Following this lengthy colloquy, the district court denied ICE's request for victim status, finding, as a factual matter, that ICE was complicit in the criminal conduct, that ICE had nevertheless been accorded victim rights, that ICE's claimed losses were unclear, and that determining ICE's purported losses would unduly complicate or prolong the sentencing process (*id*. at 51-53). Thereafter the district court accepted the guilty pleas of the Defendant Subsidiaries and imposed a sentence in accordance with the proposed overall

resolution (DE 80 at 53-66, DE 77-79). Consistent with the district court's oral ruling, the final written judgment against the Defendant Subsidiaries did not include an award of restitution (*id*. at 53-66, DE 77-79). ICE filed a notice of appeal from the final judgment against the Defendant Subsidiaries and filed an appeal in the case against Defendant Alcatel-Lucent in which a deferred prosecution agreement was executed.[11/]

[11/] The government will be filing motions to dismiss ICE's appeals once the matters are docketed and case numbers are assigned because ICE, as a nonparty, has no right to appeal in these criminal cases. See, *e.g.*, *United States* v. *Monzel*, — F.3d —, 2011 WL 1466365, at *10-*12 (D.C. Cir. 2011) (agreeing with the First and Tenth Circuits that the CVRA does not authorize nonparty crime victims or persons seeking victim status to appeal from the final judgment in a criminal case); see also *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("only parties to a lawsuit * * * may appeal an adverse judgment").

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY AND INDISPUTABLY ERR IN DENYING ICE RESTITUTION.

The CVRA embodies a classic compromise among competing interests. The statute permits crime victims – nonparties to the prosecution – to assert an array of important rights in the prosecution by simply filing a motion in the district court. And, if the victim is dissatisfied, the statute authorizes an unprecedented form of emergency nonparty review in the court of appeals, and requires an unusually prompt decision. In exchange for these extraordinary benefits (and consistent with the rapid review provision), Congress declared that such review should take place under the aegis of an extraordinary procedural mechanism: a petition for a writ of mandamus.

A. The initial question presented by these mandamus petitions is the applicable standard of review. Outside of the CVRA setting, this Court has consistently recognized that a mandamus petitioner is not entitled to this extraordinary remedy absent a clear usurpation of power or abuse of discretion by the district court. See *In re Lopez-Lukis*, 113 F.3d 1187, 1187-1188 (11th Cir. 1997); see also *In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010) (same). A mandamus petitioner, in other words, must show that its "right to issuance of the writ is clear and indisputable." *Lopez-Lukis*, 113 F.3d

at 1187-1188. Because Congress, in enacting the CVRA, authorized nonparty crime victims (or persons seeking victim status) to apply for judicial review by way of a "petition * * * for a writ of mandamus," 18 U.S.C. § 3771(d)(3), it follows that a CVRA mandamus petitioner bears the same burden to show a clear and indisputable error.

ICE disputes this basic proposition. Citing decisions from the Second and Ninth Circuits, ICE argues that this Court should review its petition under "ordinary appellate standards" rather than traditional mandamus standards. Pet. at 8-10.[12/] This Court has not yet decided this question, see *In re Stewart*, — F.3d —, 2011 WL 2023457, *2 (11th Cir. May 25, 2011) ("*Stewart II*"), but this case, like *Stewart II*, does not require its resolution because the result here would be the same under any standard of review. Should the Court reach the issue, however, it should reject the countertextual decisions ICE cites and instead follow the view of the majority of circuits that have considered the issue by enforcing the statutory text as written and apply

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[12/] In claiming that "ordinary appellate review" standards apply, ICE also contends that it is entitled to *de novo* review of its victim status. Pet. at 10-11. For the reasons set forth in this section, ICE is not entitled to *de novo* review of the district court's ruling because it is inherently factbound. Furthermore, ICE's reliance on an unpublished Third Circuit decision is misplaced because that decision is not precedential.

traditional mandamus standards of review. See *United States* v. *Monzel*, — F.3d —, 2011 WL 1466365, *4 (D.C. Cir. Apr. 19, 2011); *In re McNulty*, 597 F.3d 344, 348-349 (6th Cir. 2010); *Acker*, 596 F.3d at 372; *In re Antrobus*, 519 F.3d 1123, 1124-1125 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 393-394 (5th Cir. 2008).

