

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Case No. 11-12716-DD *consolidated with* Case No. 11-12802-DD

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

ALCATEL-LUCENT, S.A., etc., *et al.*,

Defendants-Appellees.

INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Interested Party-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

REPLY BRIEF OF INTERESTED PARTY-APPELLANT
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I. REPLY

Plaintiff-Appellee Department of Justice (“**DOJ**”) and Defendant-Appellees Alcatel-Lucent, S.A., Alcatel-Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (Plaintiff-Appellee and Defendant-Appellees are collectively referred to as “**Appellees**”) raise two primary arguments in their answer briefs: (1) they contest this Court’s jurisdiction over the appeal; and (2) they contend Interested Party-Appellant Instituto Costarricense de Electricidad (“**ICE**”) cannot establish the United States District Court for the Southern District of Florida (“**District Court**”) committed plain error when it denied ICE victim status and, consequently, the substantive rights guaranteed by the Crime Victims Rights Act (“**CVRA**”), 18 U.S.C. § 3771, including the right to mandatory restitution under the Mandatory Victims Rights Act (“**MVRA**”), 18 U.S.C. § 3663A.

Appellees’ arguments fail because: (1) this Court possesses jurisdiction under 28 U.S.C. § 1291, as discussed in ICE’s opposition to Appellees’ motions to dismiss¹ (Dkts. 7/18/2011; 7/25/11) and in response to the Jurisdictional Question

¹ This Court’s jurisdiction was challenged in Motions to Dismiss, which this Court has carried with the case. This Court must assume the truth of ICE’s allegations (*i.e.*, that it was improperly denied victim status under the CVRA and restitution under the MVRA) when resolving the jurisdictional challenge. *Erickson v. Pardus*, 51 U.S. 89, 94 (2007).

posed by the Eleventh Circuit Clerk of Court (7/25/2011; 8/08/2011); and (2) the District Court's adjudication of ICE as a criminal co-conspirator – in the absence of any competent evidence and in contravention of well-settled and binding agency law – deprived ICE of substantive federal statutory rights, to which ICE has a legitimate claim of entitlement, without sufficient due process of law.

A. This Court Possesses Jurisdiction Under 28 U.S.C. § 1291.

Whether this Court possesses jurisdiction is an issue the parties have previously briefed in some detail. (Dkts. 7/12/11; 7/15/11; 7/18/11; 7/21/11; 7/25/11; 7/28/11; 8/2/11; 8/8/11) Accordingly, ICE will limit its discussion on this issue to the following discreet rebuttal points: (1) contrary to DOJ's argument, courts may exercise jurisdiction over appeals by victims who were *de facto* intervenors in the proceedings below; (2) no controlling precedent exists because the circumstances of this case, which were contemplated in this Court's opinion in *U.S. v. Franklin*, 792 F.2d 998 (11th Cir. 1986), are unique; (3) the statutory interpretation urged by Appellees – that the CVRA only permits expedited mandamus review of a court's denial of victim status and restitution – is contrary to the legislative intent underlying the statute; and (4) ICE is entitled, at the least, to collateral order review of the District Court's ruling denying ICE's petition for restitution.

1. Jurisdiction Is Proper Under § 1291 Because ICE Has A Direct Interest At Stake And Was A *De Facto* Intervenor In The Proceedings Below.

Section 1291 confers on this Court general power to review “all final decisions” of the District Court. The statute does not distinguish between appeals by the government, a defendant, or a crime victim. Consequently, courts have found jurisdiction over crime victims’ appeals under § 1291 and have concluded crime victims have standing to appeal. *See, e.g., Doe v. U.S.*, 666 F.2d 43 (4th Cir. 1981); *U.S. v. Kones*, 77 F.3d 66 (3rd Cir. 1996); *U.S. v. Perry*, 360 F.3d 519, 529 (6th Cir. 2004).

Contrary to DOJ’s argument, courts have regularly permitted non-parties to appeal in both civil and criminal cases when they have a direct interest at stake. *See, e.g., Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1211 (D.C. Cir. 2004)(considering whether “the decree [appealed from] affects a third party’s interests,” because, if so, “he is often allowed to appeal.”); *accord West v. Radio-Keith Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934); *Doe v. U.S.*, 666 F.2d at 43; *Kones*, 77 F.3d at 68; *Perry*, 360 F.3d at 529; *U.S. v. Chagra*, 701 F.2d 354, 359-60 (5th Cir. 1983) (allowing non-party appeal in criminal case because “the right to appeal is not expressly limited

to parties by the relevant statute.”).²

In considering a non-party’s standing to appeal, courts consider: “whether [1] the non-party actually participated in the proceedings below, [2] the equities weigh in favor of hearing the appeal, and [3] the non-party has a personal stake in the outcome.” *See SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 329 (5th Cir. 2001). ICE has standing to proceed under these three prongs: it participated in the proceedings below; asserted Congressionally-protected victim rights and so the equities weigh in favor of hearing the appeal; and it has a personal stake in the outcome because restitution is mandatory under the MVRA. In short, § 1291 confers on this Court jurisdiction over this appeal, and ICE has standing to proceed with this matter. *Perry*, 360 F.3d at 530; (*see* ICE’s Opp. to DOJ Mot. at 5-8.)

