Nos. 11-12716-GG & 11-12802-GG

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 11-12716-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCATEL-LUCENT FRANCE, S.A., ET AL.,
Defendants-Appellees,

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

Consolidated with

No. 11-12802-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCATEL-LUCENT, S.A.,
Defendant-Appellee,

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

On Appeals from the United States District Court
for the Southern District of Florida

BRIEF FOR THE UNITED STATES

MYTHILI RAMAN
Acting Assistant Attorney General

CHARLES E. DUROSS
Deputy Chief, Fraud Section

JOHN D. BURETTA
Acting Deputy Assistant Attorney General

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

MICHAEL A. ROTKER
Attorney, Appellate Section
United States Department of Justice
Criminal Division
950 Pennsylvania Avenue NW, Suite 1264
Washington, DC 20530
(202) 514-3308

CERTIFICATE OF INTERESTED PERSONS

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

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

16. Cassell, Paul G.

17. Gaboury, Mario T.

18. Rotker, Michael A.

19. Duross, Charles E.

20. Gentin, Andrew

21. Sale, Jon

22. Sale & Weintraub, P.A.

23. Weinstein, Martin

24. Meyer, Robert

25. Willkie Farr & Gallagher LLP

/s Michael A. Rotker

MICHAEL A. ROTKER
Attorney
United States Department of Justice

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c), the United States submits that the Court should hear oral argument in this matter limited to whether the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (CVRA), authorizes crime victims (or persons seeking crime-victim status) to appeal from the final judgment in a criminal case denying restitution in light of their nonparty status. As the government explained in its pre-briefing motions to dismiss these appeals, this Court long ago held that it lacked jurisdiction over a nonparty crime victim's appeal from the final judgment in a criminal case denying restitution, see *United States* v. *Franklin*, 792 F.2d 998 (11th Cir. 1986), and all three courts of appeals that have considered the issue since the CVRA have concluded that the statute does not disturb this rule. Oral argument is warranted on this issue because the nonparty appellant urges this Court to reject *Franklin* and the considered decisions of other circuits reaffirming this rule.

The underlying due process issues, by contrast, present no issue meriting oral argument: as appellants admit, they did not raise these issues during the extensive proceedings below, and oral argument is unlikely to facilitate the Court's resolution of those factbound issues.

TABLE OF CONTENTS

Pages

Pages

TABLE OF AUTHORITIES

Pages

Cases

Pages

Pages

Pages

Pages

Constitutional Provisions, Statutes and Rules

Pages

Pages

Miscellaneous

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 11-12716-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

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

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

Consolidated with

No. 11-12802-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCATEL-LUCENT, S.A., f/k/a ALCATEL, S.A.,
Defendant-Appellee,

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

BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

Nonparty appellant Instituto Costarricense de Electricidad, S.A. (ICE), has appealed from certain judgments and decisions of the district court rendered in the criminal prosecutions of Alcatel-Lucent, S.A. (Parent Defendant), an international telecommunications company, see *United States* v. *Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.), and a number of its wholly-owned corporate subsidiaries, defendants Alcatel Lucent France, S.A., Alcatel-Lucent Trade International, A.G. and Alcatel Centroamerica, S.A. (Defendant Subsidiaries), see *United States* v. *Alcatel-Lucent France, S.A.,* et al., No. 10-cr-20906 (S.D. Fla.).

1. On February 22, 2011, the Defendant Subsidiaries pleaded guilty pursuant to written plea agreements to an information charging them with conspiracy to violate the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1, in violation of 18 U.S.C. § 371. The same day, the government entered into a deferred prosecution agreement (DPA) with the Parent Defendant in which the parties agreed that the government would dismiss the FCPA charges against the defendant in three years if the defendant complied with its obligations under the agreement.

2. On June 1, 2011, the district court (Cooke, *J.*), which had jurisdiction over these criminal cases pursuant to 18 U.S.C. § 3231,[1/] accepted the Defendant Subsidiaries' guilty pleas, imposed sentence, and entered final judgment against each defendant. The court also denied ICE's motion, filed pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to be declared a victim and awarded restitution, based on its finding that ICE failed to prove it was a victim. ICE filed a CVRA petition for a writ of mandamus, see 18 U.S.C. § 3771(d)(3), which this Court denied. See *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.).