B. The task of construing Section 3771(d)(3) "begins where all such inquiries begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, it is also where the inquiry ends because the operative language is unambiguous. *Id.*; see, *e.g.*, *Arlington Cent. School Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (when the statutory text is unambiguous, "the sole function of the courts * * * is to enforce it according to its terms"). The precedents ICE relies upon run afoul of first principles of interpretation by countertextually interpreting the term mandamus to mean "appeal." In adopting the CVRA's judicial-review provisions, Congress could have authorized nonparty victims (or persons seeking victim status) to seek "immediate appellate review" or "interlocutory appellate review," or something akin to it – but it did not. See *Antrobus*, 519 F.3d at 1124. Instead, it authorized "mandamus" review – a specific form of judicial review that is distinct from ordinary appellate review.

See *id.*; cf. *Will* v. *United States*, 369 U.S. 90, 97 (1967) ("Mandamus * * * may never be employed as a substitute for appeal."). Consistent with the principle that courts must "presume that [the] legislature says in a statute what it means and means in a statute what it says there," *BedRoc, Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004), the majority of the courts of appeals that have considered the issue have correctly concluded that Congress provided for mandamus review, not garden-variety appellate review.

Indeed, Congress was perfectly capable of distinguishing between appellate review and mandamus review when it so desired. Section 3771(d)(4) allows the government, "[i]n any appeal in a criminal case," to assert as error the denial of a victim's rights. The juxtaposition of "mandamus" in Section 3771(d)(3) with the term "appeal" in the very next subsection indicates that Congress made a deliberate choice to authorize victims to seek mandamus review. The fact that Congress "expressly provided for 'mandamus' in Section 3771(d)(3) but ordinary appellate review in Section 3771(d)(4), in other words, invokes "'the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'"

Monzel, 2011 WL 1466365, at *4 (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)); see also *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Furthermore, the highly compressed 72-hour window within which Congress required the courts of appeals to decide mandamus petitions under the CVRA reinforces the conclusion that traditional mandamus standards apply. See *Acker*, 596 F.3d at 372 (plain language of statute and "truncated [review] period" confirm that CVRA mandamus petitions are governed by traditional mandamus standards). It is reasonable for Congress to demand that appellate courts promptly decide whether a district judge has committed a gross legal error redressable on mandamus review, but it is far less reasonable to believe that Congress intended for appellate courts to conduct full-blown appellate review under such a restrictive time frame. See *Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended de novo review in 72 hours of novel and complex legal questions . . . . "); *Acker*, 596 F.3d at 372 (concluding that the application of traditional mandamus

standards is consistent with "the truncated period in which the court of appeals is to review such a petition and act upon it"). That is especially true in cases, such as this, where the issue involves a person or entity's claim that they are a "crime victim" inasmuch as that issue will often turn on factual determinations, rather than a glaring error of law that can be remedied promptly.

Because Section 3771(d)(3) triggers mandamus review, it follows that traditional mandamus standards of review apply. As the *Monzel* court explained, when a statute, like the CVRA, uses a term of art that has an established meaning (*i.e.*, "mandamus"), the judiciary generally presumes, in the absence of evidence to the contrary, that Congress intended to "adopt[] the cluster of ideas that were attached to [it] in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Monzel*, 2011 WL 1466365, at *4 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). As the Supreme Court very recently stated, "where Congress uses a common-law term in a statute, we assume the 'term * * * comes with a common law meaning, absent anything pointing another way.'" *Microsoft Corp.* v. *I4I Limited Partnership*, — U.S. —, 2011 WL 2224428, at *6 (June 9, 2011). Here, as the D.C. Circuit

explained, "[t]hat Congress called for 'mandamus' strongly suggests it wanted 'mandamus,'" *Monzel*, 2011 WL 1466365, at *4, and thus, that Congress intended to incorporate the common-law meaning of that concept. One of the "cluster of ideas" inherent in the concept of mandamus review is that it is a "drastic" remedy "to be invoked only in extraordinary situations," *Allied Chem. Corp.* v. *Diaflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam), and only if the lower court committed a "clear abuse of discretion." *Cheney* v. *U.S. District Court*, 542 U.S. 367, 380 (2004). The CVRA's text does not even speak to the applicable standard of review and, thus, does not displace these principles or compel a different result.

