No. 11-12716-G

IN THE

# United States Court of Appeals

FOR THE ELEVENTH CIRCUIT



UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

ALCATEL-LUCENT FRANCE, S.A., f/k/a ALCATEL CIT, S.A.; ALCATEL-LUCENT TRADE INTERNATIONAL, A.G., f/k/a ALCATEL STANDARD, A.G.; ALCATEL CENTROAMERICA, S.A., f/k/a ALCATEL DE COSTA RICA, S.A.,
*Defendants-Appellees,*



INSTITUTO COSTARRICENSE DE ELECTRICIDAD, S.A.,
*Interested Party-Appellant.*

## MOTION TO DISMISS NONPARTY APPELLANT'S APPEAL

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, the United States of America, through undersigned counsel, hereby certifies that the following persons have an interest in the outcome of this case:

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## MOTION TO DISMISS NONPARTY APPELLANT'S APPEAL

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### INTRODUCTION

Appellant Instituto Costarricense de Electricidad, S.A. (ICE) asserted below that it was a victim of the defendants' offense of conviction – conspiring to violate the Foreign Corrupt Practices Act, see *United States* v. *Alcatel-Lucent France, S.A.,* et al., No. 10-cr-20906 (S.D. Fla.)[1/] – and that it

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[1/] The defendants are Alcatel Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (collectively, the "Defendant Subsidiaries").

was entitled to restitution on that basis. The district court saw it differently, finding that ICE was not a victim but instead effectively functioned as an uncharged coconspirator; as a result of those findings, the district court declined to include an order of restitution in the final judgment of conviction. ICE has now filed a notice of appeal from that judgment.[2/]

This is not the first time that ICE has sought judicial review of this judgment and the fact-bound rulings underlying it. Following the entry of the judgment, ICE filed a petition for a writ of mandamus pursuant to the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771(d)(3) (CVRA). This Court recently denied the petition on the merits, holding that the district court had not "clearly err[ed]" in finding that ICE was not a victim and was not entitled to restitution. See *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.) (reprinted in

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[2/] ICE has also filed a notice of appeal from the final judgment entered by the same district court in the criminal case of *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.), docketed No. 11-12802-G (11th Cir.), the parent company of the Defendant Subsidiaries. The government has filed a motion to consolidate these two appeals given that the issues they present are the same; in the meantime, and out of an abundance of caution, we have filed a separate motion to dismiss the appeal in No. 11-12802-G for the reasons stated herein. In addition, we have filed, concurrently herewith, motions to suspend the briefing schedules pending the Court's disposition of our motions to dismiss.

Addendum hereto). ICE has now appealed, seeking a second bite at the proverbial apple, in order to relitigate the very same issues, but this Court lacks jurisdiction to entertain its appeal. 28 U.S.C. § 1291 empowers this Court to review final decisions, but it has long been settled in this Circuit that there is no statutory authorization for a crime victim – a nonparty to the government's criminal prosecution of a defendant – to appeal an unsatisfactory restitution order in a criminal case. See *United States* v. *Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing, for "want of jurisdiction," an appeal by a nonparty crime victim challenging a restitution award because no statute "g[a]ve [the Court] the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding"). *Franklin*'s holding, in turn, reflects a faithful application of the "well settled" rule that "only parties to a lawsuit * * * may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 302 (1988) (per curiam). ICE's nonparty status thus is fatal.

The CVRA does not alter this conclusion. That statute authorizes nonparty crime victims to seek a specific form of judicial review – extraordinary mandamus review – but it does not authorize victims to seek a separate and independent form of judicial review – ordinary appellate

review. On the contrary, the CVRA reserves to "the Government" alone the exclusive ability to assert as error the denial of a victim's rights in "any appeal." 18 U.S.C. § 3771(d)(4). All three courts of appeals that have decided this interpretive question, moreover, have held that the CVRA neither authorizes nonparty crime victim appeals nor displaces the preexisting ban against nonparty crime victims appeals from the final judgment in a criminal case. See *United States* v. *Monzel*, 641 F.3d 528, 2011 WL 1466365, at *10-*11 (D.C. Cir. 2011) (granting government's pre-briefing motion to dismiss nonparty crime victim's appeal); see also *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 54-55 (1st Cir. 2010) (mandamus is exclusive remedy for victims; no right of appeal; *United States* v. *Hunter*, 548 F.3d 1308, 1311 (10th Cir. 2008) (same). And, although Congress has authorized "the Government" and "the defendant" to appeal the sentence in a criminal case, see 18 U.S.C. § 3742(a)-(b), it has not authorized nonparties to appeal the sentence (of which restitution is a part).

For any or all of these reasons, this appeal should be dismissed.

## BACKGROUND

1. The CVRA gives "crime victims," 18 U.S.C. § 3771(a) – *i.e.*, "person[s] directly and proximately harmed as a result of the commission of

a Federal offense," 18 U.S.C. § 3771(e) – eight enumerated rights, one of which is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).[3/] The CVRA contains a "carefully crafted and detailed enforcement scheme," *Monzel*, 2011 WL 1466365, at *11, that allows crime victims and the United States to enforce the victim's rights in different ways.

A crime victim, or the prosecutor on the victim's behalf, see 18 U.S.C. § 3771(d)(1), may assert the victim's rights by filing a motion, which the district court must "take up and decide * * * forthwith." 18 U.S.C. § 3771(d)(3). The CVRA does not authorize non-party crime victims to intervene in a criminal case, and thereby obtain the status of a party. Nor do the Federal Rules of Criminal procedure allow crime victims to unilaterally obtain party status by intervening. See, *e.g.*, *United States* v. *Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007) ("[T]here is no provision in the Federal Rules of Criminal Procedure for intervention by a third party in a

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[3/] The "as provided by law" clause indicates that the CVRA operates as a procedural enforcement vehicle for crime victims to obtain restitution; it does not confer a substantive right to restitution. The substantive right to restitution must be "provided by" some other positive "law," such as the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663 (VWPA), or the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A (MVRA).

criminal proceeding.");[4/] compare Fed. R. Civ. P. 24 (permitting nonparties to intervene in civil cases). The CVRA also provides for judicial review of orders denying a crime victim's motion. It permits "the movant" (*i.e.*, the victim or the government) to "petition the court of appeals for a writ of mandamus," *id.*, and requires that court to "take up and decide" the petition within 72 hours (subject to certain limited exceptions), *id.* But while the CVRA authorizes non-party crime victims (and the government) to seek mandamus review, the statute provides that "[i]n any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the [criminal] proceeding." 18 U.S.C. § 3771(d)(4).

