Case No. 11-12716-GG *consolidated with* 11-12802-GG
Southern District of Florida Docket Nos. 10-CR-20906; 10-CR-20907

IN THE

United States Court Of Appeals

FOR THE ELEVENTH CIRCUIT

INSTITUTO COSTARRICENSE DE ELECTRICIDAD

Appellant.

vs.

UNITED STATES OF AMERICA

ALCATEL-LUCENT, S.A.; ALCATEL-LUCENT FRANCE, S.A.; ALCATEL-LUCENT TRADE INTERNATIONAL, A.G.; ALCATEL CENTROAMERICA, S.A.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES ALCATEL-LUCENT, S.A. *ET AL.*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellees Alcatel-Lucent, S.A., Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A., through undersigned counsel, hereby submit this Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1.

The following are the relevant corporate disclosures:

1. Alcatel-Lucent, S.A., is a publicly-owned company incorporated in France and traded on the Paris Euronext Stock Exchange and as American Depositary Shares on the New York Stock Exchange. Alcatel-Lucent, S.A. has no corporate parent, and no publicly held company owns more than ten percent of its outstanding stock.
2. Alcatel-Lucent France, S.A. is wholly owned by Alcatel-Lucent Participations, which in turn is wholly owned by Alcatel-Lucent, S.A.
3. Alcatel-Lucent Trade International, A.G. is wholly owned by Alcatel-Lucent N.V., which in turn is wholly owned by Alcatel-Lucent Participations, which in turn is wholly owned by Alcatel-Lucent, S.A.

4. Alcatel Centroamerica, S.A. is wholly owned by Alcatel-Lucent Services International B.V., which in turn is wholly owned by Alcatel-Lucent N.V., which in turn is wholly owned by Alcatel-Lucent Participations, which in turn is wholly owned by Alcatel-Lucent, S.A.

The following are the interested persons:

1. Alcatel Centroamerica, S.A.
2. Alcatel-Lucent, S.A. (NYSE: ALU)
3. Alcatel-Lucent N.V.
4. Alcatel-Lucent France, S.A.
5. Alcatel-Lucent Participations
6. Alcatel-Lucent Services International B.V.
7. Alcatel-Lucent Trade International, A.G.
8. Brombacher, Randolph
9. Cassell, Paul G.
10. Cooke, The Honorable Marcia G.
11. Donlon, Katherine C., f/k/a Lake, Katherine C.
12. Duross, Charles E.
13. Gaboury, Mario T.
14. Gentin, Andrew

15. Govin, James

16. Guerra, George L.

17. Heller, Dominique E.

18. Instituto Costarricense de Electricidad

19. Maglich, Jordan D.

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26. Sale, Jon A.

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STATEMENT REGARDING ORAL ARGUMENT

The Alcatel-Lucent Defendants respectfully submit that oral argument is unnecessary. As demonstrated below, this case involves the simple application of well-established legal principles. Should the Court desire oral argument, however, the Alcatel-Lucent Defendants are prepared to argue and to address any questions or concerns raised by the Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

CONGRESSIONAL MATERIAL

I. INTRODUCTION

Instituto Costarricense de Electricidad ("ICE"), a foreign-state-owned utility company, admits that its highest officers solicited and accepted bribes from defendants. Now claiming to be a victim, ICE appeared in the criminal cases below demanding restitution and certain procedural rights afforded to crime victims. The district court denied ICE restitution and victim status, concluding that ICE was a criminal participant rather than a victim and that, alternatively, restitution was not appropriate because determining the amount of restitution would unduly complicate the proceedings. ICE already sought and was denied mandamus relief in this Court, which agreed that ICE is not a victim. ICE now attempts a direct appeal from the conviction and sentence. It raises a new due process claim and again asserts that it is a victim entitled to restitution.

ICE's appeal fails for four reasons. First, there is no appellate jurisdiction because mandamus is a purported crime victim's only recourse for obtaining review of a district court's denial of victim rights; non-party victims cannot appeal directly from criminal judgments. Second, ICE's due process claim lacks merit: ICE was not deprived of "liberty" or "property" and, in any event, received due process. Third, the district court did not clearly err in finding that ICE is not a victim. And fourth, the district court's conclusion that determining restitution would unduly complicate the proceedings was not an abuse of discretion.

II. JURISDICTIONAL STATEMENT

As discussed at length in the Appellees' pending motions to dismiss and responses to the Court's jurisdictional question, and as summarized below in Section VI.A, this Court lacks jurisdiction over these appeals for two reasons. First, Congress established mandamus as a purported victim's only recourse for obtaining review of a district court's decision under the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"). Second, there is no jurisdiction under 28 U.S.C. § 1291 because a non-party victim cannot appeal the sentence entered in a criminal case.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a purported crime victim can pursue a direct appeal where Congress has established mandamus as a victim's only avenue for appellate review and the purported victim has already sought and been denied mandamus relief in this Court.

2. Whether a purported crime victim has "property" interests in obtaining restitution or exercising procedural rights, and if so, whether due process requires that a district court hold an evidentiary hearing before denying such interests.

3. Whether the district court clearly erred in finding that ICE was not entitled to status as a victim where its directors and senior officers solicited and received bribes; and whether the district court plainly erred in making this factual finding without affording ICE the same rights as a criminal defendant.

4. Whether the district court abused its discretion by invoking the complication exception in the federal restitution statutes based on the complexity of the alleged losses, the lengthy and complex history of the criminal conduct, and the purported victim's involvement in the conduct.

IV. STATEMENT OF THE CASE

A. Procedural History

These appeals arise from ICE's efforts to obtain recognition as a victim in two criminal cases brought by the U.S. Department of Justice ("DOJ") against Alcatel-Lucent, S.A., and three of its subsidiaries: Alcatel-Lucent France, S.A.; Alcatel-Lucent Trade International, A.G.; and Alcatel Centroamerica, S.A. (collectively referred to as "the Alcatel-Lucent Defendants"). As outlined in further detail in the Statement of Facts, both cases involve violations of the Foreign Corrupt Practices Act, 15 U.S.C. § 78m(b) ("FCPA"), and are premised on a

variety of conduct in countries throughout the world, including instances of bribery in Costa Rica in which ICE directors and officials accepted payments from the Alcatel-Lucent Defendants in exchange for the award of telecommunications contracts.

1. The Plea Agreements

In December 2010, after over five years of investigation and negotiation, the government and the Alcatel-Lucent Defendants agreed to resolve all criminal charges against the Alcatel-Lucent Defendants pursuant to a global settlement involving a deferred prosecution agreement for the parent corporation (Alcatel-Lucent, S.A.) and guilty pleas by the three Alcatel-Lucent subsidiaries. Plea Agreement/Factual Proffer Statement, *United States v. Alcatel-Lucent, S.A.*, No. 1:10-cr-20907 (S.D. Fla. 2011) (Dkt. 10); Plea Agreement/Factual Proffer Statement, *United States v. Alcatel-Lucent France, S.A.*, No. 1:10-cr-20906 (S.D. Fla. 2011) (V1 Dkt. 10-12).[1] The investigations conducted by the government and

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[1] The district court prepared a record on appeal in the case against the subsidiaries, *Alcatel-Lucent France, S.A.*, No. 1:10-cr-20906, consisting of five volumes of pleadings and transcripts and two folders. In this brief, citations to the record of the case against the subsidiaries include "(V_ Dkt._)" or "(F_ Dkt._)," followed by exhibit, page, or paragraph numbers as necessary. The district court did not prepare a record for the case against the parent corporation. However, as ICE notes, the record in that case is nearly identical to the record in the case against the subsidiaries. Where possible, this brief cites to the record prepared by the district court for *Alcatel-Lucent France, S.A.*

the Alcatel-Lucent Defendants lasted more than five years, spanned 34 countries, and involved conducting over 300 witness interviews and reviewing over 2 million documents.

Pursuant to the settlement agreement, the DOJ filed two parallel criminal cases in the United States District Court for the Southern District of Florida. In the first case, the DOJ and the parent corporation, Alcatel-Lucent, S.A., entered into a deferred prosecution agreement providing for a three-year deferral of prosecution for criminal violations of the books and records and internal controls provisions of the FCPA. Deferred Prosecution Agreement ¶¶ 14-15, *Alcatel-Lucent, S.A.* (Dkt. 10). In the second, the three Alcatel-Lucent subsidiaries pled guilty to conspiracy to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. Plea Agreement/Factual Proffer Statement ¶¶ 1-9, *Alcatel-Lucent France, S.A.* (V1 Dkt. 10-12). The DOJ and the Alcatel-Lucent Defendants have agreed that the facts alleged in both cases are true and accurate. *See, e.g.*, Plea Agreement/Factual Proffer Statement ¶ 11, *Alcatel-Lucent France, S.A.* (V1 Dkt. 10-12).