3. On June 11, 2011, ICE filed notices of appeal from the final judgments against the three Defendant Subsidiaries (No. 11-12716) and from what it describes as "the Court's acceptance of the Deferred Prosecution Agreement," Dkt. 66, in the case against the Parent Defendant (No. 11-12802).[2/] The notices were filed within the time prescribed for the

---

[1/] ICE states (Br. 1) that the district court had jurisdiction pursuant to 28 U.S.C. § 1345, but that statute applies in "civil actions." These are criminal cases, and "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231." *McCoy* v. *United States*, 266 F.3d 1245, 1252 n.11 (11th Cir. 2001).

[2/] ICE's notice of appeal (Dkt. 66) incorrectly states that the court "accept[ed]" the DPA, and ICE perpetuates this inaccuracy in its opening

parties to a criminal case to notice an appeal from a final judgment, see Fed. R. App. P. 4(b)(1)(A)-(B), but neither Rule 4 nor any other provision of the Federal Rules of Appellate Procedure prescribes a time period within which a nonparty, like ICE, may appeal from the final judgment in a criminal case. Nor do the Federal Rules of Appellate Procedure contemplate that a nonparty may file a notice of appeal. See Fed. R. App. P. 3(c)(1) ("The notice of appeal must * * * specify the party or parties taking the appeal.").

4. ICE asserts that this Court has jurisdiction over these appeals pursuant to 28 U.S.C. § 1291 despite its nonparty status. Br. 1. It is mistaken.

a. This Court lacks jurisdiction over ICE's appeals in No. 11-12716. As a nonparty, ICE lacks the capacity to file valid, jurisdiction-conferring notices of appeal from a final judgment denying restitution in a criminal case. See *United States* v. *Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986)

---

brief (Br. 1). The district court was not required to accept the DPA between the parties and did not in fact accept the DPA at the June 1, 2011, hearing; indeed, ICE has cited nothing in the record to substantiate its assertion that the court did otherwise. Docket Entry 65, which ICE cites in its notice of appeal, is an order granting the government's motion to exclude the period of delay during which the prosecution was deferred from the Speedy Trial Act. Dkt. 65.

(dismissing, for "want of jurisdiction," an appeal by a nonparty crime victim seeking to challenge a restitution award).

b. This Court lacks jurisdiction over ICE's appeal in No. 11-12802 for the additional reason that the case was resolved by a deferred prosecution agreement. The Parent Defendant has not been convicted or sentenced, and thus, there is no final judgment against it from which ICE (or anyone else) may appeal.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction over appeals by an alleged crime victim from either the final judgments in criminal cases to which the alleged victim is not a party, or from a case that was resolved by a deferred prosecution agreement and hence did not result in a final judgment.

2. Whether ICE has carried its burden of showing, on plain-error review:

(a) that it is a "person" within the meaning of the Due Process Clause of the Fifth Amendment in view of its status as a wholly state-owned foreign corporation;

(b) that if it is a "person," it has a constitutionally-protected "property" interest under the CVRA in an evidentiary hearing to determine

its status as a victim; and, if so,

(c) that the district court accorded ICE constitutionally adequate process in finding that ICE was not a CVRA "victim" when the district court allowed ICE to file written pleadings and be heard in open court, and ICE itself did not request any additional procedures, including the evidentiary hearing it now claims was constitutionally required.

STATEMENT OF THE CASE

The CVRA gives a "crime victim" – *i.e.*, a "person directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. § 3771(e); see also *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) – eight enumerated rights, one of which is "[t]he right to full and timely restitution as provided by law." 18 U.S.C. § 3771(a)(6). "The crime victim or their lawful representative, and the attorney for the Government," 18 U.S.C. § 3771(d)(1), may assert the victim's rights in a motion filed in the district court in which the defendant is being prosecuted or, if "no prosecution is underway, in the district court in the district in which the crime occurred," 18 U.S.C. 3771(d)(3). Crime victims are not required to intervene in the criminal case to file such a motion, and crime victims are not permitted to intervene in any event because "intervention is not

available . . . in criminal cases." *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); see also *United States* v. *Briggs*, 514 F.2d 794, 804 (5th Cir. 1975) (nonparty "has no right under the Federal Rules of Criminal Procedure to intervene"). A district court must "take up and decide" any such motion "forthwith." 18 U.S.C. § 3771(d)(3). "If the district court denies the relief sought," then "the movant" may "petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), and the court of appeals must "take up and decide" any such petition within 72 hours (subject to certain limited exceptions), *id*. "In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right." 18 U.S.C. § 3771(d)(4).