C. Citing *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) ("*Stewart I*"), ICE states that this Court has applied ordinary appellate review to a CVRA mandamus petition. ICE's argument in this regard overlooks the fact that, in *Stewart II*, a recent decision by this Court in the very same case, this Court made clear that *Stewart I* "did not explicitly indicate the standard we used in setting aside the district judge's ruling that petitioners were not CVRA victims." *In re Stewart*, 2011 WL 2023457, *2. In *Stewart II*, the Court, in denying petitioners' mandamus petition, expressly declined to indicate which standard of review was appropriate because "it ma[de] no

difference." *Id*. at *3. But the Court emphasized that, to the extent mandamus standards applied, a CVRA petitioner bore the heavy burden of showing that "the district court abused its discretion," "base[d] its decision on findings of fact that are clearly erroneous," or "misappl[ied] the law to such findings." *Id*.

In any event, the Second and Ninth Circuits' contrary interpretation of Section 3771(d)(3) is not persuasive: it is inconsistent with the text and at odds with first principles of interpretation. Even accepting that the CVRA creates a "unique regime that * * * contemplate[s] routine interlocutory review" of CVRA decisions, *Kenna* v. *U.S. District Court*, 435 F.3d 1011, 1017 (9th Cir. 2005), it does not follow – much less follow "clear[ly]," *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d at 562 – that such review is to be conducted as if this was an ordinary appeal, rather than an extraordinary mandamus action. At bottom, the Second and Ninth Circuits' view is that Congress, despite its deliberate use of the word "mandamus," really intended to create a novel and unprecedented creature that is part mandamus and part appeal. The text does not support that conclusion, let alone compel it.

II. ICE HAS NOT CARRIED ITS BURDEN OF SHOWING THAT IT IS ENTITLED TO MANDAMUS RELIEF.

This Court should deny ICE's petitions for writs of mandamus because the district court did not err at all – much less clearly and indisputably err – in denying ICE request for victim status and hundreds of millions of dollars in speculative restitution for various commercial contract disputes.[13/] Specifically, petitioner contends that the district court "never announced any findings of fact or conclusions of law" and thus "erred when it concluded ICE was not a victim," and that it mistakenly "conclud[ed] the complexity exception would preclude restitution." See Pet. at 7, 11, 25. The record belies these assertions.

First, contrary to ICE, the district court made findings that amply supported its bottom-line determination that ICE is not a victim: "I think there's only one issue that I need to determine and all else flows from there,

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[13/] Even assuming, contrary to the foregoing, that ordinary standards of appellate review applied, the result here would be the same. The question of whether a person is a victim is essentially a mixed question of law and fact: the ultimate question of whether a person is a "victim" is legal conclusion reviewed *de novo* but the subsidiary factual components of that conclusion (including issues of causation) are reviewed under the deferential clear-error standard of review. See *United States* v. *McDaniel*, 631 F.3d 1204, 1207 (11th Cir. 2011); see also *id.* (emphasizing that "factual findings underlying a restitution order" are reviewed "for clear error"); *United States* v. *Valladares*, 544 F.3d 1257, 1269 (11th Cir. 2008) (same).

and that's whether or not ICE * * * would be a victim here. I don't think it is, and I will say why, and I think most of it has been outlined by counsel for the United States but I am going to go through it" (DE 80 at 51-52). The district court went on to explain that the corrupt actions of ICE executives were closely intertwined with those of the defendants: "victim offender status here is so closely intertwined that to try to figure out the behavior of who was the victim and who was the offender would be difficult" (*id*. at 52). The district court then set forth some of the reasons why the behavior of the "quote-unquote victim and the behavior of the defendant here are closely intertwined." Those reasons included "the pervasiveness of the illegal activity, the constancy of the illegal activity and the consistency over a period of years" (*id.*). Furthermore, these factual findings were supported by the detailed recitals and exhibits contained in the government's response to ICE's petition (DE 45 at 6-13), which, as noted, the district court alluded to as having been outlined by the government.