In determining the fines, penalties, and other remedial measures imposed on the Alcatel-Lucent Defendants, the government considered numerous factors, including the value of the benefits received by the Alcatel-Lucent Defendants as the result of improper conduct, as well as their cooperation. *See* Government's

Mem. in Supp. of Proposed Plea Agreement ("Sentencing Memo") at 10, 21, *Alcatel-Lucent France, S.A.* (F2 Dkt. 44). The government also considered specific actions taken by the Alcatel-Lucent Defendants, including the unprecedented pledge to phase out the use of sales agents and consultants and the $10 million paid to settle civil claims filed by the Costa Rican Attorney General on behalf of the people of Costa Rica. *Id.* ¶¶ 16, 21. After weighing these factors, the DOJ determined that Alcatel-Lucent, S.A. would pay a $92 million criminal fine (which included fines of $500,000 each to be paid by the Alcatel-Lucent Subsidiaries). Plea Agreement/Factual Proffer Statement ¶ 6, *Alcatel-Lucent, S.A.* (Dkt. 10). Alcatel-Lucent, S.A. also agreed to retain a three-year independent corporate compliance monitor. *Id.* ¶¶ 10-13.

The Alcatel-Lucent Defendants' comprehensive settlement with the government also included the resolution of civil claims filed by the U.S. Securities and Exchange Commission ("SEC"). Because the DOJ and SEC share responsibility for the enforcement of the FCPA, the two agencies cooperated closely throughout the investigations, and considered the same set of operative facts. To resolve the civil claims brought by the SEC, the Alcatel-Lucent Defendants agreed to pay $45,372,000 as an equitable remedy of disgorgement and

prejudgment interest. Final Judgment as to Defendant Alcatel-Lucent § V, *SEC v. Alcatel-Lucent, S.A.*, No. 1:10-CV-24620 (S.D. Fla. Dec. 29, 2010) (Dkt. 5).[2]

2. ICE Attempts To Intervene As A "Victim"

In January 2011, after the government and the Alcatel-Lucent Defendants announced the agreements to resolve the charges, ICE petitioned the DOJ for a Victim Identification Number so that ICE could seek restitution pursuant to the CVRA. Initial Br. of Interested Party-Appellant Instituto Costarricense de Electricidad ("ICE Br.") at 2 (filed Dec. 12, 2011). The DOJ denied the request, explaining that it believed ICE was "a participant in the bribery scheme given the number of high-ranking corrupt officials at ICE, rather than a victim." ICE Mot. to Correct Record on Appeal ("ICE Mot. to Correct") at 1 (filed Nov. 10, 2011).

Nevertheless, the DOJ kept ICE apprised of the proceedings in the district court. *See, e.g.*, Government's Response to ICE's Pet. for Victim Status and Restitution ("Gov't Response") at Exs. 3, 8, 10, 12-15, *Alcatel-Lucent France, S.A.* (F2 Dkt. 45) (email correspondence between counsel for government and counsel for ICE concerning ICE's request to be considered a victim); Tr. of Status Conference Held May 11, 2011 Before the Honorable Marcia G. Cooke

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[2] ICE has never objected to the Final Judgment in the SEC's civil case, despite the fact that SEC regulations permit distribution of disgorged funds to aggrieved persons. *See* 17 C.F.R. § 201.1100 *et seq*. As a result, the disgorged funds were sent to the U.S. Treasury. *See* Plaintiff's Motion to Approve Consent Judgment § V, *SEC v. Alcatel Lucent, S.A.* (Dkt. 4).

("5/11/2011 Tr.") at 18:20-19:4, *Alcatel-Lucent France, S.A.* (V4 Dkt. 28) (counsel for government representing that he had "provided to [ICE's counsel] timely, reasonable, and accurate information about every public court proceeding").

At a March 9, 2011 status conference, ICE entered an appearance in the actions and requested that the court recognize its status as a victim. *See* Tr. of Status Conference Held Mar. 9, 2011 Before the Honorable Marcia G. Cooke ("3/9/2011 Tr.") at 21:9-12, *Alcatel-Lucent France, S.A.* (V3 Dkt. 20). ICE argued that it had been "significantly damaged in connection with" the conduct of the Alcatel-Lucent Defendants and was entitled to restitution and other victims' rights. *Id.* at 21:23-24, 18:17-19. After hearing from ICE, the district court noted that "it sounds as if . . . there's some disagreement about who the victim is" and ordered a presentence investigation in which ICE would have the opportunity to make a presentation to the probation office. *Id*. at 19:5-7; 20:1-2.

The district court scheduled a change of plea and sentencing hearing for June 1, 2011. In the interim, ICE made oral and written presentations to the probation office, which prepared a report on its presentence investigation. ICE Mot. to Correct at 7. ICE also filed a petition seeking "rights as a victim of the Alcatel-Lucent Defendants and . . . appropriate sanctions resulting from the [DOJ's] failure to protect those rights," and submitted over 750 pages of exhibits in support of the petition. Pet. for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and

Objection to Plea Agreements and Deferred Prosecution Agreement ("ICE Pet. for Relief") at 1, *Alcatel-Lucent France, S.A.* (F1 Dkt. 22). ICE argued in its petition that it was a victim and that it was entitled to restitution for its damages, which included "money furnished to 'consultants' for bribes, profits of Alcatel-Lucent, overpayment of contracts, defective equipment and services, lost business, services and profits, interest paid[,] remediation expenses[,] and lost opportunity costs." *Id.* at 7 n.10.

Following extensive oral argument at the June 1, 2011 hearing, the district court denied ICE's petition for recognition as a victim and its request for restitution. *See* Tr. of Change of Plea and Sentencing Hearing Held June 1, 2011 Before the Honorable Marcia G. Cooke ("6/1/2011 Tr.") at 17-39, *Alcatel-Lucent France, S.A.* (V5 Dkt. 80). The court held that it would be inappropriate to accord ICE victim status because ICE functioned as a co-conspirator in the bribery. *Id.* at 52-53. The court based its decision on evidence of "the high placed nature of the criminal conduct within the organization" and "the number of people involved, that basically it was 'Bribery Is Us,'" as well as "the pervasiveness of the illegal activity, the constancy of the illegal activity and the consistency over a period of years." *Id.* at 52:12-21.

The court also denied restitution on the independent ground that calculating appropriate restitution to ICE would be overly complex and would unduly prolong

the sentencing process. *Id.* at 53:4-14. The court found that it would not be possible to quantify restitution "accurately, within a reasonable amount of time" because determining the amount of damage caused by the conduct of the Alcatel-Lucent Defendants, as opposed to harm resulting from the actions of its competitors or even ICE itself, could require "lengthy months of hearings as to what the damages would be [and] how would they flow." *Id.* The court based its findings on "the things that have been filed in this case," including the DOJ's criminal informations and the more than 750 pages of briefing and exhibits submitted by ICE. *Id.* at 51:19-52:21.

3. ICE Simultaneously Files A Mandamus Petition And A Direct Appeal

Pursuant to the procedure provided by the CVRA, ICE sought review of the district court's decision by filing a petition for writ of mandamus with this Court in each of the two criminal actions. Petition for Writ of Mandamus Pursuant to the CVRA, *In re ICE*, Nos. 11-12707 & 11-12708 (11th Cir. June 15, 2011) ("*In re ICE*"). On June 17, 2011, this Court denied the mandamus petitions, holding that the "district court did not clearly err in finding that [ICE], here seeking to be deemed a 'crime victim,' actually functioned as the offenders' coconspirator." Order of June 17, 2011 at 2, *In re ICE*. This Court also denied ICE's subsequent petition for rehearing en banc. Order of September 2, 2011 at 2, *In re ICE*.