1. The criminal charges in these cases arose from an investigation into the payment of bribes by employees and agents of the defendants in various countries around the world, including Costa Rica, between 1998 and 2007, including Costa Rica. Dkt. 1. The investigation revealed that the Costa Rican bribes were solicited by, and eventually paid to, nearly half of the Board of Directors (among others) at ICE, a "wholly state-owned telecommunications authority in Costa Rica responsible for awarding and administering public tenders for telecommunications contracts." Dkt. 1, at

7 ¶13.

2. On December 27, 2010, federal prosecutors returned a criminal information against the Defendant Subsidiaries charging them with conspiracy to commit offenses against the United States, to wit: violating the anti-bribery provisions, the books and records provisions, and internal controls provisions of the FCPA, 15 U.S.C. § 78dd\-1, *et seq*., all in violation of 18 U.S.C. § 371. A separate criminal information also was filed against the Parent Defendant, charging it with violations of the internal controls and books and records provisions of the FCPA, 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78ff(a). On the same date, the Defendant Subsidiaries entered into written plea agreements with the government in which they agreed to plead guilty to the conspiracy charge. The government and the Parent Defendant entered into a Deferred Prosecution Agreement.[3/]

[3/] Due to a clerical mistake, these agreements, though reached in December 2010, were not actually filed with the Court until February 2011.

3. ICE thereafter filed a CVRA motion alleging that it was a victim of this bribery conspiracy and seeking roughly $400 million dollars in restitution on that basis. Dkt. 22 (motion). The district court denied the motion. The court thereafter accepted the Defendant Subsidiaries' guilty pleas and imposed sentence and final judgments against them consistent with the terms of their plea agreements. *Id*. at 53-66.

4. ICE sought review of the district court's denial of its motion by filing (a) a CVRA petition for a writ of mandamus as well as (b) notices of appeal from (i) the final judgments against the Defendants Subsidiaries and (ii) what ICE described as "the Court's acceptance of the Deferred Prosecution Agreement in this matter." Dkt. 66.

This Court denied ICE's mandamus petition on the merits, holding that the district court had not erred in "finding that ICE failed to establish that it was directly and proximately harmed by the [defendants'] criminal conduct," and in further finding, in light of the "pervasive, constant and consistent illegal conduct" of the members of ICE's Board of Directors, that ICE "actually functioned as the [defendants'] coconspirator." *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.).

Meanwhile, the government filed pre-briefing motions to dismiss ICE's appeals on the ground that ICE, as a nonparty to the prosecutions, lacked the capacity to file valid, jurisdiction-conferring notices of appeal. This Court ordered the government's motions carried with the case.

STATEMENT OF THE FACTS

1. The Charges And Proposed Resolutions. On February 22, 2011, the Defendant Subsidiaries each entered into a written plea agreement with the government in which they agreed to plead guilty to the FCPA conspiracy charge. The same day, the government filed a deferred prosecution agreement in the case against Defendant Alcatel-Lucent. Dkt. 10. The proposed overall resolution with the defendants included a $92 million criminal penalty,[4/] the implementation of an enhanced compliance program, and the retention of an independent compliance monitor to review and ensure the effective implementation of the enhanced compliance

---

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

program to prevent, detect, and deter future violations of the FCPA. The government provided ICE's counsel with notice of the charges and the ensuing court hearings, which allowed ICE to attend those hearings and participate by filing pleadings and speaking at the resulting hearing. ICE has never disputed that it received notice.