DOJ contends that only parties or “those who properly become parties” may appeal an adverse judgment and that no one can “properly become a party” in criminal cases because intervention is not contemplated by the Federal Rules of Criminal Procedure. (DOJ Br. p.21) Indeed, DOJ argues that there is a “prohibition” against non-party intervention in criminal cases. (DOJ Br. p.24) If formal intervention is what is required, and formal intervention is prohibited, DOJ essentially argues non-parties *never* have standing to appeal adverse rulings in

² *See also U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Plain v. Murphy Family Farms*, 296 F.3d 975, 980 (10th Cir. 2002); *U.S. v. Briggs*, 514 F.2d 794 (5th Cir. 1974).

criminal cases. This argument is plainly defeated by criminal cases in which non-parties *have* been permitted to appeal. *See, e.g., Doe*, 666 F.2d at 46; *Kones*, 77 F.3d at 68; *Perry*, 360 F.3d at 529. Further, actual participation in the proceedings below for purposes of non-party standing to appeal does not require formal intervention as DOJ contends. A district court's decision to permit a non-party to participate in a dispute is "the equivalent of authorizing intervention." *In re Sealed Case (Medical Records)*, 381 F.3d at 1211; *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009)("[A]ppeals may be taken by nonparties who were treated on all sides as de facto parties but who never formally intervened.").

A non-party in *Perry* had standing to appeal the district court's elimination of her property interest – a judgment lien obtained based on an order of restitution under the MVRA. 360 F.3d at 524. The appeal was permitted because the *de facto* "Intervenor" participated in the proceedings below by filing an opposition to a motion and the equities favored hearing the appeal. *Id.* at 532. Although considered and treated as an intervenor, the non-party victim in *Perry* never sought to intervene formally and was never granted permission to intervene by the district court; rather, the "Intervenor" merely filed an opposition to the defendant's motion for partial release of judgment lien. *See U.S. v. Perry*, Case No. 5:01-cr-00017-DAP, Dkt. 22, (N.D. Ohio Oct. 25, 2001). Similarly, here, ICE participated and effectively intervened in the proceedings below by filing its Petition for Relief

Pursuant to 18 U.S.C. § 3771(d)(3) (“**Petition**”). DOJ’s argument that this Court lacks jurisdiction because ICE failed to formally intervene while simultaneously arguing that ICE was not permitted to intervene) is simply wrong. *In re Siler*, 571 F.3d at 608. The District Court treated ICE as a *de facto* intervenor, ICE participated in the proceedings below, the equities weigh in favor of hearing the appeal, and ICE has a personal stake in the outcome. Accordingly, this Court has jurisdiction over the appeal under § 1291.

2. The Circumstances Of This Case Are Unique And No Controlling Precedent Exists.

DOJ contends this Court’s decision in *Franklin* is controlling and compels dismissal. (DOJ Br. pp.22-23) DOJ is wrong. In *Franklin*, this Court dismissed an appeal from an unsatisfactory restitution order under the Victim and Witness Protection Act (“**VWPA**”) for want of jurisdiction. Critically, in doing so the Court stated:

[H]owever, we intimate no view on two issues *not* before us: First, whether a victim has an implied right to intervene in a sentencing proceeding ...; second, whether an appeal may be taken to this court from an order denying such intervention or, if intervention is granted, from the district court’s final disposition of the restitution issue.

792 F.2d at 1000 (emphasis added). *Franklin*’s holding is limited to the facts of that case, in which a non-party, who did not participate in the sentencing proceeding and who cited no statute that would permit an exercise of jurisdiction,

noticed an appeal. This Court distinguished that case from the circumstances here where a victim effectively intervened “to urge the district court to incorporate a restitution order” and appealed “from the district court’s final disposition of the restitution issue.” *Id.*; *Siler*, 571 F.3d at 608 (finding victim who petitioned district court was *de facto* “intervenor”). Accordingly, *Franklin* does not control.

Further, *Franklin* was decided before passage of the CVRA and the MVRA. Assuming *arguendo* that *Franklin* stood for the proposition DOJ says it does, this Court should recede from it nonetheless because it pre-dates the CVRA and relies on the VWPA and, thus, the “underpinnings” of the decision are called into serious question.³ See *Perry*, 360 F.3d at 529 (“Since the cases holding that victims cannot appeal restitution orders depend so heavily on the VWPA, the differences between the VWPA and the MVRA help show why these older decisions do not preclude Intervenor from appealing the district court’s elimination of her property interest.”).⁴

³ *State Oil Co v. Khan*, 522 U.S. 3, 20 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