On November 17, 2011, ICE submitted to the U.S. Supreme Court an application for extension of time to file a petition for a writ of certiorari challenging this Court's mandamus decision. Docket, *ICE v. United States*, No. 11A505 (U.S. 2011). Justice Thomas granted the application on November 29, 2011, extending the time to seek Supreme Court review to January 10, 2012. *Id.* However, as of the time of filing this brief, ICE has not filed a certiorari petition (and has not requested a further extension), making this Court's denial of mandamus relief final. *Id.*

Seeking a second bite at the apple, ICE filed the present direct appeals. The government and Alcatel-Lucent Defendants moved to dismiss the appeals for lack of jurisdiction based on authority establishing that mandamus is a purported victim's only avenue for seeking review of a district court's decision under the CVRA and that a victim cannot appeal a criminal sentence. Government's Mot. to Dismiss Nonparty Appellant's Appeal at 2-3 (filed July 12, 2011); Alcatel-Lucent Defendants' Mot. to Dismiss Due to Lack of Jurisdiction at 7 (filed July 15, 2011). The Clerk of Court subsequently issued the jurisdictional question "[w]hether Instituto Costarricense de Electricidad can appeal the district court's denial of its request to be recognized as a victim and receive restitution under the [CVRA]," to which the government and Alcatel-Lucent Defendants responded along the same lines. Letter filed July 25, 2011 at 3. The Court consolidated the appeals on

October 17, 2011, and the jurisdictional motions were carried with the case. Order of October 17, 2011 at 1.

B. Statement of Facts

ICE is a wholly state-owned telecommunications authority in Costa Rica responsible for awarding and administering public tenders for telecommunications contracts. Information ¶ 13, *Alcatel-Lucent France, S.A.* (V1 Dkt. 1). ICE is governed by a seven-member board of directors (appointed by the President and the Cabinet) that evaluates and approves, on behalf of the Costa Rican government, all bid proposals submitted by telecommunications companies. *Id.* ¶ 13.

The Alcatel-Lucent Defendants conspired to violate the FCPA principally by entering into agreements with business "consultants" who were retained with the intention of paying bribes to foreign government officials for assistance in obtaining or retaining contracts. *See* Plea Agreement/Factual Proffer Statement, Ex. 3 ¶¶ 13-20, 39-53, *Alcatel-Lucent France, S.A.* (V1 Dkt. 12). The plea agreements are based on conduct occurring in several countries, but a substantial part of the case revolves around bribes paid by the Alcatel-Lucent Defendants to ICE in Costa Rica. *Id.*

As discussed in detail in Section VI.C below, corruption at ICE was pervasive at the time of the events in question. *See id.* ¶¶ 48-53 (admitting improper payments to five members of ICE management); Gov't Response at 7-9,

Alcatel-Lucent France, S.A. (V2 Dkt. 45) (naming five ICE officials who accepted bribes). Nearly half of ICE's board members accepted bribes from the Alcatel-Lucent Defendants, as did other ICE officials in high-level management positions. ICE Pet. for Relief ¶ 10 (F1 Dkt. 22) (acknowledging that "a total of five decision-makers affiliated with ICE," including "three Directors and two senior officials," accepted bribes). According to the government's key cooperating witness, ICE was soliciting bribes from the Alcatel-Lucent Defendants and other companies bidding on public contracts. 5/11/2011 Tr. at 22:4-14 (V4 Dkt. 28); Gov't Response at 7-9 & n.4 (V2 Dkt. 45) (proffering interviews of witness Christian Sapsizian stating that ICE officials solicited bribes from Alcatel).

C. Standard of Review

ICE does not dispute that it failed to raise its due process claim before the district court and that the claim is therefore subject to plain error review. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). Plain error review requires "(1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Whether ICE is a victim under the CVRA is a mixed question of law and fact. *See In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (classifying the issue of "whether petitioners are victims of the criminal conduct described in the

information" as "a mixed question of law and fact.").[3] For mixed questions, the Court reviews legal conclusions *de novo* and the underlying factual findings for clear error. *See, e.g.*, *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004); *see also United States v. James*, 564 F.3d 1237, 1242 (10th Cir. 2009) (reviewing district court's application of the MVRA *de novo* and the underlying factual findings for clear error).

The abuse of discretion standard governs the remaining issues in this appeal. The district court's decision to deny ICE restitution due to the complexity involved is reviewed for abuse of discretion. *See United States v. Gupta*, 572 F.3d 878, 887 (11th Cir. 2009) ("We review a decision not to award restitution for abuse of discretion."); *United States v. Gallant*, 537 F.3d 1202, 1252 (10th Cir. 2008)

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[3] The cases cited by ICE do not support its argument that victimhood is "a pure legal issue." ICE Br. at 9 n.7. In *United States v. Brock-Davis,* the Ninth Circuit acknowledged that factual findings supporting restitution decisions are reviewed for clear error, and in fact applied the clear error standard when analyzing the facts underlying the district court's decision regarding victimhood. 504 F.3d 991, 996-99 (9th Cir. 2007). Similarly, in *United States v. de la Fuente*, the Ninth Circuit stated that the district court's application of the MVRA and legal conclusions are reviewed *de novo*, but that "[f]actual findings made in support of th[e] conclusion[s] are reviewed for clear error, including factual findings regarding causation." 353 F.3d 766, 771-72 (9th Cir. 2003). In neither case did the Ninth Circuit state or imply that victimhood is a pure legal issue. But even if victimhood were a pure legal issue in the Ninth Circuit, this Court expressly held in *In re Stewart* that victimhood is "a mixed question of law and fact." 552 F.3d at 1288.

(reviewing district court's application of complexity exception to mandatory restitution under the MVRA for abuse of discretion). Similarly, the district court's acceptance of the parties' plea agreements is reviewed for abuse of discretion. *See United States v. Frye*, 402 F.3d 1123, 1126 (11th Cir. 2005).

V. SUMMARY OF ARGUMENT

This Court lacks appellate jurisdiction. When a district court denies relief under the CVRA, the purported victim may seek review by petitioning the court of appeals for a writ of mandamus. But, as all the circuits to have considered the issue have held, the CVRA does not allow the victim to directly appeal the denial of victim rights. This Court should join its sister circuits and dismiss ICE's appeal. Nor can ICE use the final-order statute, 28 U.S.C. § 1291, to perform an end-run around the CVRA's mandamus-only rule. The law of the circuit is clear that a non-party victim cannot invoke § 1291 to appeal an adverse sentencing decision.

Should the Court break with its sister circuits and exercise jurisdiction over ICE's appeal, it should reject ICE's claims on the merits. The due process claim, which is subject to plain error review, fails for several reasons. First, a victim does not have a "property" interest in restitution; restitution is part of a defendant's criminal sentence and a person cannot have a property interest in another's punishment. Nor does a victim have a property interest in exercising the CVRA's procedural rights; an entitlement to procedure is not a property interest. Moreover,

it is far from obvious that ICE—a foreign state-owned utility company—is a "person" entitled to protection under the Due Process Clause. Finally, ICE was not "deprived" of the CVRA's procedural rights, and it received all the process it was due before being denied restitution.

The district court did not clearly err in finding that ICE was a participant in rather than a victim of the bribery scheme. It is undisputed that ICE's senior officials and directors took bribes, and the district court had before it information indicating that bribery at ICE was rampant. Indeed, in ICE's (unsuccessful) mandamus action, this Court upheld the district court's finding that ICE was not a victim of the bribery. That decision, which applied the clear error standard of review (not the stricter mandamus standard), is the law of the case and should not be revisited. As a non-victim, ICE was not eligible for restitution or the CVRA's procedural guarantees.

The district court's alternative basis for denying restitution—that fashioning a restitution order would unduly complicate and prolong the proceedings—did not amount to an abuse of discretion. Assessing ICE's claimed losses would have required the resolution of complex questions of fact (*e.g.*, whether and to what extent ICE received substandard equipment under the tainted contracts), would have involved questions of foreign law, would have posed intractable questions of

causation, and would have required rejecting the parties' hard-fought plea agreements.

VI. ARGUMENT

A. This Court Lacks Jurisdiction To Hear ICE's Appeal.

As the DOJ and the Alcatel-Lucent Defendants argued in detail in their motions to dismiss the appeals for lack of jurisdiction and in their responses to this Court's jurisdictional question, neither the CVRA nor 28 U.S.C. § 1291 confers jurisdiction over these appeals. *See generally* Mot. to Dismiss Nonparty Appellant's Appeal (July 12, 2011); Mot. to Dismiss Due to Lack of Jurisdiction (July 15, 2011); Response to Jurisdictional Question (July 28, 2011); Response of Alcatel-Lucent Defendants to Jurisdictional Question (Aug. 2, 2011).[4]

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[4] With respect to the case against the parent corporation, *Alcatel-Lucent, S.A.,* the Court also lacks jurisdiction pursuant to 28 U.S.C. § 1291 because no "final judgment" has occurred in the case. The Supreme Court has held that in order for a court of appeals to assert jurisdiction under § 1291, there must be a "final judgment" that "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945). "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt v. United States*, 489 U.S. 794, 799 (1989). In *Alcatel-Lucent, S.A.,* neither conviction nor sentencing has occurred because the parties reached a deferred prosecution agreement. *See* 6/1/2011 Tr. at 57:9-12 (V5 Dkt. 80).