2. a. On December 27, 2010, a criminal information was filed against the Defendant Subsidiaries charging them with conspiracy to violate the anti-bribery, books and records, and internal controls provisions of the FCPA, as amended, 15 U.S.C. § 78dd-1, *et seq.*, all in violation of 18 U.S.C. § 371. The

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[4/] Some courts have allowed nonparty news organizations to intervene in a criminal case for the discrete purpose of litigating issues ancillary to the merits, such as the denial of pretrial access to criminal proceedings. See, *e.g.*, *United States* v. *Hunter*, 548 F.3d 1308, 1314 (10th Cir. 2008) (noting cases); cf. *The News-Journal Corp.* v. *Foxman*, 939 F.2d 1499, 1506 (11th Cir. 1991) (entertaining nonparty media appeal of pretrial order). In the victim's rights arena, however, nonparty victims are seeking to litigate issues after the judgment that bear on the merits of the underlying case.

information alleged that the three entities entered into agreements with business "consultants" who were retained primarily to pay bribes to government officials for assistance in obtaining or retaining contracts, falsely recording such payments in their books and records, and knowingly circumventing internal accounting controls in the process. The charges were based on the conduct of one or more of the Defendant Subsidiaries in Costa Rica, Honduras, Taiwan, and Malaysia.[5/]

On February 22, 2011, the Defendant Subsidiaries entered into signed plea agreements pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The same day, the government filed a deferred prosecution agreement in the case against Defendant Alcatel-Lucent. The proposed overall resolution with Defendant Alcatel-Lucent and the Defendant Subsidiaries included a $92 million criminal penalty, the implementation of an enhanced compliance program, and the retention of an independent compliance monitor to review and ensure the effective

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[5/] The government also filed a criminal information against Defendant Alcatel-Lucent, S.A. ("Alcatel-Lucent"), the parent company of the Defendant Subsidiaries, on December 27, 2010, in *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.). The information charged Defendant Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA, 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

implementation of the enhanced compliance program.

b. The district court consolidated the cases against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent. At a March 9, 2011, status hearing, the court directed the 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. 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. On May 11, 2001, the district court heard further from the government, counsel for ICE, and counsel for Defendant Alcatel-Lucent and Defendant Subsidiaries. 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.

c. On June 1, 2011, the district court heard extensive argument from ICE and the government concerning ICE's objections to the proposed overall resolution and requests for victim status and restitution. The court denied ICE's request for victim status, finding, as a factual matter, that ICE was

complicit in the corruption that gave rise to the FCPA charges at issue:

> I think that given the nature of the corporate conduct in this area, it seems, based upon the findings and the things that have been filed in this case, that the behavior of the victim and the behavior of the quote-unquote victim and the behavior of the defendant here are closely intertwined. I see that from the pervasiveness of the illegal activity, the constancy of the illegally activity and the consistency over a period of years.

Dkt. 80, at 51. The district court further found that, "even though [ICE was] not charged in a conspirator-coconspirator relationship, that's essentially what went on here; that 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. Even though you didn't know specifically, it's enough to say that the principals were involved here." *Id.* at 51-52.[6/] The district court also denied ICE's restitution request because its claimed losses were unclear and that determining complex issues of fact related to the cause or amount of ICE's purported losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to ICE was outweighed by the burden on the sentencing process. *Id.* at 52-53. The district court then accepted the guilty pleas of the

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[6/] Although the district court rejected ICE's claim that it was a crime victim, it noted that the government afforded ICE many of the rights accorded to crime victims. *Id.* at 52.

Defendant Subsidiaries and imposed a sentence in accordance with the proposed overall resolution. *Id.* Consistent with the district court's oral ruling, the final written judgment against the Defendant Subsidiaries did not include an award of restitution. *Id.*

3. ICE filed a CVRA mandamus petition, and on June 17, 2011, this Court denied ICE's petition, holding that "the district court did not clearly err in finding that [ICE] * * * actually functioned as the [Defendant Subsidiaries'] coconspirator," and that the court "did not err in finding that ICE failed to establish that it was directly and proximately harmed by the offenders' criminal conduct." See *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. 2011) (unpub.), pet. for reh'g en banc pending (filed July 7, 2011), *reprinted in* Add. 2, *infra*.

## ARGUMENT

ICE's nonparty status bars it from appealing the final judgment against the defendants. Accordingly, this appeal should be dismissed.[7/]

1. Prior to the CVRA, courts generally interpreted the All Writs Act, 28 U.S.C. § 1651, to bar nonparty crime victims from seeking a writ of mandamus of a ruling in a criminal case adversely affecting their interests. See, *e.g.*, *United States* v. *McVeigh*, 106 F.3d 325, 328-329 (10th Cir. 1997) (dismissing victims' mandamus petition challenging pretrial order prohibiting

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[7/] Although this motion does not concern the merits of ICE's appeal, it bears noting that ICE faces at least two very substantial, if not insuperable, barriers to relief. As an initial matter, this Court's order denying ICE's mandamus petition would be entitled to preclusive effect in this appeal because the order rejected ICE's arguments on the merits, rather than on the basis of the special limitations inherent in mandamus review. See *United States* v. *Dean*, 752 F.2d 535, 541-543 (11th Cir. 1985) (concluding that a merits-based denial of an earlier mandamus petition would be entitled to preclusive effect in a subsequent appeal). And, even if preclusion were not determinative, ICE could not carry its heavy burden of showing that the factual findings underlying the district court's rulings were clearly erroneous, essentially for the reasons given by the mandamus panel. Even though these merits-based arguments provide a sound basis for affirming the judgment, the Court may not bypass the threshold jurisdictional question posed by this appeal. See *McClendon* v. *Georgia Dep't of Community Health*, 261 F.3d 1252, 1258 n.4 (11th Cir. 2001) ("The Supreme Court in [*Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)] rejected the doctrine of 'hypothetical jurisdiction,' a practice previously adopted by this Court whereby we would hypothetically assume jurisdiction over a case and then proceed to dismiss the case on the merits.").

them from attending a trial at which they were expected to testify); see also *Aref* v. *United States*, 452 F.3d 202, 207 (2d Cir. 2006) ("We are aware of no authority authorizing a non-party to petition the Court of Appeals for a writ of mandamus in a criminal case."). The CVRA abrogated this restriction by authorizing crime victims to seek judicial review by way of a "petition * * * for a writ of mandamus." 18 U.S.C. § 3771(d)(3); cf. *Warth* v. *Seldin*, 425 U.S. 490, 513 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). At the same time, Congress, in enacting Section 3771(d)(3), did not disturb (or purport to disturb) the established body of pre-CVRA precedent holding that nonparty crime victims may not appeal the final judgment in a criminal case.[8/]