⁴ Pre-CVRA cases upon which Appellees rely rested on the proposition that crime victims lacked a sufficient personal stake in the controversy to have standing to appeal. See *U.S. v. Johnson*, 983 F.2d 216 (11th Cir. 1993). *Perry* analyzed those cases and concluded they were no longer persuasive after passage of the MVRA because they relied upon the fact that under the VWPA, a court did not have to award restitution. 360 F.3d at 524-26. The CVRA elevated restitution to

3. Legislative Intent Underlying The CVRA Supports Exercising Jurisdiction.

Nothing in the CVRA precludes crime victims from seeking regular appellate review. Rather, the CVRA states that crime victims “may petition the court of appeals for a writ of mandamus.” 18 U.S.C. 3771(d)(3). Had Congress intended mandamus review to be crime victims’ exclusive appellate remedy, it could have said so, but it did not. This Court applies the plain meaning of statutes unless doing so would lead to not just an unwise, but to a “clearly absurd result.” *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001). There is nothing “absurd” about allowing a crime victim to seek appellate review of a district court decision denying restitution. Accordingly, this Court should follow the plain language of § 1291, decline to insert a limitation into the plain text of the CVRA, and allow ICE to directly appeal from the District Court’s adverse decision.

However, if this Court deems the plain language of the CVRA ambiguous, it should consider the legislative intent underlying the statute. *U.S. v. Grigsby*, 111 F.3d 806, 816 (11th Cir. 1997). Congress enacted the CVRA in October 2004 to solidify and broaden crime victims’ rights. Statement of Sen. Feinstein, 150 CONG. REC. S4269 (April 22, 2004) (The CVRA was designed “to correct, not continue, an absolute “right” of a crime victim and further, entitled victims to pursue their rights in court. 18 U.S.C. §§ 3771(a)(6), (d)(1).

the legacy of the poor treatment of crime victims in the criminal process.”) Legislative history is clear that in adopting the CVRA Congress intended to protect and confirm remedies for crime victims found in then-existing “case law”:

It is not the intent of [the CVRA] to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law.

150 CONG. REC. S4267 (Apr. 22, 2004)(statement of Sen. Kyl) (emphasis added).

When the CVRA was enacted, crime victims’ appeals under § 1291 had been permitted in cases such as *Doe*, *Kones*, and *Perry*. As such, Congress intended to protect rights recognized in pro-victim “case law” – such as the right to appeal under § 1291 – while overruling decisions that denied victims the ability to protect their rights. *See U.S. v. McVeigh*, 106 F.3d 325 (10th Cir 1997); 150 CONG. REC. S10911 (Oct. 9, 2004)(“This legislation is meant to ensure that cases like the *McVeigh* case, where victims ... were effectively denied the right to attend the trial, are no longer followed.”) (statement of Sen. Kyl).

“Congress is presumed to be aware of court decisions construing statutes” *In re Griffith*, 206 F.3d 1389, 1393 (11th Cir. 2000). If Appellees’ proposed reading of § 1291 and the CVRA is accepted, then crime victims would be stripped of their right to appeal, previously recognized in the cases noted above. This construction is directly inconsistent with clear and definitive legislative history. *See Letter of Senator Jon Kyl to Attorney General Eric Holder*, June 6, 2011,

reprinted in 157 CONG. REC. S3608 (June 8, 2011)(discussing Congress’ intent to add accelerated mandamus relief to victims’ pre-existing rights of appeal: “Congress sought to leave these protections in place, while expanding them to ensure that crime victims could obtain quick vindication of their rights in appellate courts”).⁵

Indeed, limiting crime victims to mandamus review or a clear and indisputable error standard, risks making the CVRA “a mere formality, given the traditionally narrow scope of mandamus relief” *In re Amy Unknown*, 636 F.3d 190, 197 (5th Cir. 2011) (Jones, J., concurring). Accordingly, instead of reading the expedited mandamus review provision as the exclusive vehicle for crime victim appellate review, it is intended to be read as a supplemental procedure. A crime victim who desires an extremely accelerated (72-hour) review of a district court ruling limited to determining whether the district court committed “clear and indisputable” error can use the CVRA’s mandamus provision. The victim, however, may also receive thorough (and lengthier) appellate review under § 1291. This reading fully harmonizes the mandamus review provision, § 1291, and

⁵ Senator Kyl’s letter added that § 3771(d)(4) was designed to “help develop a body of case law expanding crime victims’ rights in the many defense appeals that are filed.” 157 CONG. REC. S3608.

legislative history, leaving intact pre-existing rights of crime victims to take appeals under § 1291.