1. Congress Established Mandamus As The Sole Mechanism For Victims To Obtain Review Of CVRA Issues.

The CVRA provides that "[i]f the district court denies the relief sought" pursuant to the statute by a person or entity claiming to be a victim, "the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Every circuit to have considered the issue has held that a purported crime victim may not directly appeal decisions under the CVRA, but rather is limited to the mandamus procedure outlined in § 3771(d)(3). *See United States v. Hunter*, 548 F.3d 1308, 1311, 1315 (10th Cir. 2008) (dismissing a direct appeal challenging the denial of a motion for recognition as a victim under the CVRA because "the CVRA does not provide for victim appeals," but rather "explicitly provides for a single avenue through which individuals may seek appellate review of the district court's application of the statute: mandamus"); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52-55 (1st Cir. 2010) (electing to "join the Tenth Circuit to hold that 'individuals claiming to be victims under the CVRA may not appeal from the alleged denial of their rights under that statute except through a petition for a writ of mandamus'" (quoting *Hunter*, 548 F.3d at 1309)); *United States v. Monzel*, 641 F.3d 528, 540-44 (D.C. Cir. 2011) (agreeing that "mandamus is a crime victim's only recourse for challenging a restitution order" under the CVRA).

ICE ignores this uniform line of decisions, simply contending that jurisdiction exists "because the final orders under review came from the District Court." ICE Br. at 1. But the approach adopted by the First, Tenth, and D.C. Circuits is well-reasoned and firmly rooted in the language of the CVRA and the backdrop of case law existing at the time of the statute's enactment. *See Hunter*, 548 F.3d at 1311-16; *Aguirre-Gonzalez*, 597 F.3d at 52-55; *Monzel*, 641 F.3d at 540-44. Indeed, these precedents were described as "persuasive authority" in the Court's recent order requesting the parties to address the jurisdictional question whether ICE can directly appeal the district court's denial of victim status and restitution. Letter filed July 25, 2011 at 3.

Moreover, consistent with these decisions, this Court has previously dismissed two direct appeals of district court CVRA rulings. *See* Order, *United States v. Coon*, No. 08-16719-GG (11th Cir. July 16, 2009) (dismissing direct appeal sua sponte and holding that "[t]he portion of the district court's order that denied the [claimants'] motion to be recognized as victims" under the CVRA "is not appealable"); Order, *United States v. Coon*, No. 10-12236-E (11th Cir. July 16, 2010) (citing the provision for mandamus review in Section 3771(d)(3) and dismissing appeal "for lack of jurisdiction").

This Court should follow its sister circuits and hold that it has no jurisdiction over ICE's direct appeals because the sole mechanism for a victim to obtain review

of CVRA decisions is a petition for writ of mandamus. ICE has already sought and obtained such mandamus review. ICE's appeals should accordingly be dismissed.

2. Binding Precedent Holds That A Non-Party Cannot Appeal A Criminal Sentence.

Even if the mandamus remedy did not preclude other avenues of appellate review under the CVRA, binding precedent holds that this Court may not exercise jurisdiction under 28 U.S.C. § 1291 to consider a non-party victim's appeal of a criminal sentence. *See United States v. Johnson*, 983 F.2d 216, 221 (11th Cir. 1993) (holding that a defrauded bank lacked standing to appeal an order rescinding a prior order of restitution that had been rendered as part of a defendant's criminal sentence); *United States v. Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (finding "no statute . . . that would give us the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding in the district court").

The Second, Ninth and Tenth Circuits are in accord. *See United States v. Grundhoefer*, 916 F.2d 788, 793-94 (2d Cir. 1990) (no jurisdiction over victim's appeal of order denying restitution under the VWPA); *United States v. Mindel*, 80 F.3d 394 (9th Cir. 1996) (dismissing victim's appeal of order rescinding restitution under the VWPA; victim lacked standing to appeal order or to petition the appellate court for mandamus review); *United States v. Kelley*, 997 F.2d 806 (10th

Cir. 1993) (dismissing victim's appeal of denial of restitution for lack of jurisdiction).

Because 28 U.S.C. § 1291 does not permit a non-party crime victim to maintain a direct appeal of a district court's sentencing decision, ICE's appeals should be dismissed for lack of jurisdiction.[5]

B. ICE's Due Process Claim Is Meritless.

ICE argues for the first time on appeal that the district court violated ICE's rights under the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall be deprived of . . . liberty[] or property[] without due process of law." U.S. Const. amend. V. ICE's due process claim, which is subject to plain error review, fails for three independent reasons. First, a victim's interests in exercising procedural CVRA rights or in obtaining restitution as part of a defendant's sentence are not "property interests" that trigger due process protection. Second, it is not obvious that ICE is a "person" entitled to invoke the Due Process Clause. Third, even if ICE were entitled to due process, the district

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[5] Although the Supreme Court has held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment," the Court has also recognized a narrow exception where a non-named party is "bound by the order from which they [are] seeking to appeal." *Devlin v. Scardelletti*, 536 U.S. 1, 7-8 (2002). Such circumstances recognized by the Court include (i) where a non-party was subject to an adverse contempt order; and (ii) where a non-named member of a class action has failed to intervene in the case below but will be bound by an order approving settlement. *Id.* Neither circumstance applies here.

court did not deny ICE any of the procedural rights listed in the CVRA and provided ICE with due process prior to denial of its request for restitution.

1. ICE Has Not Identified A Cognizable Property Interest.

To prevail on its due process claim, ICE must establish that it was deprived of a property interest. To establish a property interest in a given benefit, a person must show both that a source of law other than the Constitution gives him "a legitimate claim of entitlement" to the benefit, *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972), and that the benefit "constitute[s] a 'property' interest for purposes of the Due Process Clause," *Castle Rock v. Gonzales*, 545 U.S. 748, 766, 125 S. Ct. 2796, 2809 (2005); *O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005). ICE contends that it has "constitutionally protected property interests under the CVRA." ICE Br. at 12.

a) ICE Has No Property Interest In CVRA Procedural Rights.

ICE identifies several participatory rights in the CVRA that it claims are property interests under the Due Process Clause, including: "The right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime . . . of the accused"; "The right to be reasonably heard at any public proceeding in the district court involving . . . pleas [or] sentencing. . . ."; "The reasonable right to confer with the attorney for the Government in the case";

and "The right to be treated with fairness and with respect for the victim's dignity and privacy." ICE Br. at 12-13 (quoting 18 U.S.C. § 3771(a)).

These rights are merely procedural: they provide certain avenues for victims to participate in the criminal process, but guarantee nothing concrete or substantive. *See, e.g.*, *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (characterizing the rights protected under the CVRA as participatory, not substantive). Binding precedent holds that procedural or participatory rights do not qualify as property interests under the Due Process Clause. *Castle Rock*, 545 U.S. at 764, 125 S. Ct. at 2808 ("[A]n entitlement to nothing but procedure . . . can[not] be the basis for a property interest."); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.").[6]

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[6] The procedural rights claimed by ICE also lack the "ascertainable monetary value" required for a constitutionally-protected property interest. *Castle Rock*, 545 U.S. at 766, 125 S. Ct. at 2809; *see also Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993) (no property interest in benefits that lack "measurable economic value"); *see also Crim v. Bd. of Educ.*, 147 F.3d 535, 546-47 (7th Cir. 1998) (right to confer with colleagues at professional meetings, without more, is not a property interest).

Courts have uniformly refused to extend due process protection to victims' procedural rights. In *Dix v. County of Shasta*, for example, the Ninth Circuit held that a California law giving victims the right to notice and the right to be heard at sentencing did not create rights protected by the Due Process Clause. 963 F.2d 1296, 1298-1301 (9th Cir. 1992); *accord Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1994) (victim's rights to notice and to be heard, as protected under Ohio's victim impact law, were not protected interests for due process purposes); *Jackson v. Henderson*, No. 05-0677, 2006 WL 2559713, at *2 (M.D. Tenn. Aug. 31, 2006) ("[Tennessee's] Victim's Bill of Rights does not translate into a due process right under the United States Constitution."); *see also Doe v. Milwaukee Cnty.*, 903 F.2d 499, 503 (7th Cir. 1990) (entitlement to government investigation of possible crime not "property" for due process purposes).

b) ICE Has No Property Interest In Restitution.