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[8/] Some courts have recognized limited exceptions to this rule in civil cases in recognition of the fact that such litigation often implicates the pecuniary rights of nonparties. See, *e.g.*, *Devlin* v. *Scardelletti*, 536 U.S. 1, 6 (2002) (nonnamed member of a class action who timely object to a class settlement may appeal the denial of their objections); *SEC* v. *Forex Asset Management, LLC*, 242 F.3d 325, 329 (5th Cir. 2001). "On the issue of non-party appeals," however, "there is an important distinction between civil and criminal cases." *Hunter*, 548 F.3d at 1312. Criminal cases stand on different footing because they place an individual citizen against the sovereign. While nonparties, including crime victims, may have an interest (continued...)

a. The rule barring nonparty appeals has a long and distinguished pedigree. Over a century and half ago, the Supreme Court held that persons who were "strangers to the judgment and proceedings" below were not "proper parties" to seek a writ of error under the statutes then in force "and the principles of the common law." *Bayard* v. *Lombard,* 50 U.S. (9 How.) 530, 551-552 (1850). Later cases interpreted *Bayard* to stand for the proposition that "[o]nly parties, or those who represent them, can appeal." *Ex parte Cutting*, 94 U.S. (4 Otto) 14, 21 (1876); *Ex parte Cockroft*, 104 U.S. (14 Otto) 578, 578-579 (1881). In the early part of the twentieth century, the Court declared *Bayard*'s rule against nonparty appeals "no longer open to discussion." *United States ex rel. Louisiana* v. *Boarman*, 244 U.S. 397, 402 (1917). And, even though *Bayard* and the cases that followed it were civil suits – Congress had not yet authorized direct appeals in criminal cases – the Supreme Court applied the same principles in criminal cases soon after direct appeals were authorized. See *Grant* v. *United States*, 227 U.S. 74, 78-79 (1913) (barring nonparty's attempt to seek a writ of error).

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[8/](...continued)
in some aspects of a criminal case, they do not have a tangible interest in the outcome. See, *e.g.*, *id.* ("*Devlin*, like many of the cases that the [victims] cite, is a civil case."); *Aguirre-Gonzalez*, 597 F.3d at 53-54 (endorsing *Hunter*'s civil-criminal distinction for nonparty appeals).

The issue of nonparty appeals in criminal cases was dormant for many years, but it resurfaced following the enactment of the Victim and Witness Protection Act of 1982. As relevant here, the VWPA authorized district courts to exercise their discretion to award restitution to victims of certain federal offenses. In some cases, the victim – a nonparty to the government's prosecution of the offender – attempted to appeal an unsatisfactory restitution order. In *Franklin*, this Court dismissed a victim's appeal, holding that it lacked jurisdiction over the appeal because no statute authorized a nonparty to appeal from the final judgment in a criminal case. 792 F.2d at 999-1000; see also *United States* v. *Johnson*, 983 F.2d 216 (11th Cir. 1993). Other courts similarly refused to entertain nonparty victim appeals of restitution awards. See *United States* v. *Kelley*, 997 F.2d 806, 807 (10th Cir. 1993); *United States* v. *Grundhoefer*, 916 F.2d 788 (2d Cir. 1990); *United States* v. *Brown*, 744 F.2d 905, 909 (2d Cir. 1984); cf. *United States* v. *United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (victim not entitled to appeal from a criminal judgment seeking mandatory restitution).

b. The CVRA reaffirmed the fundamental premise underlying these decisions by reserving to the government alone the prerogative to "assert as error" the denial of a victim's rights "in any appeal in [the] criminal case."

18 U.S.C. § 3771(d)(4). As the D.C. Circuit recently concluded, "[h]ad Congress intended to allow victims to directly appeal, it seems likely it would have provided them that right under Section 3771(d)(4) just as it provided them mandamus petitions under Section 3771(d)(3)." *Monzel*, 2011 WL 1466365, at *5. In so holding, the D.C. Circuit aligned itself with the First and Tenth Circuits, both of which held that the CVRA's mandamus-review mechanism is the exclusive remedy for crime victims. See *Aguirre-Gonzalez*, 597 F.3d at 54-56; *Hunter*, 548 F.3d at 1312-1313.[9/] Indeed, by authorizing victims and the government to seek mandamus review, but reserving to the government alone the ability to appeal, Congress manifested an appreciation of the differences between the two types of review and the significance of nonparty status. Against that landscape, Congress's decision to permit appellate review by the government implies that it did not intend to permit appellate review by nonparties. Cf. *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

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[9/] In *In re: Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), Judge Jones, the opinion's author, discussed whether nonparty crime victims could appeal in Part II of her opinion, but ultimately did not decide the issue. *Id.* at 194-197. The two other members of the panel declined to join Part II of Judge Jones' opinion because they considered it "advisory." *Id.* at 192 n.1.

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The conclusion that Congress did not intend to permit victims to appeal is further confirmed by the fact that Congress has authorized appeals of the sentence imposed in a criminal case (which includes an order of restitution, see, *e.g., United States* v. *McNair*, 605 F.3d 1152, 1217 (11th Cir. 2010) (defendant challenged "only the restitution part of his sentence")) by "the Government" and "the defendant," but not by the victim. See 18 U.S.C. § 3742(a)-(b). Congress enacted the CVRA two decades after it enacted Section 3742, but it elected not to amend Section 3742 at the same time to expand the categories of persons who may appeal to include nonparty crime victims. That failure is consistent with the conclusion that Congress did not intend to permit nonparties to appeal the sentence reflected in the final judgment in a criminal case.