In its brief, DOJ suggests that recognizing a crime victim's right to appeal crime victims' rights issues would somehow improperly interfere with executive branch prerogatives. (DOJ Br. p.25) DOJ concedes that crime victims have "psychological, emotional, and financial interests" in criminal cases (DOJ Br. p.22) but maintains these interests do not permit victims to "intervene" in criminal proceedings. To be sure, Congress did not want crime victims to interfere with basic decisions of prosecutors determining such things as what charges to file. *See* 18 U.S.C. § 3771(d)(6). But at the same time, Congress clearly believed that the CVRA would allow crime victims to seek full judicial review when their rights were violated: Congress thought it "important for victims' rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings other than the trial such as ... *sentencings where victims' rights are abridged.*" 150 CONG. REC. S7304 (Apr. 22, 2004)(statement of Sen. Feinstein) (emphasis added); *see also* 18 U.S.C. § 3771(d)(5)("limitations on relief" under the CVRA do "not affect the victim's right to restitution"). As is clear from both the statute and its legislative history, Congress wanted crime victims to be able to protect *their* rights in the process. Crime victims' efforts to enforce their rights do not interfere with the prosecution of a criminal case –

ordering a criminal defendant to pay restitution to a victim under a mandatory restitution statute in no way impedes the DOJ's prosecuting efforts. Had Congress thought that was the case, it would not have provided crime victims with affirmative rights under the CVRA that allow them to have involvement in the prosecutorial process (*i.e.* conferring with counsel for the government and participating in and speaking at court proceedings). 18 U.S.C. § 3771(a).

Accordingly, the plain language of the CVRA does not preclude victims from seeking regular appellate review and, if this Court deems the statute ambiguous, clear legislative intent underlying its passage supports that mandamus is a *supplemental*, not the exclusive, method of obtaining appellate review.

4. This Court Has Jurisdiction Over ICE's Appeal Of The District Court's Order Denying It Restitution.

Even if this Court concludes it does not possess jurisdiction to review the District Court's judgment, it would still possess "collateral order" jurisdiction over an important part of ICE's appeal. ICE's notice of appeal specifically states it appeals from "the denial of ICE's request for an order of restitution." Courts possess jurisdiction to review final collateral orders that: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) are effectively unreviewable on appeal from a final judgment. *See Hofmann v. De Marchena Kaluche & Asociados*, 642 F.3d

995, 997-98 (11th Cir. 2011); *Council v. Sutton*, 366 F. Appx. 31, 34 (11th Cir. 2010).

Regarding the first prong, Appellees do not contest that the District Court's oral ruling "conclusively determined" that ICE's petition for restitution was denied. Under the second prong, the denial of ICE's petition for victim status and restitution involved important but separate issues from the guilty pleas and convictions of Defendant-Appellees. ICE's petition for victim status and restitution was designed to ensure it received "rights" under the CVRA, including the right "to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). The hearing on ICE's petition did not involve any disputed facts concerning the guilt or innocence of Defendants. Indeed, Subsidiary Defendants had already pled guilty and DOJ and Parent Defendant had already entered into a Deferred Prosecution Agreement when ICE filed its petition. This appeal concerns matters of constitutional and statutory interpretation that are completely separate from the merits of the underlying action.

In any event, to satisfy the requirement for collateral order review, the "order does not have to be separate from the entirety of the underlying dispute." *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 175 (5th Cir. 2009); *see, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985)(issue of immunity was separate from merits of underlying dispute "even though a reviewing court must

consider the plaintiff's factual allegations in resolving the immunity issue.”); *Moore v. Felger*, 19 F.3d 1054, 1057 (5th Cir.1994)(“This court has exercised appellate jurisdiction when factual disputes relevant to the district court decision ... were resolvable based on the record.”). Instead, courts look to whether there is a “substantial public interest” that will be served by allowing collateral order review. *Henry*, 566 F.3d at 177. The public clearly has a substantial interest in seeing that a crime victim who has suffered harm from a criminal act (like ICE) receives proper restitution.

Regarding the third prong, if this Court accepts Appellees’ argument that ICE cannot appeal from the final judgment in this case, then the District Court’s restitution order would be “effectively unreviewable on appeal from a final judgment.” Accordingly, the Court should then exercise jurisdiction to review the district court’s restitution decision as a “collateral order,” reverse the District Court’s decision, and remand for further proceedings.

B. ICE’S Due Process Rights Were Violated.

1. ICE May Properly Raise Its Due Process Argument On Appeal.

Appellees contend that ICE “forfeited” its due process arguments by not raising them in the District Court proceedings below. (DOJ Br. p.32) As discussed below, ICE had no opportunity to raise its due process arguments below

– indeed, the District Court’s order at the end of the proceedings is precisely what violated ICE’s due process rights. And in any event, nothing prohibits this Court from considering a legal issue or theory first raised on appeal; the decision to do so is discretionary. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984). This Court has identified five circumstances in which it will consider an argument raised for the first time on appeal: (1) if the issue involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice; (2) where the appellant raises an objection to an order which he had no opportunity to raise at the district court level; (3) a substantial interest is at stake; (4) proper resolution of the issue is beyond any doubt; and (5) the issue presents significant questions of general impact or of great public concern. *Id.*; *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001); *Nary v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994).