ICE also claims that it has a property interest in receiving restitution. ICE Br. at 29-30. It is undisputed that the CVRA does not create an independent right of restitution, but merely affirms the right to restitution "as provided in law." 18 U.S.C. § 3771(a)(6); *see also In re Doe*, 264 F. App'x 260, 262 n.2 (4th Cir. 2007) (noting that the CVRA only "protects the right to receive restitution that is provided for elsewhere"). ICE thus argues that it has a property interest in

receiving restitution under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A ("MVRA"). ICE is wrong for two separate reasons.

First, the MVRA does not apply to this case. In relevant part, the MVRA applies to offenses "against property under [Title 18], . . . including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A). Although an open question in this and every other circuit, *see United States v. McNair*, 605 F.3d 1152, 1221 n.107 (11th Cir. 2010), the Alcatel-Lucent Defendants submit that the offense at issue—conspiracy to violate the FCPA's anti-bribery provision—is not "an offense against property." Indeed, in *United States v. Huff*, which involved convictions for both wire fraud and bribery, this Court made it a point to rely solely on the wire fraud conviction to satisfy the MVRA's "offense against property" requirement. 609 F.3d 1240, 1247 (11th Cir. 2010).[7]

Second, this Court has repeatedly held that restitution is *not* akin to compensatory damages, but is a criminal penalty designed to punish, deter, and rehabilitate. *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) ("[R]estitution under the MVRA is punishment."); *United States v. Logal*, 106 F.3d

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[7] When the MVRA does not apply, restitution is governed by the Victim and Witness Protection Act, 18 U.S.C. § 3663 ("VWPA"). *See* 18 U.S.C. § 3663(a)(1)(A). Restitution under the VWPA is discretionary, and a person cannot have a property interest in a discretionary benefit. *Castle Rock*, 545 U.S. at 756, 125 S. Ct. at 2803.

1547, 1552 (11th Cir. 1997) (restitution is not "compensatory in nature" but is a criminal penalty); *United States v. Hairston*, 888 F.2d 1349, 1355 (11th Cir. 1989) ("Restitution is not a civil matter; it is a criminal penalty meant to have strong deterrent and rehabilitative effect."). The Supreme Court has made clear that a person cannot have a due process property interest in someone else's punishment. *See Castle Rock*, 545 U.S. at 768, 125 S. Ct. at 2810 ("[T]he benefit that a third party may receive from having someone else arrested [and prosecuted] for a crime generally does not trigger protections under the Due Process Clause."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

ICE may argue that the Sixth Circuit's split decision in *United States v. Perry* supports its claim that it has a property interest in restitution. 360 F.3d 519 (6th Cir. 2003). But that is not so. In *Perry*, a victim appealed a district court's vacatur of a judgment lien that had been recorded based on a prior restitution award. The majority held that the victim had standing to appeal, reasoning that the victim had a property interest in the properly-recorded judgment lien. *Id.* at 525-26. But the court took pains to "limit [its holding] to the facts" and suggested that a victim does *not* have "a constitutionally cognizable property interest" in a restitution award until she records a judgment lien. *Id.* at 526, 530-31 & n.9. At

most, *Perry* stands for the principle that the holder of a properly-recorded judgment lien has a property interest in the *lien*, not in the underlying right to restitution. The decision does not help ICE, which did not succeed in obtaining a restitution award—let alone a judgment lien based on the award.

In any event, this Court need not decide whether the CVRA or the MVRA creates property interests in this case. To establish plain error, ICE must identify a binding decision that directly resolves the issue it raises on appeal. *See United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) (per curiam) (holding, with immaterial exceptions, that "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it."). No binding case law holds that a victim's procedural rights are property interests; in fact, the case law addressing the issue is uniformly to the contrary. With respect to restitution, ICE must cite binding case law establishing *both* that the MVRA applies to cases of foreign bribery *and* that restitution under the MVRA is a property interest. Because no such precedent exists (binding or otherwise), ICE has failed to establish that the district court plainly erred with respect to its due process claim.

2. It Is Not Obvious That ICE Is A "Person" Under The Due Process Clause.

ICE has also failed to show plain error because no case law has explicitly resolved whether ICE—as a state-owned Costa Rican utility company—is a

"person" that may invoke the protection of the Due Process Clause. Although this Court extended due process protection to a foreign state-owned corporation in *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 991-92 & n.2 (11th Cir. 1986), that case did not explicitly address the issue whether foreign state-owned corporations are "persons" for due process purposes; rather, in concluding that the Due Process Clause applied to the defendant, *Sea Lift* simply relied on decisions granting due process protection to *privately owned* foreign corporations. *Id.* at 992 n.2 (citing, *e.g.*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868 (1984)).

More recently, the Second and D.C. Circuits have deemed it "far from obvious" that foreign state-owned corporations are entitled to due process protection. *Frontera Res. Azerbaijan Corp. v. State Oil Co.*, 582 F.3d 393, 401 (2d Cir. 2009); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 n* (D.C. Cir. 2005); *see also People's Mojahedin Org. v. Dep't of State*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."). Given the considerable uncertainty on the issue of ICE's status as a Fifth Amendment "person," ICE has failed to establish that the district court committed a clear and obvious mistake. *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993) (to be "plain," the error must be "clear" and "obvious").

3. Even If ICE Were Entitled To Due Process, The District Court Never Violated That Right.

To prevail on its due process challenge, ICE must show that it was actually deprived of a property interest without due process of law. *Daniel v. Williams*, 474 U.S. 327, 330-32, 106 S. Ct. 662, 664-66 (1986). The record shows that ICE received all of the CVRA's procedural rights as well as full due process before its request for restitution was denied.

a) ICE Received The CVRA's Procedural Rights.

As the government painstakingly demonstrated in prior briefing, ICE received all of the CVRA's participatory rights. *See* Gov't Response at 13-21 (V2 Dkt. 45). Namely:

Right to Notice Under CVRA § 3771(a)(2). ICE admitted before the district court that the government attorney "agree[d] to provide [it with] notice of hearings and *he has done that*." 6/1/2011 Tr. at 35:10-17 (V5 Dkt. 80) (emphasis added). The record reflects that ICE received reasonable, accurate, and timely notice of the court proceedings in this case, either via counsel for the government or the district court's electronic filing system. Gov't Response at 13-21 (V2 Dkt. 45) (describing notice provided to ICE); 3/9/2011 Tr. at 20:12-16 (V3 Dkt. 20) (government attorney stating that he "provided [ICE] as a matter of professional courtesy notice of all hearings").

Right to be Heard Under CVRA § 3771(a)(4). ICE received a full opportunity to be heard orally and in writing. ICE was given unlimited time to argue for restitution and victims' rights at three separate hearings. For example, of the 63 pages transcribed during the change of plea and sentencing hearing, 23 pages are devoted to oral argument from ICE's counsel, with the remaining 40 pages shared among the judge, the government, and the Alcatel-Lucent Defendants. *See generally* 6/1/2011 Tr. (V5 Dkt. 80). Moreover, ICE submitted (and the district court considered) over 40 pages of briefing and more than 750 pages of exhibits in support of its request for restitution and CVRA rights. *See* ICE Pet. for Relief, Exs. A-Z (F1 Dkt. 22); 6/1/2011 Tr. at 51:1-52:14 (V5 Dkt. 80) (district court stating that it considered ICE's filings). Finally, ICE admits that the district court permitted it to correspond directly with the probation office and to submit a report to the office concerning victim and restitution issues. ICE Mot. to Correct at 7-8.

Right to Confer Under CVRA § 3771(a)(5). ICE has been afforded the "reasonable right to confer with the attorney for the government in the case." 18 U.S.C. § 3771(a)(5). The record reflects that the government responded to phone calls, emails, and letters from ICE's counsel; provided copies of relevant documents when not available on PACER; engaged in discussion about ICE's claimed victim status; and provided periodic updates about the status of the cases.

See Gov't Response, Exs. 3, 8, 10, 12-15 (F2 Dkt. 45) (email correspondence between government and counsel for ICE concerning ICE's request to be considered a victim); 6/1/2011 Tr. at 11:21-13:20 (V5 Dkt. 80) (government describing interaction with ICE). ICE contends, however, that the government was required to, but did not, confer with it prior to filing charges in December 2010. ICE Br. at 7 & n.5. ICE is wrong on both the facts and the law.