2. The Initial Proceedings. The case against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent were consolidated before the district court. On March 9, 2011, after hearing from the government, the Defendant Subsidiaries, and counsel for ICE, the district court directed the U.S. Probation Office to prepare a memorandum, which would review the proposed plea agreements with the Defendant Subsidiaries and address the victim and restitution issues raised by ICE. On May 2 and 3, 2001, ICE filed a "Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement" in which, in part, it objected to the proposed overall resolution and sought protection of its rights as a purported victim of the offenses, including the right to $400 million in restitution. Dkt. 22.

On May 11, 2011, the district court held a status conference at which it heard further from the government, counsel for ICE, and counsel for the

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

3. The Government's Response To ICE's Motion. On May 23, 2011, the government filed a written response to ICE's petition, Dkt. 45, as well as a memorandum in support of the proposed plea agreements and deferred prosecution agreement, Dkt. 44.

The government's threshold argument was that ICE was not a "crime victim" within the meaning of the CVRA, as the facts and circumstances showed that ICE, as an organization, was complicit in the pervasive corruption that provided high-ranking ICE officials the very platform from which to demand the bribes in the first instance. Dkt. 45, at 6-13. More specifically, the government explained that the corruption at ICE appeared to have existed for many years; that the corruption did not simply involve low-level employees but extended to nearly half of the Board of Directors of ICE, who received millions of dollars in bribes in this case alone; that the corruption was pervasive in the tender process (*e.g.*, ICE officials were

receiving large bribes from other companies at the same time); and that the problems appeared to be systemic (*e.g.*, an audit report of ICE at the time indicated "serious deficiencies in internal control mechanisms," pointing to structural problems of the organization as a whole) (*id*. at 7-12). Indeed, as the government also explained, one of the corrupt board members later confessed to Costa Rican prosecutors "a kind of culture" had developed at ICE of accepting bribes (*id*. at 11). Under these facts and circumstances, the government argued that it was difficult to consider ICE to be a "crime victim" given its apparent complicity in the corruption occurring within the organization.

Even if ICE was considered a victim, the government explained that the district court, the Probation Office, and the government itself had all taken steps to ensure that ICE was still afforded the rights of a victim. For example, the government explained in detail that it had ensured that ICE had been given timely and accurate notice of every hearing, and noted that ICE had attended each hearing, been given the opportunity to be heard at each hearing, the opportunity to confer with the government prosecutors, and the opportunity to submit a request for restitution with Probation Office, and otherwise been treated fairly by the relevant government actors.

Finally, the government argued that ICE would not be entitled to an award of restitution in any event because its claimed losses were too speculative to support a restitution award. The government noted that the corruption existed for a long period of time at the highest levels of ICE and was pervasive in the tender process at the organization. The government further explained that there was significant reason to believe that the defendants' competitors were likewise paying bribes to the same or different ICE officials in seeking the same business (*id*. at 9-10). Under those circumstances, the government argued that it was simply not possible to determine which company would have won any particular bid and at what price.

Beyond the speculative nature of any of ICE's claimed losses, the government showed that even if there was some mechanism by which to calculate restitution, it would so prolong and complicate the sentencing proceedings that any need for restitution would be outweighed by the burden on the sentencing process. See 18 U.S.C. § 3663A(c)(3)(B); 18 U.S.C. § 3663(a)(1)(B)(ii). Indeed, the first filing by ICE included nearly 1,300 pages of exhibits (many of which were in Spanish and only some of which were translated), and the ongoing civil litigation in Costa Rica

brought by ICE against Alcatel-Lucent France, which has been pending for more than six years, resulted in a denial of ICE's claims following a year-long trial with more than 60 witnesses. Dkt. 45 at 30, Ex. 18. The Costa Rican court's findings of fact and conclusions of law issued just weeks before the June 1st hearing exceeded 2,000 pages. ICE's claims for damages involve a series of complex commercial disputes concerning the quality of services and products, which are both complex and broad and have little, if any, nexus to the crime charged (*id*. at 30 (listing various commercial claims for which ICE now seeks restitution)).