Here, ICE could never have anticipated that the District Court would make an off-the-cuff oral finding that was not supported by any evidence and instead was improperly based solely on Appellees’ counsel’s argument that ICE was a criminal co-conspirator and, based on that “thought,” deny it statutorily guaranteed rights it would otherwise be entitled to. Indeed, the District Court’s conduct *was* the deprivation that ICE complains of now. Accordingly, ICE, as a non-party *de facto* intervenor, had no opportunity to raise its due process arguments to the District

Court below. It makes no sense to suggest that ICE was required to assert its due process rights were violated to the very government actor that deprived it of its rights in the first place. Further, ICE had no opportunity to object to the violation because under the CVRA, ICE was required to petition the court of appeals for a writ of mandamus within 14 days of the denial of its petition for victim status if it wanted to preserve the right to re-open the plea agreements. 18 U.S.C. § 3771(d)(5). Accordingly, ICE may properly raise its due process arguments on appeal – these circumstances fall squarely within the second scenario contemplated above.

Further, whether ICE is entitled to due process rights and whether the CVRA and MVRA bestow protected property interests are pure questions of constitutional law. This Court's refusal to consider important constitutional issues would result in a miscarriage of justice because substantial interests are at stake. Therefore, this Court may likewise use its discretion to consider ICE's due process arguments under the first or third scenarios contemplated above.

Moreover, because this Court is adjudicating questions of law for the first time on appeal, it should apply a *de novo* standard of review. *U.S. v. Smith*, 343 Fed. Appx. 441, 442 (11th Cir. 2009) (“When an issue presented involves a legal interpretation, review is *de novo*.”).

2. ICE Is Entitled To Due Process Rights Because It Is An Autonomous State-Owned Foreign Corporation.

As discussed in its initial brief, ICE is a state-owned autonomous foreign corporation. (ICE Br. p.10) No binding case law has held definitively that foreign *states* are or are not “persons” under the Due Process Clause.⁶ However, as DOJ now concedes, ICE is not a foreign state and, as acknowledged by Defendant-Appellees, this Court has previously afforded due process protections to a state-owned Costa Rican entity, just like ICE. *See Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989 (11th Cir. 1986). In *Sea Lift*, this Court considered whether exercising personal jurisdiction over a state-owned Costa Rican entity that refined petroleum was consistent with due process and held it was not because the Defendant’s contacts with Florida were insufficient to find that general or specific jurisdiction existed. *Id.* If foreign state-owned entities were *not* entitled to due process protections, there would be no reason for this Court to ensure the state-owned Costa Rican entity’s due process rights were not violated when it was sued in Florida. *Id.*; *see also, Frontera Resources Azerbaijan v. State Oil Co.of the Azerbaijan*, 582 F.3d 393, 398 (2d Cir. 2009)(analyzing

⁶ The U.S. Supreme Court assumed without deciding that a foreign state is a “person” in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992). This Circuit declined to determine the constitutional status of a “foreign sovereign” and has not ruled on the status of a state-owned autonomous foreign corporation. *S & Davis Int’l v. the Rep. of Yemen*, 218 F.3d 1292, 1304-05 (11th Cir. 2000).

jurisdictional requirement of minimum contacts as a right under the Due Process Clause). Accordingly, binding precedent from this Circuit mandates that foreign state-owned autonomous entities like ICE be afforded protections under the Due Process Clause.⁷

3. ICE Made A Legitimate Claim Of Entitlement To Statutorily Guaranteed Rights.

Contrary to DOJ's position, to have a property interest in a benefit, ICE need not demonstrate it is entitled to the benefit but, rather, that it has a "legitimate *claim* of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)(emphasis added). The rights afforded by the CVRA are not discretionary – crime victims are entitled to those clearly delineated rights and District Courts "shall ensure" those rights are received. 18 U.S.C. § 3771(b)(1); *cf.*

⁷ Although DOJ concedes ICE is not a foreign state, it asserts it is "likely" the agent of a foreign state and, therefore, not a "person" under the Due Process Clause. (DOJ Br. p.37) The only support provided for this contention is DOJ's mischaracterization of *Millicom. Intern. Cellular v. Republic of Costa Rica*, 995 F.Supp. 14, 16 (D.D.C. 1998). In *Republic of Costa Rica*, the court considered whether the subsidiary of a "Costa Rican instrumentality [ICE]" was immune under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *Id.* at 15-16. Immunity from suit is conferred under the FSIA to foreign states and their "agencies or instrumentalities," which are defined under that statute as entities whose shares are majority owned by a foreign state or political subdivision. 28 U.S.C. § 1603(b). ICE's immunity from suit in that action was presumed. *Id.* at fn. 5. *Id.* Critically, *Republic of Costa Rica* did not analyze the constitutional status of an "instrumentality" of a foreign state under the Due Process Clause. Accordingly, *Republic of Costa Rica* is inapposite and bears no weight on this Court's analysis.

Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 756 (2005) (discussing that deeply-rooted police discretion exists in connection with the enforcement of restraining orders and, therefore, there is no due process right in their enforcement⁸). ICE provided undisputed evidence that it is a “crime victim” under the plain language of the CVRA, which makes no exception for an uncharged “co-conspirator” and, therefore, ICE had more than a “hopeful expectation” in the statutory rights granted by that statute. *See Crim v. Bd. of Ed. of Cairo School Dist. No. 1*, 147 F.3d 535, 545 (1998)(cognizable due process property right is legitimate claim of entitlement, not a “hopeful expectation.”).