Regarding the facts, email correspondence demonstrates that ICE contacted the government in early September 2010—well before the charges were filed—claiming a right to victim treatment. *See* Gov't Response, Ex. 15 (F2 Dkt. 45) (email from government referring to "[w]hen we spoke at the beginning of September"). Although skeptical, the government invited ICE to submit information and analysis in support of its claim, yet ICE never did so. Gov't Response at 17-18 & n.9 (V2 Dkt. 45); *see also* 5/11/2011 Tr. at 19-20 (V4 Dkt. 28). In fact, ICE did not submit anything to support its claim until it petitioned the district court for victim rights in May 2011. Gov't Response at 18 n.9 (V2 Dkt. 45). Thus, even assuming § 3771(a)(5) gives victims the right to confer before charges are filed, ICE failed to diligently pursue that right and should not now be heard to complain.

As for the law, § 3771(a)(5) does not give victims a right to confer *before* charges are filed. The statute affords victims the right to confer with the

government attorney "in the case," and there is no criminal "case" until charges have been brought. *See Chavez v. Martinez*, 538 U.S. 760, 766, 123 S. Ct. 1994, 2000 (2005) (concluding that a criminal "case" "at the very least requires the initiation of legal proceedings"). The CVRA's right to confer thus does not kick in until charges have been filed. *See In re W.R. Huff Asset Mgmt. Co.*, 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."); *but see In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (per curiam) (stating in dictum that the conferral right attaches before charges are filed).

Right to be Treated with Fairness and Respect Under CVRA § 3771(a)(8). ICE does not, and cannot, argue that it was denied the right "to be treated with fairness and with respect for [its] dignity and privacy." *Id.* Indeed, ICE's counsel admitted to the district court that the government has "always been polite" when conferring with him. 6/1/2011 Tr. at 35:12-13 (V5 Dkt. 80).

b) <u>ICE Received Full Due Process Before Being Denied Restitution</u>.

ICE received all the process that was due before being denied restitution. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965)); *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir.

1994) ("Due process entitles an individual to notice and some form of hearing before state action may finally deprive him or her of a property interest.").

As discussed above, ICE was given notice and afforded a meaningful opportunity to be heard (both orally and in writing) before it was denied restitution. ICE met in person with the probation office and submitted a written report regarding its purported status as a victim. In addition, ICE submitted briefing and exhibits to the district court to support its claim for restitution, and it received unlimited time to argue for restitution at three separate hearings. Due process required nothing more.

ICE does not dispute that the district court complied with 18 U.S.C. § 3664, which sets out the procedures to be followed in making restitution decisions under both the VWPA and MVRA. In *United States v. Satterfield*, this Court held that an earlier but materially identical version of § 3664 comported with the Due Process Clause. 743 F.2d 827, 839-41 (11th Cir. 1984).[8] ICE nevertheless argues that due process required the district court to hold an evidentiary hearing before denying restitution (despite the fact that ICE never requested an evidentiary hearing). But *Satterfield* rejected this contention, holding that § 3664 provides due process even

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[8] When the Court decided *Satterfield*, § 3664 was codified at 18 U.S.C. § 3580. Congress later redesignated it as § 3664. Pub. L. No. 98-473, § 212(a)(1), 98 Stat 1837 (1984).

though it does not require a court to hold an evidentiary hearing to resolve restitution-related factual disputes. *Id.* at 839-40. *Satterfield* explained that a "sentencing procedure is not a trial" and that "courts have . . . prevent[ed] the sentencing hearing from becoming a full-scale evidentiary hearing." *Id.* at 840.

Every other circuit to have considered the issue agrees that due process does not require an evidentiary hearing in these circumstances. *See United States v. Maurer*, 226 F.3d 150, 151-52 (2d Cir. 2000) (per curiam) ("'[T]he district court is not required, by . . . the Due Process Clause[,] to hold a full-blown evidentiary hearing in resolving sentencing disputes' . . . about restitution orders."); *United States v. Rochester*, 898 F.2d 971, 981 (5th Cir. 1990) (same); *United States v. Keith*, 754 F.2d 1388, 1392-93 (9th Cir. 1985); *United States v. Florence*, 741 F.2d 1066, 1068-69 (8th Cir. 1984).[9] The district court's decision not to hold an evidentiary hearing was permissible and certainly did not rise to the level of plain error.

C. The District Court Did Not Clearly Err In Finding That ICE Was Not A Victim Within The Meaning Of The CVRA.

ICE contends that its due process rights were violated "because the District Court adjudicated ICE a 'co-conspirator' when ICE was never . . . afforded the due

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[9] Moreover, *Satterfield* and these other cases involved challenges to restitution orders brought by *defendants*. Thus, the cases in no way support ICE's assertion that a *victim* has a property interest in obtaining restitution.

process protections given to criminal Defendants." ICE Br. at 9. But the record belies the very premise of ICE's claim. The district court did not adjudicate ICE guilty of conspiracy to violate the FCPA—the offense to which the Alcatel-Lucent Defendants pled guilty—or convict ICE of any crime at all. Rather, the district court merely ruled that ICE was not a "victim" under the CVRA because ICE functioned as a participant in the underlying bribery.

The weight of authority establishes that a participant in an offense is not a victim entitled to the benefits afforded by federal victim protection statutes. *See United States v. Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010) (holding that absent extraordinary circumstances, "a participant in a crime cannot recover restitution" under the MVRA); *United States v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008) (indicating that a person claiming victims status is properly denied restitution under the MVRA if his intentions were "*in pari materia* with those of the defendant"); *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) (stating that "any order entered under the MVRA that has the effect of treating coconspirators as 'victims' . . . contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may . . . deal with it *sua sponte*"); *United States v. Weir*, 861 F.2d 542, 546 (9th Cir. 1988) (suggesting that it would be improper to consider a participant in a crime a victim under the VWPA).

ICE fails to identify a single case supporting the claim—raised for the first time on appeal—that its rights were violated because it was not charged with conspiracy and accorded the procedural safeguards to which a criminal defendant is entitled before the district court determined that it was a participant rather than a victim of the underlying crime. In fact, the only court to specifically address the issue explicitly rejected the claim that formal prosecution is a necessary prerequisite for using criminal participation as a ground for denying victim status. *United States v. Lazar*, 770 F. Supp. 2d 447, 452 (D. Mass. 2011) (holding that a "conspirator who participates in a fraudulent scheme with the same criminal intent as his or her coconspirators" is not a victim entitled to restitution, "whether or not the conspirator is formally charged as a defendant.").

Neither this Court nor the Supreme Court has ever declared it improper for an uncharged individual to be viewed as a participant in the crime for the limited purpose of assessing his status as a victim. In the absence of such binding precedent, the district court did not plainly err in concluding that ICE was a co-conspirator rather than a victim under the CVRA without treating ICE as a criminal defendant. *See United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) ("[W]here neither the Supreme Court nor this Court has ever resolved an issue . . . there can be no plain error in regard to that issue."); *United States v. Humphrey*,

164 F.3d 585, 588 (11th Cir. 1999) ("A plain error is an error that is 'obvious' and is 'clear under current law.'").

That ICE was not prosecuted as a co-conspirator in no way indicates that there was insufficient evidence to support a finding that ICE participated in the bribery. The district court was fully aware that, due to the limitations of the FCPA, the government lacked the power to charge ICE with any crime—regardless of the strength of the evidence. *See United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (concluding that Congress intended to "exempt foreign officials from prosecution for receiving bribes"); 5/11/2011 Tr. at 28:14-18 (V4 Dkt. 28) ("By the way, the Foreign Corrupt Practices Act does not permit us to charge [ICE] officials."); Gov't Response at 7 & n.2 (V2 Dkt. 45) (noting that "ICE officials and ICE itself could not be charged with extortion or bribery" under the FCPA).