c. Adjacent provisions in the CVRA confirm that Congress did not disturb (or intend to disturb) the ban on nonparty victim appeals. Most notably, Congress provided that the CVRA should not be construed to "impair the [government's] prosecutorial discretion," 18 U.S.C. § 3771(d)(6), yet a construction of the CVRA that allowed nonparty crime victims to

appeal would have that effect. The conduct of litigation in which the United States is a party is "reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. § 516, and the Attorney General, in turn, has delegated to the Solicitor General the responsibility for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). When, as here, the government has opted not to appeal, a nonparty victim's appeal would interfere with the government's exercise of its prosecutorial discretion in this regard. As the Tenth Circuit has explained, "[i]f individuals were allowed to re-open criminal sentences after all issues have been resolved – including any mandamus petitions by victims – then the government's prosecutorial discretion would be limited. A successful appeal by the [victims] would require a new sentencing hearing that could lead to a new sentence. * * * The government determined what it believed to be the proper sentence for [the defendant], and Section 3771(d)(6) shows that Congress did not intend to allow non-party appeals that could disturb that judgment." *Hunter*, 548 F.3d at 1316. In short, if Congress wants to allow nonparty crime victims to exercise this traditional governmental prerogative, it should be required to speak more clearly than it has in the CVRA. See *Griffin* v. *Oceanic Contractors,*

*Inc.*, 458 U.S. 564, 576 (1982) ("Congress may amend the statute; [courts] may not."). This approach is especially appropriate here, because the rule sought by the victims, which would give them a *de facto* veto power over the government's decision whether to appeal, would jeopardize the important societal interest in the finality of criminal judgments.

2. Some crime victims have argued in other cases that they are entitled to bring a direct appeal notwithstanding their nonparty status and the foregoing legal principles because, prior to the CVRA, the Third and Sixth Circuits had allowed victims to appeal restitution orders. The CVRA, the argument goes, is "pro-victim" remedial legislation and it should not be construed to strip victims (in those circuits at least, but see *Franklin*, 792 F.2d at 999-1000) of their preexisting appellate rights. This argument does not withstand scrutiny.

In *United States* v. *Kones*, 77 F.3d 66 (3d Cir. 1996), the Third Circuit reached the merits of a victim's appeal of an adverse restitution order, but the court did not address the legal significance of the victim's nonparty status; instead, it stated, without analysis, that it had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. *Id.* at 68. Even if this perfunctory and unexplained statement had precedential effect, but see *Steel Co.* v. *Citizens for*

*a Better Environment*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings * * * have no precedential effect."), *Kones* affirmed the district court's order denying restitution anyway. *Id.* at 71. In *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004), the Sixth Circuit concluded that a victim, who was (erroneously) permitted to intervene in a criminal case, see p. 4, *supra*, had standing to appeal an order vacating a judgment lien she had obtained to enforce her restitution award. *Id.* at 522. Even if *Perry* was correct on its own terms, but see *id.* at 539-544 (Gibbons, J., dissenting), it is inapposite here because it was not an appeal of an order awarding restitution but an appeal of an order relating to the enforcement of a restitution order; as such, an order granting the victim relief would not have altered the defendant's sentence, see *Monzel*, 2011 WL 1466365, at *12 (distinguishing *Perry* on this ground). Furthermore, *Perry* involved an intervenor's standing to appeal, not a non-party's standing to appeal, *id.* at 526, 532, and the decision in any case predates *In re Acker*, 596 F.3d 370 (6th Cir. 2010), a post-CVRA decision holding that mandamus is the exclusive remedy for a victim.

There is, of course, a general background presumption that Congress legislates "with knowledge of the law." *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). To the extent this presumption can be

applied to the pre-CVRA body of lower court case law regarding nonparty victim appeals of restitution orders in criminal cases, the most sensible and reasonable application of that presumption would attribute to Congress an intent to adopt the majority rule – which this Court embraced in *Franklin* – barring such appeals. See, *e.g.*, *Monzel*, 2011 WL 1466365, at *12 (dismissing victim's appeal, rejecting *Kones* and *Perry*, and holding that "[t]here was no settled right of appeal for the CVRA to narrow").

## CONCLUSION

This appeal should be dismissed with prejudice.

Respectfully submitted,

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[*/] Assistant Attorney General Lanny A. Breuer is recused.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this document was filed and served on all counsel of record by email on July 8, 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.

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# ADDENDUM

*In re: Instituto Costarricense de Electricidad, S.A.*,
Nos. 11-12707-G & 11-12708-G
(11th Cir. June 17, 2011) (unpub.) (order denying petitions for writs of mandamus)

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**



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No. 11-12707-G

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In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

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No. 11-12708-G

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In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

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On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before: WILSON and MARTIN, Circuit Judges

BY THE COURT:

As an initial matter, the Court, sua sponte, consolidates the petitions for writ of mandamus docketed in case numbers 11-12707 and 11-12708.

Petitioner seeks a writ of mandamus pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3). In reviewing a petition for a writ of mandamus under

§ 3771(d)(3) we must determine "whether the district . . . base[d] its decision on findings of fact that are clearly erroneous . . . [and] if not, [whether] it misappl[ied] the law to such findings." In re Stewart, ---F.3d---, 2011 WL 2023457, at *3 (11th Cir. 2011). "To prevail [under the CVRA], a victim must demonstrate some injury . . . caused by the offender's crime." Id. The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e); see also In re Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008) (explaining that if "criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA").

The district court did not clearly err in finding that "Instituto Costarricense de Electricidad" ("ICE"), here seeking to be deemed a "crime victim," actually functioned as the offenders' coconspirator. The district court identified the pervasive, constant, and consistent illegal conduct conducted by the "principals" (i.e. members of the Board of Directors and management) of ICE, the organization claiming status as a victim under the CVRA. Neither did the district court err in finding that ICE failed to establish that it was directly and proximately harmed by the offenders' criminal conduct. Cf. United States v. Lazarenko, 624 F.3d 1247, 1252 (9th Cir. 2010) ("[A]s a general rule, a participant in a crime cannot recover restitution.").

Petitioner's Petitions for Writ of Mandamus are DENIED. The Motion to Extend the 72 hour deadline established by 18 U.S.C. § 3771(d)(3) is also DENIED.

No. 11-12716-G

IN THE

# United States Court of Appeals

FOR THE ELEVENTH CIRCUIT





UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

ALCATEL-LUCENT FRANCE, S.A., f/k/a ALCATEL CIT, S.A.; ALCATEL-LUCENT TRADE INTERNATIONAL, A.G., f/k/a ALCATEL STANDARD, A.G.; ALCATEL CENTROAMERICA, S.A., f/k/a ALCATEL DE COSTA RICA, S.A.,
*Defendants-Appellees,*

INSTITUTO COSTARRICENSE DE ELECTRICIDAD, S.A.,
*Interested Party-Appellant.*

## MOTION TO DISMISS NONPARTY APPELLANT'S APPEAL

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, the United States of America, through undersigned counsel, hereby certifies that the following persons have an interest in the outcome of this case:

1. Cooke, The Honorable Marcia G.
2. Brombacher, Randolph
3. Govin, James
4. Guerra, George L.
5. Maglich, Jordan
6. Morella, Gianluca
7. Pearlman, Dominique H.
8. Saavedra, Damaso
9. Alcatel Centroamerica, S.A.
10. Alcatel-Lucent, S.A.
11. Alcatel-Lucent Trade International, A.G.
12. Alcatel-Lucent France, S.A.
13. Instituto Costarricense de Electricidad, S.A.
14. Saavedra, Pelosi, Goodwin & Hermann, A.P.A.
15. Wiand Guerra King, P.L.