But the district court did not stop there. The court went on to further describe the relationship between ICE and Alcatel-Lucent as essentially that of co-conspirators, especially "given the high-placed nature of the criminal conduct within the organization, the number of people involved, that

basically it was "'Bribery Is Us,' meaning that everybody was involved in it" (DE 80, at 52). This view was consistent with evidence of numerous board members demanding and receiving bribes from the defendants and other companies, as well as the additional evidence concerning the pervasiveness of bribery at ICE (DE 45 at 6-13). ICE's bald assertion that the court made no findings in support of its rejection of its claim for victim status thus is belied by the record.

Second, the district court correctly recognized that, because ICE was not a victim, there was no need for the district court to reach the issue of restitution; but the district court ultimately decided to address the issue of restitution anyway, out of an abundance of caution, in order "to put a nail in this coffin" (DE 80, at 53). As the district court explained, "[m]erely because damages exist, what would be considered restitution, does not mean that restitution flows from it" (*id.*) And the district court went on to find that any attempt to determine the amount of restitution in these cases would result in an overly complex and lengthy sentencing process that might involve "lengthy months of hearings as to what the damages would be, in which country, how would they flow, how would the Court ascertain that . . . [?]" (*id.*) The district court's alternative ruling – that even if ICE was a victim,

restitution would not be appropriate in the circumstances of this case – was correct. Cf. 18 U.S.C. § 3663A(c)(3)(B) (court need not order restitution if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution is outweighed by the burden on the sentencing process"); 18 U.S.C. § 3663(a)(1)(B)(ii) (court may decline to order restitution if it determines that "the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution").

The district court's approach in this regard is consistent with the Sixth Circuit's decision in *Acker*, which upheld a district court's decision to deny restitution where the district court found that determining restitution would be unduly complicated and would unduly prolong the sentencing process. In *Acker*, the petitioners objected that the plea agreement made no provision for restitution in deference to the pending civil suit they had filed. 596 F.3d at 371-372. They sought to vacate the plea agreement, direct the district court to reopen the proceedings, and be permitted to participate as a party to the renegotiation of a plea agreement that would include provisions for restitution. *Id*. at 373. The Sixth Circuit rejected petitioners claims: "Upon

review, we cannot conclude that the district court abused its discretion in accepting the agreement. * * * The district court reasonably concluded that the difficulty of determining the losses claimed would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process." *Id.* The same is true here.

CONCLUSION

The petitions for writs of mandamus should be denied.

Respectfully submitted,

MYTHILI RAMAN
Acting Assistant Attorney General

GREG D. ANDRES
Acting Deputy Assistant Attorney General

/s Michael A. Rotker

By: _____

CHARLES E. DUROSS
Deputy Chief, Fraud Section

ANDREW GENTIN
Trial Attorney, Fraud Section
United States Department of Justice

MICHAEL A. ROTKER
Attorney, Appellate Section

United States Department of Justice
Criminal Division
950 Pennsylvania Avenue, NW
Suite 1264
Washington, D.C. 20530
(202) 514-3308

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed and served on all counsel of record by email on June 17, 2011. I further certify that (1) required privacy redactions have been made; and (2) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s Michael A. Rotker

By: _____

MICHAEL A. ROTKER
Attorney, Appellate Section

United States Department of Justice
Criminal Division
950 Pennsylvania Avenue, NW
Suite 1264
Washington, D.C. 20530
(202) 514-3308