Contrary to ICE's arguments on appeal, the evidence in the record was sufficient to support the district court's factual finding that ICE functioned as a coconspirator. Indeed, a panel of this Court already reached the merits of this issue and concluded that the district court did not clearly err in finding that ICE was a participant given the evidence before it. In denying ICE's petition for mandamus, the Court held that, given the "pervasive, constant, and consistent illegal conduct conducted by the 'principals' (i.e. members of the Board of Directors and management) of ICE," the district court "did not clearly err in finding that [ICE]

. . . actually functioned as the offenders' coconspirator." Order of June 17, 2011 at 2, *In re ICE*. The Court's previous ruling, on which ICE did not seek certiorari, *see* Docket, *ICE v. United States*, No. 11A505 (U.S. 2011), establishes the law of the case and is binding in this appeal. *See United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) ("The law of the case doctrine bars relitigation of issues that were decided either explicitly or by necessary implication, in an earlier appeal of the same case."); *Alphamed, Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1285-86 (11th Cir. 2004) ("Under the law of the case doctrine, both district courts and appellate courts are generally bound by a prior appellate decision in the same case."); *Klay v. Pacificare Health Sys., Inc.*, 389 F.3d 1191, 1199 (11th Cir. 2004) ("failure to seek . . . certiorari with respect to these issues caused our previous ruling to become law of the case.").[10]

This Court was correct in holding that the record supports the district court's finding that ICE participated in the bribery. It is undisputed that numerous high-level officials at ICE—including nearly half of ICE's board of directors—accepted bribes from the Alcatel-Lucent Defendants. Plea Agreement/Factual Proffer

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[10] A decision denying a writ of mandamus establishes the law of the case in a related appeal unless the denial was based on the "special limitations inherent in the writ." *United States v. Dean*, 752 F.2d 535, 542 (11th Cir. 1985). In analyzing the victim issue, this Court's mandamus decision expressly applied the ordinary clear error standard of review (not the stricter mandamus standard), thus establishing the law of the case.

Statement, Ex. 3 ¶¶ 16, 45-50 (V1 Dkt. 12) (admitting improper payments to five ICE directors and members of management); Gov't Response at 7-9 (V2 Dkt. 45) (naming the five ICE officials who accepted bribes); ICE Pet. for Relief ¶ 10 (F1 Dkt. 22) (acknowledging that "a total of five decision-makers affiliated with ICE," including "three Directors and two senior officials," accepted bribes). The government proffered testimony from its key cooperating witness establishing that the bribes were in fact solicited by the ICE officials themselves. Gov't Response at 7-9 & n.4 (V2 Dkt. 45) (proffering interviews of witness Christian Sapsizian stating that ICE officials solicited bribes from Alcatel). This testimony further indicated that the solicitation of bribes dated back more than two decades and involved not just Alcatel, but also its competitors in the telecommunications industry. *Id.* (describing Sapsizian's testimony that ICE officials sought improper payments from Alcatel and other suppliers starting in the early 1980s); *see also* 5/11/2011 Tr. at 22:4-11 (V4 Dkt. 28) (same); 6/1/2011 Tr. at 6:24-7:6, 8:15-21 (V5 Dkt. 80) (same).

The government also proffered evidence corroborating this testimony that it received from Costa Rican law enforcement authorities pursuant to international treaty. 5/11/2011 Tr. at 22:19-23:20 (V4 Dkt. 28) (explaining that, through Mutual Legal Assistance Treaties, the government exchanged information and evidence with "multiple law enforcement agencies across the world, including Costa Rica");

6/1/2011 Tr. at 42:13-23 (V5 Dkt. 80) (proffering government's request to Costa Rican authorities pursuant to the treaty and "significant amounts of records" received pursuant to that request). For example, the government obtained a statement from one of the ICE directors who accepted bribes from the Alcatel-Lucent Defendants explaining the culture of bribery that had developed within ICE. Gov't Response at 11-12 (V2 Dkt. 45) (describing testimony of former ICE director Jose Antonio Lobo).

Given the evidence of pervasive and long-term corruption existing throughout the tender process at ICE, involving not just low-level rogue employees but also the very individuals responsible for the control and management of the company, the district court did not clearly err in concluding that ICE as an organization participated in the bribery for which the Alcatel-Lucent Defendants were charged. *See, e.g.*, *Local 1814 Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984) (holding that union was properly found responsible for actions of its highest officers in accepting kickbacks).

D. The District Court Did Not Abuse Its Discretion In Denying ICE's Request for Restitution Because An Order Of Restitution Would Unduly Complicate And Prolong The Proceedings.

ICE claims that the district court erred as a matter of law in denying its request for restitution. ICE Br. at 29-30. But ICE ignores the fact that both the MVRA and the VWPA explicitly grant district courts discretion to decline

restitution where fashioning an order of restitution would unduly complicate the sentencing proceedings. *See* 18 U.S.C. § 3663(a)(1)(B)(ii) (VWPA provision stating that "[t]o the extent that the court 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 to any victims, the court may decline to make such an order"); *id.* § 3663A(c)(3)(B) (MVRA provision stating that mandatory restitution is inapplicable where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to the degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process").[11] As the legislative history of the VWPA makes clear, the complication exception was "added . . . to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages owed the victim." S. Rep. No. 97-532, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2537.

Courts have routinely declined to order restitution where determining the amount or cause of damages would be unduly burdensome. *See United States v.*

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[11] ICE asserts without explanation that the MVRA—and not the VWPA—applies in this case. ICE Br. at 29. As explained in Section VI(B)(1)(b), however, this Court should hold that the VWPA applies to this case and that restitution would therefore be discretionary.

Kones, 77 F.3d 66, 71 (3d Cir. 1996) (upholding district court's denial of restitution where proceedings to determine restitution would "unduly burden" the sentencing court by requiring the parties to "fully litigat[e] a tangentially related" claim for damages); *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir. 1985) (upholding denial of restitution where restitution would require calculation of an individual's future lost earnings).

In keeping with these principles, the district court held that even if ICE were a victim, fashioning a restitution order would unduly complicate and prolong the sentencing proceedings. The district court found that it could not determine damages "accurately, within a reasonable amount of time, and by that I don't mean lengthy months of hearings as to what the damages would be." 6/1/2011 Tr. at 53:4-14 (V5 Dkt. 80). The court weighed the difficulty of assessing damages against the (nonexistent) need for restitution, stating that "even though the Foreign Corrupt Practices Act might allow it in other cases for which restitution can be allowed, there's no victim that was damaged here in the sense that something needs to be restored or made whole." *Id.*

As discussed below, the district court did not abuse its discretion in denying restitution on the ground that a restitution order would unduly complicate the proceedings because, as the district court recognized, (1) fashioning an order would raise numerous complex issues of causation, damages, and foreign law, and

(2) a restitution order would have necessitated the rejection of the parties' plea agreement pursuant to Rule 11(c)(1)(C).

1. The Record Reflects That Calculating Restitution Would Raise Numerous Complex Issues Of Causation, Damages, And Foreign Law Better Suited To A Civil Trial.

ICE admits that if restitution is allowed, it will pursue nine different categories of restitution relating to "Alcatel's failure to meet the contract requirements." ICE Br. at 29; *id.*, Ex. A at 2. ICE's claimed damages include alleged costs related to undelivered equipment; professional fees; advertising and public relations; rate reductions; fines incurred for non-fulfillment; and other damages. ICE Br. at 29; *id.*, Ex. A at 2. Assessing ICE's claims would require the district court to hold the equivalent of a civil trial in which the parties submitted and contested evidence on a multitude of issues such as profits, costs, the value of equipment provided, the value of competing bids, and comparisons to other available equipment. This would require extensive discovery, expert testimony, and a prolonged hearing in order to reconstruct the relevant contract tenders, some of which occurred over a decade ago. And given the international scope of the alleged misconduct and the Costa Rican, French and Swiss nationalities of the Alcatel-Lucent Defendants, foreign discovery and expertise would also be required. The complicated nature of ICE's claims is highlighted by the fact that ICE submitted over 750 pages of exhibits and over forty pages of briefing in

support of its initial petition alone. *See* ICE Pet. for Relief, Exs. A-Z (F1 Dkt. 22); Mem. in Support of Pet. for Relief (F1 Dkt. 22). Courts have declined to order restitution under far less complex and time-consuming circumstances. *See, e.g.*, *Fountain*, 768 F.2d at 801-02 (upholding district court's refusal to order restitution where claimed damages would require "a complex calculation of future lost earnings" and were "quintessentially civil").

ICE previously asserted nearly identical restitution claims in a Costa Rican court, and the resulting litigation took years to resolve. *See* Gov't Response, Ex. 16 at 4 (F2 Dkt. 45) (affidavit of Costa Rican legal expert Ruben Hernandez Valle describing similarity between ICE's Costa Rican claims and the present restitution claims); Gov't Opp'n to Pet. for Mandamus at 15, *In re ICE* (stating that Costa Rican proceedings were pending for more than six years, involved more than 60 witnesses, and resulted in findings of fact and conclusions of law that exceeded 2,000 pages). ICE pursued restitution in Costa Rica in the same manner as in the present cases, by asserting a claim for restitution in connection with a related criminal prosecution. Gov't Response, Ex. 16 at 4-6 (F2 Dkt. 45) (Valle affidavit describing ICE's claim for "moral damages" and "material damages" in conjunction with Costa Rican criminal proceeding). Following a year-long trial, the Costa Rican tribunal held that ICE had failed to show its claimed damages. Alcatel's Opp'n to Pet. for Relief, Ex. 2 at 2-3 (F2 Dkt. 42) (decision of Costa

Rican tribunal denying ICE's claim for civil damages made in conjunction with criminal proceedings in Costa Rica). Faced with nearly identical restitution claims, and without the benefit of a lengthy trial, the district court did not abuse its discretion in declining ICE's request for damages.