16. Cassell, Paul G.

17. Gaboury, Mario T.

18. Rotker, Michael A.

19. Duross, Charles E.

20. Gentin, Andrew

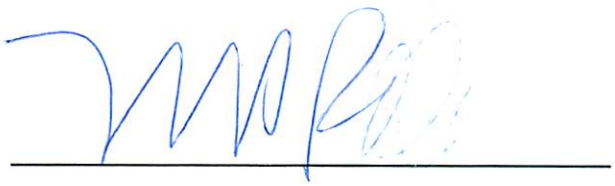
21. Sale, Jon

22. Sale & Weintraub, P.A.

23. Weinstein, Martin

24. Meyer, Robert

25. Willkie Farr & Gallagher LLP



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IN THE

# United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

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No. 11-12716-G

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

ALCATEL-LUCENT FRANCE, S.A., f/k/a ALCATEL CIT, S.A.; ALCATEL-LUCENT TRADE INTERNATIONAL, A.G., f/k/a ALCATEL STANDARD, A.G.; ALCATEL CENTROAMERICA, S.A., f/k/a ALCATEL DE COSTA RICA, S.A., *Defendants-Appellees,*

INSTITUTO COSTARRICENSE DE ELECTRICIDAD, S.A.,
*Interested Party-Appellant.*

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## MOTION TO DISMISS NONPARTY APPELLANT'S APPEAL

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### INTRODUCTION

Appellant Instituto Costarricense de Electricidad, S.A. (ICE) asserted below that it was a victim of the defendants' offense of conviction – conspiring to violate the Foreign Corrupt Practices Act, see *United States* v.

*Alcatel-Lucent France, S.A.*, et al., No. 10-cr-20906 (S.D. Fla.)[1/] – and that it was entitled to restitution on that basis. The district court saw it differently, finding that ICE was not a victim but instead effectively functioned as an uncharged coconspirator; as a result of those findings, the district court declined to include an order of restitution in the final judgment of conviction. ICE has now filed a notice of appeal from that judgment.[2/]

This is not the first time that ICE has sought judicial review of this judgment and the fact-bound rulings underlying it. Following the entry of the judgment, ICE filed a petition for a writ of mandamus pursuant to the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771(d)(3) (CVRA). This Court recently denied the petition on the merits, holding that the district

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[1/] The defendants are Alcatel Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (collectively, the "Defendant Subsidiaries").

[2/] ICE has also filed a notice of appeal from the final judgment entered by the same district court in the criminal case of *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.), docketed No. 11-12802-G (11th Cir.), the parent company of the Defendant Subsidiaries. The government has filed a motion to consolidate these two appeals given that the issues they present are the same; in the meantime, and out of an abundance of caution, we have filed a separate motion to dismiss the appeal in No. 11-12802-G for the reasons stated herein. In addition, we have filed, concurrently herewith, motions to suspend the briefing schedules pending the Court's disposition of our motions to dismiss.

court had not "clearly err[ed]" in finding that ICE was not a victim and was not entitled to restitution. See *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.) (reprinted in Addendum hereto). ICE has now appealed, seeking a second bite at the proverbial apple, in order to relitigate the very same issues, but this Court lacks jurisdiction to entertain its appeal. 28 U.S.C. § 1291 empowers this Court to review final decisions, but it has long been settled in this Circuit that there is no statutory authorization for a crime victim – a nonparty to the government's criminal prosecution of a defendant – to appeal an unsatisfactory restitution order in a criminal case. See *United States* v. *Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing, for "want of jurisdiction," an appeal by a nonparty crime victim challenging a restitution award because no statute "g[a]ve [the Court] the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding"). *Franklin*'s holding, in turn, reflects a faithful application of the "well settled" rule that "only parties to a lawsuit * * * may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 302 (1988) (per curiam). ICE's nonparty status thus is fatal.

The CVRA does not alter this conclusion. That statute authorizes

nonparty crime victims to seek a specific form of judicial review – extraordinary mandamus review – but it does not authorize victims to seek a separate and independent form of judicial review – ordinary appellate review. On the contrary, the CVRA reserves to "the Government" alone the exclusive ability to assert as error the denial of a victim's rights in "any appeal." 18 U.S.C. § 3771(d)(4). All three courts of appeals that have decided this interpretive question, moreover, have held that the CVRA neither authorizes nonparty crime victim appeals nor displaces the preexisting ban against nonparty crime victims appeals from the final judgment in a criminal case. See *United States* v. *Monzel*, 641 F.3d 528, 2011 WL 1466365, at *10-*11 (D.C. Cir. 2011) (granting government's pre-briefing motion to dismiss nonparty crime victim's appeal); see also *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 54-55 (1st Cir. 2010) (mandamus is exclusive remedy for victims; no right of appeal; *United States* v. *Hunter*, 548 F.3d 1308, 1311 (10th Cir. 2008) (same). And, although Congress has authorized "the Government" and "the defendant" to appeal the sentence in a criminal case, see 18 U.S.C. § 3742(a)-(b), it has not authorized nonparties to appeal the sentence (of which restitution is a part).

For any or all of these reasons, this appeal should be dismissed.

## BACKGROUND

1. The CVRA gives "crime victims," 18 U.S.C. § 3771(a) – *i.e.*, "person[s] directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. § 3771(e) – eight enumerated rights, one of which is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).[3/] The CVRA contains a "carefully crafted and detailed enforcement scheme," *Monzel*, 2011 WL 1466365, at *11, that allows crime victims and the United States to enforce the victim's rights in different ways.

A crime victim, or the prosecutor on the victim's behalf, see 18 U.S.C. § 3771(d)(1), may assert the victim's rights by filing a motion, which the district court must "take up and decide * * * forthwith." 18 U.S.C. § 3771(d)(3). The CVRA does not authorize non-party crime victims to intervene in a criminal case, and thereby obtain the status of a party. Nor do the Federal Rules of Criminal procedure allow crime victims to unilaterally obtain party status by intervening. See, *e.g.*, *United States* v.