One of the rights afforded by the CVRA is the “right to full and timely restitution as provided in law,” 18 U.S.C. § 3771(a)(6), and pursuant to the MVRA, courts “shall order...that the defendant make restitution to the victim of the offense” 18 U.S.C. § 3663A; *Perry*, 360 F.3d at 530 (explaining that while the VWPA “does not guarantee the victim much ... [t]he MVRA makes restitution

⁸ Police have discretion to enforce mandatory arrest statutes because it may be factually impossible to make the arrest when, for instance, the offender’s whereabouts are unknown. *Id.* Contrastingly, District Courts are not afforded discretion when ensuring crime victims’ right under the CVRA. If they are crime victims, they are entitled to those rights. If they make a legitimate claim of entitlement to those rights, whether entitled in actuality or not, they are entitled to due process protections in connection with those rights. That is not to say such rights cannot ultimately be denied but, rather, due process must be satisfied in connection with that denial.

mandatory for victims ... the victims of many crimes now have a right to restitution.”). As discussed below, the MVRA applies to the Defendant-Appellees’ violations and, as admitted by DOJ, ICE has a monetary interest in the right to mandatory restitution. (DOJ Br. p.48) *See Gonzales*, 545 U.S. at 76 (discussing “ascertainable monetary value”); *Dix v. County of Shasta*, 963 F.2d 1296, 1300 (9th Cir. 1992)(indicating that statute that would require money be given to victim would be sufficient to create the “entitlement” necessary to constitute property interest).⁹ Thus, contrary to the Defendant-Appellees’ assertion, ICE has an economic interest in the right to mandatory restitution and is entitled to due process rights in connection with that interest. *See Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1994).

a) The MVRA applies to Defendant-Appellees’ violations.

The MVRA applies to any “offense against property under [Title 18] ..., including any offense committed by ‘fraud or deceit’.” 18 U.S.C. § 3663A(c)(1)(A)(ii). The MVRA governs these proceedings for two independent reasons. First, the MVRA “applies to all offenses ... involving ‘fraud or deceit’.” *U.S. v. Singer*, 2005 WL 2605400 (11th Cir. 2005). Defendant-Appellees admitted

⁹ ICE presented evidence of the losses sustained as a result of Defendant-Appellees’ crimes. (*see* ICE Br. Exh. A) The record demonstrates its right to restitution has an ascertainable monetary value.

they engaged in “fraud or deceit” because, in part, they “knowingly falsified” their books and records, including by “drafting sham” business agreements, “mischaracterizing” bribes as legitimate expenses, preparing “false invoices,” and entering into sham “business consulting agreements.” (V1 Dkt.1,10,11,12) Indeed, courts have universally applied the MVRA to the conspiracy offense to which Subsidiary Defendants pled guilty.¹⁰ Notably, in a recent prosecution in the District Court for violations of the same statute implicated here, committed against a similar party as ICE, restitution was ordered after defendant pled guilty to conspiracy to commit crimes for which FCPA violations was an objective. *See U.S. v. Diaz*, No. 09-cd-20346-JEM, Doc. 37 (S.D. Fla. Aug. 5, 2010).

Second, the MVRA governs because the underlying offenses are Title 18 “offenses against property.” “Offenses against property” are those “in which physical or tangible property, including money, is taken ... by theft, deceit or fraud.” *U.S. v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002). By inducing ICE to buy Defendants’ products and services with bribes, Defendants “took” ICE’s property by “theft, deceit or fraud.” Therefore, this matter is governed by the MVRA, not by the VWPA.

¹⁰ *See U.S. v. Quarrell*, 310 F.3d 664, 677 (10th Cir. 2002); *U.S. v. Futrell*, 209 F.3d 1286, 1290 (11th Cir. 2000).

- b) *The right to mandatory restitution is a substantive due process right.*

Legislative history establishes that, at the very least, the right to mandatory restitution contemplated in the CVRA and MVRA is a protected property interest that is entitled to due process protections:

This provision [the MVRA] is intended ... to clarify that the issuance of a restitution order is an integral part of the sentencing process that is to be governed by the same, but no greater, procedural protections as the rest of the sentencing process this provision fully comports with the requirements of the due process clause of the fifth amendment [T]he act ... ensures the protection of the victim's right to a fair determination of the restitution owed.

S. Rep. No. 104-179, at 20-21 (1996). As noted by the Sixth Circuit, this legislative history “[m]akes clear that Congress meant the MVRA to protect the **rights of all individuals, including victims, in a manner consistent with due process requirements.**” *Perry*, 360 F.3d at 524 (emphasis added).

4. The District Court's Ruling Deprived ICE Of Statutorily Guaranteed Substantive Rights In Violation Of Its Due Process Rights, And Was Contrary To Binding Agency Law.