ICE argues that restitution "requires no time or analysis" because the district court could simply award ICE the value of the bribes. ICE Br. at 29-30. But, as discussed above, ICE admits that the value of the bribes is only "the floor on restitution" and that it ultimately seeks nine categories of damages stemming from alleged breaches of contract. ICE Br. at 29-30; *id.*, Ex. A at 2. In addition, ICE's proposed shortcut for measuring the amount of restitution would only work if ICE could establish that the Alcatel-Lucent Defendants' bribes directly caused the contract prices to increase by the amount of the bribes. This assumption is unwarranted because, as discussed above in Section VI(C), the entire tender process was corrupted and ICE solicited and accepted bribes from multiple competitors. Determining the effect of Alcatel's bribes on the contract prices ultimately paid by ICE would require the court to consider extensive evidence not only of the conduct of the Alcatel-Lucent Defendants, but also of its competitors and ICE itself.

Nor do the cases cited by ICE establish that it is entitled to restitution in the amount of the bribes "as a matter of law." ICE Br. at 8 n.6, 29. Rather, the cases

stand for the proposition that the amount of a bribe may serve as a proxy for damages where the circumstances indicate that the victim suffered direct harm in the approximate amount of the bribe. In *United States v. McNair*, this Court upheld a restitution order that required the defendant, a county commissioner who was convicted of accepting bribes from contractors, to pay restitution to the county in the amount of the bribe. 605 F.3d at 1218-20. Following a 12-day trial, the district court found that the contractors who paid the bribes had overcharged the county "not necessarily in the awarding of those contracts in the first instance, but, rather, . . . through agreements . . . due to change orders, and things of that nature." *Id.* at 1219. This Court held that the district court did not clearly err in finding that the contractors overcharged the county during the course of the contractual relationship based on facts established during trial. *Id.* at 1220-22. Here, in contrast, the district court did not have the benefit of a lengthy trial and would need to take additional evidence in order to determine whether the bribes accurately reflect ICE's alleged damages. And as described above, the facts of the present case are far more complex than those in *McNair*, and the resulting restitution proceedings would consume considerable resources of the district court and the parties.[12]

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[12] The two remaining cases cited by ICE, *United States v. Gamma Tech* and *United States v. Gaytan*, are inapposite to the present case. Both cases

In enacting the VWPA, Congress expected that any "entitlement to restitution could be readily determined by the sentencing judge based upon the evidence he had heard during the trial of the criminal case or learned in the course of determining whether to accept a plea." *Kones*, 77 F.3d at 69 (citing S. Rep. 97-532, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 2536-37). By contrast, the restitution ICE seeks would require the equivalent of a civil trial to resolve complex issues of causation regarding the effect of the bribes paid by the Alcatel-Lucent Defendants and the quality of the products and services delivered by the Alcatel-Lucent Defendants. ICE Br. at 29-30; *id.*, Ex. A at 2. The district court was well within its discretion to decline ICE's request for a prolonged inquiry, which would have resulted in the exact scenario that Congress sought to avoid: a "prolonged and complicated trial[] on the question of damages." S. Rep. No. 97-532, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 2537.

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involve restitution orders requiring an employee who accepted bribes to pay the amount of the bribe to his employer. *See United States v. Gamma Tech Indus.*, 265 F.3d 917, 928-29 (9th Cir. 2001); *United States v. Gaytan*, 342 F.3d 1010, 1012 n.3 (9th Cir. 2003). And both cases rely on the same provision of the California Labor Code that provides that "[e]verything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully." *Gamma Tech,* 265 F.3d at 929; *Gaytan*, 342 F.3d at 1012 n.3. Although *Gamma Tech* and *Gayton* might be relevant to a claim by ICE against its former employees, they are not relevant to the present case.

2. Restitution Would Invalidate Plea Agreements That Took Years To Fashion.

ICE admits that a restitution order "would likely have invalidated the Rule 11(C)(1)(c) [sic] plea agreements altogether." ICE Br. at 18. Under Rule 11(c)(1)(C), the parties may "agree that a specific sentence . . . is the appropriate disposition of the case," and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). As a result, the district court could not accept the Rule 11(c)(1)(C) pleas and then order restitution not authorized by the agreements. *See United States v. BP Prods. N. Am., Inc.,* 610 F. Supp. 2d 655, 724 n.49 (S.D. Tex. 2009) (accepting a Rule 11(c)(1)(C) plea agreement that did not provide for restitution and noting that, although restitution is available for the crimes at issue, "the terms of the plea agreement, which this court cannot alter, but only accept or reject, do not provide for . . . restitution").

Rejecting the Plea Agreements, which were the result of a five-year investigation and a lengthy negotiation process, would have landed the parties back at square one, unduly complicating and prolonging the sentencing process. In light of the efforts expended by the parties in reaching a global resolution, and the fact that rejection of the Plea Agreements would impose an extraordinary burden on the sentencing process, the district court acted well within its discretion in accepting the Plea Agreements as written.

E. The Interests Of Justice And Finality Favor Affirming The Plea Agreements.

ICE contends that the district court's acceptance of the plea agreements and deferred prosecution agreement "seriously affected the fairness, integrity, and public reputation of judicial proceedings." ICE Br. at 30. On the contrary, the proposed settlement is a just resolution of the charges, is in accordance with the law, and is consistent with the U.S. Sentencing Guideline and the Principles of Federal Prosecution of Business Organizations set forth in the U.S. Attorneys' Manual.

As discussed above, the parties reached the settlement agreement after extended investigations and negotiations, a full analysis of the facts and circumstances, and a comprehensive review of the aggravating and mitigating factors. The agreed-upon resolution includes:

- A total criminal fine of $92 million—one of the largest fines ever for a violation of the FCPA—with $90.5 million to be paid by the parent company Alcatel-Lucent, S.A., and $500,000 each to be paid by the three subsidiaries.

- Guilty pleas by each of the subsidiaries to conspiracy to violate the FCPA's anti-bribery, books and records, and internal controls provisions.

- A three-year deferred prosecution agreement under which Alcatel-Lucent, S.A. is charged with violations of the books and records and

internal controls provisions of the FCPA.

- A continuing obligation to provide full, complete, and truthful cooperation to the DOJ, SEC, and other domestic and foreign law enforcement agencies.

- The imposition of a corporate compliance monitor. The monitor's term will be three years, during which the monitor will conduct a review of Alcatel-Lucent's FCPA policies, procedures, and compliance, and will prepare periodic reports on his reviews to be furnished to the French Ministry of Justice and, ultimately, to the DOJ and SEC.

- The implementation of numerous other remedial measures—some of which have been adopted at Defendants' own initiative. Most notably, Alcatel-Lucent, S.A. voluntarily phased out the use of sales agents and consultants at substantial cost to the company. The DOJ has acknowledged that this commitment is an unprecedented remedial action.

- Finally, a related resolution with the SEC, under which the company is enjoined from any further violations of the FCPA and has paid disgorgement of illicit profits and prejudgment interest totaling $45.4 million.

See Deferred Prosecution Agreement, *Alcatel-Lucent, S.A.* (Dkt. 10); Plea Agreement/Factual Proffer Statement, *Alcatel-Lucent France, S.A.* (V1 Dkt. 10-12).

In addition to the above terms, virtually all of the individuals who were substantially involved in prior misconduct either are no longer employed by the companies or have been disciplined. The disciplinary actions taken by the companies resulted in significant management changes in a number of countries worldwide. When considered as a whole, and in the context of Alcatel's voluntary remedial measures, the proposed settlement is in the interest of justice and should be affirmed.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

March 5, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because the brief, excluding exempted sections, contains 11,130 words. This brief was prepared using Microsoft Word in Times New Roman 14-pt font.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, a true and correct copy of the foregoing brief in case numbers 11-12716 and 11-12802 was served via Electronic Mail and U.S. Mail postage prepaid on all counsel or parties of record on the Service List below.

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