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[3/] The "as provided by law" clause indicates that the CVRA operates as a procedural enforcement vehicle for crime victims to obtain restitution; it does not confer a substantive right to restitution. The substantive right to restitution must be "provided by" some other positive "law," such as the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663 (VWPA), or the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A (MVRA).

*Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007) ("[T]here is no provision in the Federal Rules of Criminal Procedure for intervention by a third party in a criminal proceeding.");[4/] compare Fed. R. Civ. P. 24 (permitting nonparties to intervene in civil cases). The CVRA also provides for judicial review of orders denying a crime victim's motion. It permits "the movant" (*i.e.*, the victim or the government) to "petition the court of appeals for a writ of mandamus," *id.*, and requires that court to "take up and decide" the petition within 72 hours (subject to certain limited exceptions), *id.* But while the CVRA authorizes non-party crime victims (and the government) to seek mandamus review, the statute provides that "[i]n any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the [criminal] proceeding." 18 U.S.C. § 3771(d)(4).

2. a. On December 27, 2010, a criminal information was filed against the Defendant Subsidiaries charging them with conspiracy to violate the anti-

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[4/] Some courts have allowed nonparty news organizations to intervene in a criminal case for the discrete purpose of litigating issues ancillary to the merits, such as the denial of pretrial access to criminal proceedings. See, *e.g.*, *United States* v. *Hunter*, 548 F.3d 1308, 1314 (10th Cir. 2008) (noting cases); cf. *The News-Journal Corp.* v. *Foxman*, 939 F.2d 1499, 1506 (11th Cir. 1991) (entertaining nonparty media appeal of pretrial order). In the victim's rights arena, however, nonparty victims are seeking to litigate issues after the judgment that bear on the merits of the underlying case.

bribery, books and records, and internal controls provisions of the FCPA, as amended, 15 U.S.C. § 78dd-1, *et seq.*, all in violation of 18 U.S.C. § 371. The information alleged that the three entities entered into agreements with business "consultants" who were retained primarily to pay bribes to government officials for assistance in obtaining or retaining contracts, falsely recording such payments in their books and records, and knowingly circumventing internal accounting controls in the process. The charges were based on the conduct of one or more of the Defendant Subsidiaries in Costa Rica, Honduras, Taiwan, and Malaysia.[5/]

On February 22, 2011, the Defendant Subsidiaries entered into signed plea agreements pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The same day, the government filed a deferred prosecution agreement in the case against Defendant Alcatel-Lucent. The proposed overall resolution with Defendant Alcatel-Lucent and the Defendant Subsidiaries included a $92 million criminal penalty, the

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[5/] The government also filed a criminal information against Defendant Alcatel-Lucent, S.A. ("Alcatel-Lucent"), the parent company of the Defendant Subsidiaries, on December 27, 2010, in *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.). The information charged Defendant Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA, 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

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.

b. The district court consolidated the cases against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent. At a March 9, 2011, status hearing, the court directed the 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. 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. On May 11, 2001, the district court heard further from the government, counsel for ICE, and counsel for Defendant Alcatel-Lucent and Defendant Subsidiaries. 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.

c. On June 1, 2011, the district court heard extensive argument from ICE and the government concerning ICE's objections to the proposed overall

resolution and requests for victim status and restitution. The court denied ICE's request for victim status, finding, as a factual matter, that ICE was complicit in the corruption that gave rise to the FCPA charges at issue:

> I think that given the nature of the corporate conduct in this area, it seems, based upon the findings and the things that have been filed in this case, that the behavior of the victim and the behavior of the quote-unquote victim and the behavior of the defendant here are closely intertwined. I see that from the pervasiveness of the illegal activity, the constancy of the illegally activity and the consistency over a period of years.

Dkt. 80, at 51. The district court further found that, "even though [ICE was] not charged in a conspirator-coconspirator relationship, that's essentially what went on here; that 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. Even though you didn't know specifically, it's enough to say that the principals were involved here." *Id.* at 51-52.[6/] The district court also denied ICE's restitution request because its claimed losses were unclear and that determining complex issues of fact related to the cause or amount of ICE's purported losses would complicate or prolong the sentencing process to a degree that the need to

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[6/] Although the district court rejected ICE's claim that it was a crime victim, it noted that the government afforded ICE many of the rights accorded to crime victims. *Id.* at 52.

provide restitution to ICE was outweighed by the burden on the sentencing process. *Id.* at 52-53. The district court then accepted the guilty pleas of the Defendant Subsidiaries and imposed a sentence in accordance with the proposed overall resolution. *Id.* Consistent with the district court's oral ruling, the final written judgment against the Defendant Subsidiaries did not include an award of restitution. *Id.*

3. ICE filed a CVRA mandamus petition, and on June 17, 2011, this Court denied ICE's petition, holding that "the district court did not clearly err in finding that [ICE] * * * actually functioned as the [Defendant Subsidiaries'] coconspirator," and that the court "did not err in finding that ICE failed to establish that it was directly and proximately harmed by the offenders' criminal conduct." See *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. 2011) (unpub.), pet. for reh'g en banc pending (filed July 7, 2011), *reprinted in* Add. 2, *infra*.

## ARGUMENT

ICE's nonparty status bars it from appealing the final judgment against the defendants. Accordingly, this appeal should be dismissed.[7/]

1. Prior to the CVRA, courts generally interpreted the All Writs Act, 28 U.S.C. § 1651, to bar nonparty crime victims from seeking a writ of mandamus of a ruling in a criminal case adversely affecting their interests. See, *e.g.*, *United States* v. *McVeigh*, 106 F.3d 325, 328-329 (10th Cir. 1997) (dismissing victims' mandamus petition challenging pretrial order

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[7/] Although this motion does not concern the merits of ICE's appeal, it bears noting that ICE faces at least two very substantial, if not insuperable, barriers to relief. As an initial matter, this Court's order denying ICE's mandamus petition would be entitled to preclusive effect in this appeal because the order rejected ICE's arguments on the merits, rather than on the basis of the special limitations inherent in mandamus review. See *United States* v. *Dean*, 752 F.2d 535, 541-543 (11th Cir. 1985) (concluding that a merits-based denial of an earlier mandamus petition would be entitled to preclusive effect in a subsequent appeal). And, even if preclusion were not determinative, ICE could not carry its heavy burden of showing that the factual findings underlying the district court's rulings were clearly erroneous, essentially for the reasons given by the mandamus panel. Even though these merits-based arguments provide a sound basis for affirming the judgment, the Court may not bypass the threshold jurisdictional question posed by this appeal. See *McClendon* v. *Georgia Dep't of Community Health*, 261 F.3d 1252, 1258 n.4 (11th Cir. 2001) ("The Supreme Court in [*Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)] rejected the doctrine of 'hypothetical jurisdiction,' a practice previously adopted by this Court whereby we would hypothetically assume jurisdiction over a case and then proceed to dismiss the case on the merits.").