The District Court denied ICE the rights afforded by the CVRA, including the right to mandatory restitution under the MVRA, based on a wholly unsubstantiated “thought” that ICE – the corporate entity – operated as a criminal co-conspirator. This ruling was announced in open court and relied upon *argument* of counsel. There was no competent evidence to support such a finding. (*See* V5

Dkt.80 at 20:12-15)(raising to the District Court the critical issue of lack of evidence in support of the contention that ICE was a criminal co-conspirator). Further, contrary to DOJ's argument, ICE *did* request an opportunity to present evidence in connection with its Petition: ICE counsel stated, "Judge, we ask ... that we be able to present evidence of the harm and directly to the Court of the determiner" (V5 Dkt.80 at 39:11-13) Thus, to hold that ICE was a criminal co-conspirator and then deny it protected property rights under the CVRA, including restitution under the MVRA, due process mandates that there must have been *evidence* to support such a finding – there was none.¹¹ This is especially true because the conduct of the ICE personnel who accepted bribes as a matter of law cannot be attributed to ICE – the corporate entity – under well-settled principles of agency law.

¹¹ Defendant-Appellees rely on cases in which courts held the purported victims were not entitled to crime victim's rights because they were criminal co-conspirators. In those cases, there was *evidence* in the form of admissions or guilty pleas of such conspiracy, or else, a jury finding that the conspiracy existed beyond a reasonable doubt. *See U.S. v. Lazar*, 770 F.Supp.2d 447 (D. Mass 2011)(evidence in form of admissions by crime victims of knowledge of and participation in mortgage scheme); *U.S. v. Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010)(purported victim was named as primary co-conspirator in indictment and jury found beyond reasonable doubt that he conspired with defendant); *U.S. v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006)(restitution order was vacated because it encompassed losses incurred by one of the primary charged, prosecuted, and convicted co-conspirators).

The United States Supreme Court has long recognized that an agent's conduct is not imputed to the principal when the agent acts for its own benefit. *American Surety Co. of New York v. Pauly*, 170 U.S. 133, 148 (1898). Binding precedent in this Circuit is consistent:

[T]he purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.

Standard Oil Co. of Tex. v. U.S., 307 F.2d 120, 128 (5th Cir. 1962); *Union Cent. Life Ins. Co. v. Robinson*, 148 F. 358, 360 (5th Cir. 1906)("[T]he knowledge of the agent is imputed to the principal ... however ... the rule has no application to a case where the agent is acting for himself, in his own interest"); *Golden Door Jewelry Creations, Inc. v. Wright*, 117 F.3d 1328, 1338 (11th Cir. 1997)(no imputation where "the officer acts outside of his authority or adversely to the interests of the corporate entity."); *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1354 (11th Cir. 2008)("Imputation is inappropriate where ... agent [] was engaged in fraud or self-dealing adverse to a corporate principal []."); *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008)("[A] principal is not charged with an agent's actions or knowledge when the agent is

acting adversely to the principal's interests.”)¹²

The District Court had to ignore this fundamental legal tenet to conclude ICE – the corporate entity – rather than the former personnel who accepted bribes for their own benefit, was a co-conspirator. The record established three former directors and three former employees (out of over 15,000 individuals associated with ICE) accepted bribes, for their own benefit and to their principal's detriment. The few individuals who received bribes did so in secret for personal gain and in breach of fiduciary responsibilities to ICE. Here, there is no suggestion by Appellees, much less evidence, indicating any benefit to ICE, nor any intent by the criminals who received the bribes to benefit ICE. Indeed, the only pertinent record evidence establishes that ICE was severely harmed. (*See* ICE Br. Ex. A) As a matter of law, agents who accept bribes operate for their own benefit and to the detriment of their principals. *See U.S. v. Carter*, 217 U.S. 286 (1910)(“If [official] takes any gift, gratuity, or benefit in violation of his duty ... it is a betrayal of his trust and a breach of his confidence”); *Skilling v. U.S.*, 130 S. Ct. 2896, 2926-27 (2010)(“When one tampers with [the employer-employee] relationship for the

¹² *See e.g., Ohio Millers' Mut. Ins. Co. v. Artesia State Bank*, 39 F.2d 400, 402 (5th Cir. 1930)(President's knowledge of obtaining certificate of deposit by fraud not imputed to principal); *FDIC v. Lott*, 460 F. 2d 82, 88 (5th Cir. 1972)(knowledge of bank officer/director who fraudulently dealt with bank was not imputed to principal); *Beck v. Deloitte & Touche, Deloitte, Haskins & Sells, Ernest & Young, L.L.P.*, 144 F.3d 732 (11th Cir. 1998)(self-interest of directors not imputed to corporation).

purpose of causing the employee to breach his duty, he in effect is defrauding the employer of a lawful right.”); *U.S. v. McNair*, 605 F.3d 1152, 1221 (11th Cir. 2010) (awarding restitution to county for commissioners’ acceptance of gratuities).¹³