prohibiting them from attending a trial at which they were expected to testify); see also *Aref* v. *United States*, 452 F.3d 202, 207 (2d Cir. 2006) ("We are aware of no authority authorizing a non-party to petition the Court of Appeals for a writ of mandamus in a criminal case."). The CVRA abrogated this restriction by authorizing crime victims to seek judicial review by way of a "petition * * * for a writ of mandamus." 18 U.S.C. § 3771(d)(3); cf. *Warth* v. *Seldin*, 425 U.S. 490, 513 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). At the same time, Congress, in enacting Section 3771(d)(3), did not disturb (or purport to disturb) the established body of pre-CVRA precedent holding that nonparty crime victims may not appeal the final judgment in a criminal case.[8/]

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[8/] Some courts have recognized limited exceptions to this rule in civil cases in recognition of the fact that such litigation often implicates the pecuniary rights of nonparties. See, *e.g.*, *Devlin* v. *Scardelletti*, 536 U.S. 1, 6 (2002) (nonnamed member of a class action who timely object to a class settlement may appeal the denial of their objections); *SEC* v. *Forex Asset Management, LLC*, 242 F.3d 325, 329 (5th Cir. 2001). "On the issue of non-party appeals," however, "there is an important distinction between civil and criminal cases." *Hunter*, 548 F.3d at 1312. Criminal cases stand on different footing because they place an individual citizen against the sovereign. While nonparties, including crime victims, may have an interest

(continued...)

a. The rule barring nonparty appeals has a long and distinguished pedigree. Over a century and half ago, the Supreme Court held that persons who were "strangers to the judgment and proceedings" below were not "proper parties" to seek a writ of error under the statutes then in force "and the principles of the common law." *Bayard* v. *Lombard,* 50 U.S. (9 How.) 530, 551-552 (1850). Later cases interpreted *Bayard* to stand for the proposition that "[o]nly parties, or those who represent them, can appeal." *Ex parte Cutting*, 94 U.S. (4 Otto) 14, 21 (1876); *Ex parte Cockroft*, 104 U.S. (14 Otto) 578, 578-579 (1881). In the early part of the twentieth century, the Court declared *Bayard*'s rule against nonparty appeals "no longer open to discussion." *United States ex rel. Louisiana* v. *Boarman*, 244 U.S. 397, 402 (1917). And, even though *Bayard* and the cases that followed it were civil suits – Congress had not yet authorized direct appeals in criminal cases – the Supreme Court applied the same principles in criminal cases soon after direct appeals were authorized. See *Grant* v. *United States*, 227 U.S. 74, 78-79 (1913) (barring nonparty's attempt to seek a writ of error).

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[8/](...continued)
in some aspects of a criminal case, they do not have a tangible interest in the outcome. See, *e.g.*, *id.* ("*Devlin*, like many of the cases that the [victims] cite, is a civil case."); *Aguirre-Gonzalez*, 597 F.3d at 53-54 (endorsing *Hunter*'s civil-criminal distinction for nonparty appeals).

The issue of nonparty appeals in criminal cases was dormant for many years, but it resurfaced following the enactment of the Victim and Witness Protection Act of 1982. As relevant here, the VWPA authorized district courts to exercise their discretion to award restitution to victims of certain federal offenses. In some cases, the victim – a nonparty to the government's prosecution of the offender – attempted to appeal an unsatisfactory restitution order. In *Franklin*, this Court dismissed a victim's appeal, holding that it lacked jurisdiction over the appeal because no statute authorized a nonparty to appeal from the final judgment in a criminal case. 792 F.2d at 999-1000; see also *United States* v. *Johnson*, 983 F.2d 216 (11th Cir. 1993). Other courts similarly refused to entertain nonparty victim appeals of restitution awards. See *United States* v. *Kelley*, 997 F.2d 806, 807 (10th Cir. 1993); *United States* v. *Grundhoefer*, 916 F.2d 788 (2d Cir. 1990); *United States* v. *Brown*, 744 F.2d 905, 909 (2d Cir. 1984); cf. *United States* v. *United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (victim not entitled to appeal from a criminal judgment seeking mandatory restitution).

b. The CVRA reaffirmed the fundamental premise underlying these decisions by reserving to the government alone the prerogative to "assert as error" the denial of a victim's rights "in any appeal in [the] criminal case."

18 U.S.C. § 3771(d)(4). As the D.C. Circuit recently concluded, "[h]ad Congress intended to allow victims to directly appeal, it seems likely it would have provided them that right under Section 3771(d)(4) just as it provided them mandamus petitions under Section 3771(d)(3)." *Monzel*, 2011 WL 1466365, at *5. In so holding, the D.C. Circuit aligned itself with the First and Tenth Circuits, both of which held that the CVRA's mandamus-review mechanism is the exclusive remedy for crime victims. See *Aguirre-Gonzalez*, 597 F.3d at 54-56; *Hunter*, 548 F.3d at 1312-1313.[9/] Indeed, by authorizing victims and the government to seek mandamus review, but reserving to the government alone the ability to appeal, Congress manifested an appreciation of the differences between the two types of review and the significance of nonparty status. Against that landscape, Congress's decision to permit appellate review by the government implies that it did not intend to permit appellate review by nonparties. Cf. *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

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[9/] In *In re: Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), Judge Jones, the opinion's author, discussed whether nonparty crime victims could appeal in Part II of her opinion, but ultimately did not decide the issue. *Id.* at 194-197. The two other members of the panel declined to join Part II of Judge Jones' opinion because they considered it "advisory." *Id.* at 192 n.1.

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The conclusion that Congress did not intend to permit victims to appeal is further confirmed by the fact that Congress has authorized appeals of the sentence imposed in a criminal case (which includes an order of restitution, see, *e.g.*, *United States* v. *McNair*, 605 F.3d 1152, 1217 (11th Cir. 2010) (defendant challenged "only the restitution part of his sentence")) by "the Government" and "the defendant," but not by the victim. See 18 U.S.C. § 3742(a)-(b). Congress enacted the CVRA two decades after it enacted Section 3742, but it elected not to amend Section 3742 at the same time to expand the categories of persons who may appeal to include nonparty crime victims. That failure is consistent with the conclusion that Congress did not intend to permit nonparties to appeal the sentence reflected in the final judgment in a criminal case.

c. Adjacent provisions in the CVRA confirm that Congress did not disturb (or intend to disturb) the ban on nonparty victim appeals. Most notably, Congress provided that the CVRA should not be construed to "impair the [government's] prosecutorial discretion," 18 U.S.C. § 3771(d)(6), yet a construction of the CVRA that allowed nonparty crime victims to

appeal would have that effect. The conduct of litigation in which the United States is a party is "reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. § 516, and the Attorney General, in turn, has delegated to the Solicitor General the responsibility for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). When, as here, the government has opted not to appeal, a nonparty victim's appeal would interfere with the government's exercise of its prosecutorial discretion in this regard. As the Tenth Circuit has explained, "[i]f individuals were allowed to re-open criminal sentences after all issues have been resolved – including any mandamus petitions by victims – then the government's prosecutorial discretion would be limited. A successful appeal by the [victims] would require a new sentencing hearing that could lead to a new sentence. * * * The government determined what it believed to be the proper sentence for [the defendant], and Section 3771(d)(6) shows that Congress did not intend to allow non-party appeals that could disturb that judgment." *Hunter*, 548 F.3d at 1316. In short, if Congress wants to allow nonparty crime victims to exercise this traditional governmental prerogative, it should be required to speak more clearly than it has in the CVRA. See *Griffin* v. *Oceanic*

*Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("Congress may amend the statute; [courts] may not."). This approach is especially appropriate here, because the rule sought by the victims, which would give them a *de facto* veto power over the government's decision whether to appeal, would jeopardize the important societal interest in the finality of criminal judgments.

2. Some crime victims have argued in other cases that they are entitled to bring a direct appeal notwithstanding their nonparty status and the foregoing legal principles because, prior to the CVRA, the Third and Sixth Circuits had allowed victims to appeal restitution orders. The CVRA, the argument goes, is "pro-victim" remedial legislation and it should not be construed to strip victims (in those circuits at least, but see *Franklin*, 792 F.2d at 999-1000) of their preexisting appellate rights. This argument does not withstand scrutiny.

In *United States* v. *Kones*, 77 F.3d 66 (3d Cir. 1996), the Third Circuit reached the merits of a victim's appeal of an adverse restitution order, but the court did not address the legal significance of the victim's nonparty status; instead, it stated, without analysis, that it had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. *Id.* at 68. Even if this perfunctory and unexplained statement had precedential effect, but see *Steel Co.* v. *Citizens for*

*a Better Environment*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings * * * have no precedential effect."), *Kones* affirmed the district court's order denying restitution anyway. *Id.* at 71. In *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004), the Sixth Circuit concluded that a victim, who was (erroneously) permitted to intervene in a criminal case, see p. 4, *supra*, had standing to appeal an order vacating a judgment lien she had obtained to enforce her restitution award. *Id.* at 522. Even if *Perry* was correct on its own terms, but see *id.* at 539-544 (Gibbons, J., dissenting), it is inapposite here because it was not an appeal of an order awarding restitution but an appeal of an order relating to the enforcement of a restitution order; as such, an order granting the victim relief would not have altered the defendant's sentence, see *Monzel*, 2011 WL 1466365, at *12 (distinguishing *Perry* on this ground). Furthermore, *Perry* involved an intervenor's standing to appeal, not a non-party's standing to appeal, *id.* at 526, 532, and the decision in any case predates *In re Acker*, 596 F.3d 370 (6th Cir. 2010), a post-CVRA decision holding that mandamus is the exclusive remedy for a victim.

There is, of course, a general background presumption that Congress legislates "with knowledge of the law." *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). To the extent this presumption can be

applied to the pre-CVRA body of lower court case law regarding nonparty victim appeals of restitution orders in criminal cases, the most sensible and reasonable application of that presumption would attribute to Congress an intent to adopt the majority rule – which this Court embraced in *Franklin* – barring such appeals. See, *e.g.*, *Monzel*, 2011 WL 1466365, at *12 (dismissing victim's appeal, rejecting *Kones* and *Perry*, and holding that "[t]here was no settled right of appeal for the CVRA to narrow").

## CONCLUSION

This appeal should be dismissed with prejudice.

Respectfully submitted,

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[*/] Assistant Attorney General Lanny A. Breuer is recused.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was served on July 8, 2011, by first-class mail, postage prepaid, on:

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*United States Department of Justice*

# ADDENDUM

*In re: Instituto Costarricense de Electricidad, S.A.*,
Nos. 11-12707-G & 11-12708-G
(11th Cir. June 17, 2011) (unpub.) (order denying petitions for writs of mandamus)

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**



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No. 11-12707-G

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In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

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No. 11-12708-G

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In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

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On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before: WILSON and MARTIN, Circuit Judges

BY THE COURT:

As an initial matter, the Court, sua sponte, consolidates the petitions for writ of mandamus docketed in case numbers 11-12707 and 11-12708.

Petitioner seeks a writ of mandamus pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3). In reviewing a petition for a writ of mandamus under

§ 3771(d)(3) we must determine "whether the district . . . base[d] its decision on findings of fact that are clearly erroneous . . . [and] if not, [whether] it misappl[ied] the law to such findings." In re Stewart, ---F.3d---, 2011 WL 2023457, at *3 (11th Cir. 2011). "To prevail [under the CVRA], a victim must demonstrate some injury . . . caused by the offender's crime." Id. The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e); see also In re Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008) (explaining that if "criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA").

The district court did not clearly err in finding that "Instituto Costarricense de Electricidad" ("ICE"), here seeking to be deemed a "crime victim," actually functioned as the offenders' coconspirator. The district court identified the pervasive, constant, and consistent illegal conduct conducted by the "principals" (i.e. members of the Board of Directors and management) of ICE, the organization claiming status as a victim under the CVRA. Neither did the district court err in finding that ICE failed to establish that it was directly and proximately harmed by the offenders' criminal conduct. Cf. United States v. Lazarenko, 624 F.3d 1247, 1252 (9th Cir. 2010) ("[A]s a general rule, a participant in a crime cannot recover restitution.").

Petitioner's Petitions for Writ of Mandamus are DENIED. The Motion to Extend the 72 hour deadline established by 18 U.S.C. § 3771(d)(3) is also DENIED.