ICE and Appellees agree that courts have held criminal co-conspirators are not entitled to the benefits afforded by federal victim protection statutes – but here there is no *evidence* whatsoever of conspiracy by ICE! Contending the “co-conspirator” exception to victim status applies here, Defendant-Appellees cite to *Local 1814 Int’l Longshoremen’s Ass’n v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984). There, the court attributed to a Union the acts of its highest two officers who accepted kickbacks in return for steering business to an entity. *Id.* In doing so, however, the court reasoned the conduct of those officers would “foreseeably yield benefits to the union itself, and which did in fact yield such benefits.” *Id.* at 1387 (1984)(*but see* J. Wald, dissenting at 1405: “There is absolutely no evidence that any of the kickback money here went into the union coffers”). Indeed, that the union received a benefit was a crucial finding. *Id.* at 1396. Here, record evidence establishes the opposite: ICE was injured. Further, when attributing the

¹³ See also *U.S. v. Liu*, 200 Fed. Appx. 39 (2d Cir. 2006)(bank whose official accepted bribes was victim); *U.S. v. George*, 477 F.2d 508, 513 (7th Cir. 1973)(agent who received kickbacks defrauded employer); *U.S. v. Gamma Tech Ind., Inc.*, 265 F.3d 917, 926 (9th Cir. 2001)(contractor was victim of kickback conspiracy); *U.S. v. Gaytan*, 342 F.3d 1010, 1012 (9th Cir. 2003)(city whose former official accepted bribes was a victim).

conduct of the officers to the union, the court reasoned the union had reason to know of the kickbacks because they continued after the filing of the indictment. *Id.* (“Under such circumstances, one might reasonably have expected a truly upright union to have taken *some* disciplinary action.”). In contrast, ICE *did* take prompt action when it discovered that bribes had been accepted in return for providing business to Defendant-Appellees by terminating those rogue individuals and assisting in their criminal prosecution. (ICE Br. p.6).

Defendant-Appellees also rely on *Lazar*, and argue that formal prosecution is not required to find a purported victim operated as a co-conspirator. (Def. Br. p.36) In that case, however, there was evidence in the form of admissions by the victims themselves of knowledge of and participation in a mortgage scheme. *Lazar*, 770 F. Supp. 2d at 449. The court considered the purported victims’ “willingness as a participant in the scheme and whether he or she shared the same criminal intent as the defendant from whom restitution is sought.” *Id.* Based on the victims’ own admissions, the court determined their intent was *in pari materia* with that of the defendant. *Id.* at 452 (“[R]estitution may not be ordered under the MVRA to a conspirator who participates in a fraudulent scheme *with the same criminal intent* as his or her coconspirators....”)(emphasis added); *see also U.S. v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008)(“[R]estitution under the MVRA may not be denied simply because the victim had greedy or dishonest motives, where

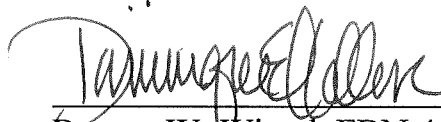
those intentions were not *in pari materia* with those of the defendant.”). In contrast, here there was no admission of guilty intent from ICE. Rather, the only evidence presented at all established that the bribery scheme was kept secret between the agents of Defendant-Appellees and those six discreet ICE individuals (from the other 15,000 ICE employees and other company board members). Accordingly, *Lazar* does not support the District Court’s application of the narrow “co-conspirator” exception to a finding of victim status and restitution under the MVRA. *Id.* (Noting “[e]xceptions to the MVRA are as rare as hen’s teeth”).

Similarly, in *Lazarenko*, another case relied on by Appellees, the co-conspirator exception to restitution applied but in that case, the “victim” was named as the primary co-conspirator in the indictment and a jury found beyond a reasonable doubt that the would-be victim conspired with the defendant. 624 F.3d at 1250. Here, ICE was not charged in the indictment as a co-conspirator, there was no evidence presented demonstrating that ICE conspired with Defendant-Appellees, no jury trial, and certainly no finding beyond a reasonable doubt that ICE functioned as a criminal co-conspirator.

None of the cases cited by Appellees address the circumstances here: the District Court made an oral finding that a victim was a criminal co-conspirator and relied on mere argument of counsel (in the absence of formal prosecution, an admission of guilty intent, a jury finding beyond a reasonable doubt, or any

supporting evidence) – in direct contravention of well-settled agency law. That unsupported finding operated as a *de facto* adjudication of guilt which deprived ICE, the principal, of constitutionally guaranteed entitlements. Accordingly, this Court should: reverse the lower ruling; award restitution in at least the amount of the bribes; and remand this matter for additional proceedings.

Respectfully submitted, this 23rd day of April, 2012.



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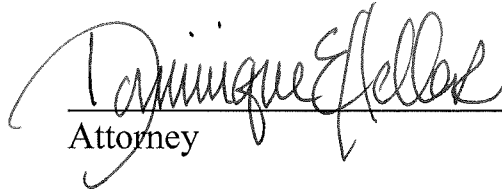
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I. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 Pt. Times New Roman font.