To resolve such a restitution claim, the government pointed out that the district court would be required to "make specific findings on how it calculated the exact dollar amount of the victims' actual losses," which would be particularly important here as the district court would need to determine "any value of services or items received by the victim" and offset them against the restitution order. *Huff*, 609 F.3d at 1248. This would require proceedings akin to a trial that could last weeks (if not months), involve countless witnesses (many of whom would be coming from foreign jurisdictions), numerous experts, and scores of exhibits (many of which would have been in Spanish and highly technical in nature). And in the

end, given the facts and circumstances, it is likely the loss amount, if any, would be speculative.[5/]

4. The Change of Plea and Sentencing Hearing. On June 1, 2011, the district court held a lengthy, multi-hour hearing at which counsel for ICE and the government addressed ICE's objections to the proposed overall resolution and request for victim status and for restitution. The first portion of the proceeding concerned ICE's status, and the district court began by hearing from the government. Dkt. 80, at 5-17. The court then heard from ICE, who was represented at the hearing by three outside lawyers and whose own in-house counsel also was present. *Id*. The court permitted ICE's lead counsel to address the court at some length – more than 23 pages of transcribed text – regarding the issues raised in its motion, including its legal status. *Id*. at 17-39. Counsel concluded his presentation by asking the court to reject the plea agreements; find that ICE is a victim; order the

---

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

government to treat it as a victim; and enter an order of restitution. Following a short recess, and a further colloquy with the government, the district court orally denied ICE's motion on the ground that ICE had failed to show it was a victim. *Id.* at 51-52. In view of the "pervasiveness," "constancy," and "consistency" of the illegal activity at issue, the "high-placed nature of the criminal conduct within the organization," and the "number of people involved," many of whom were corporate "principals," *id.* at 52, the court determined that ICE "essentially" functioned as an unindicted coconspirator. *Id.*; see also *id.* ("[B]asically it was 'Bribery Is Us,' meaning that everybody was involved in it."). The court thus made a "find[ing] that ICE is not a victim," *id.* at 53. And, even though, as a result of that finding, "the Government was not obliged to" do so, the court found that the government had "treated [ICE] with appropriate informational respect in regard to this case and what they should know." *Id.* For these reasons, and because of the problems associated with determining losses, the court found that "there's no victim that was damaged here in the sense that something needs to be restored or made whole," and that the determination of any such damages would be unduly cumbersome and difficult. *Id.* Accordingly, the court denied ICE's motion "for victim status

and to be awarded restitution." *Id*. At no time following the court's rulings did ICE voice any objections to the procedures accorded to it by the district court in deciding its motion for victim status and restitution.

The district court thereafter accepted the guilty pleas of the Defendant Subsidiaries and imposed a sentence in accordance with the proposed overall resolution. Dkt. 80, at 53-66. Consistent with the district court's oral ruling, the final written judgment against the Defendant Subsidiaries did not include an award of restitution (*id*. at 53-66).

5. This Court Denies ICE's Mandamus Petition. ICE filed a CVRA mandamus petition asserting (as relevant here) that the district court's findings were not supported by the record; that even if they were, the CVRA does not contain a "co-conspirator" exception; and that the court otherwise erred in denying restitution. ICE did not raise any constitutional claims in its petition and, as was the case before the district court, it did not take issue with the adequacy of the procedures used by the district court to decide its CVRA motion. This Court denied the petition on the merits, holding that the district court had not erred in "finding that ICE failed to establish that it was directly and proximately harmed by the [defendants'] criminal conduct," and in further finding, in light of the "pervasive,

constant and consistent illegal conduct" of the members of ICE's Board of Directors, that ICE "actually functioned as the [defendants'] coconspirator." *In re: Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.). "As a general rule, a participant in a crime cannot recover restitution." *Id.* (quoting *United States* v. *Lazarenko*, 624 F.3d 1247, 1252 (9th Cir. 2010)).

SUMMARY OF ARGUMENT

The unpreserved due process claim now presented for the first time in this appeal lacks merit, but the appeal itself suffers from a more fundamental defect: the Court lacks appellate jurisdiction.

I. **A**. "[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). This "well settled" rule, *id.*, compels the dismissal of this appeal. ICE, the appellant, is not a "party" to the government's criminal prosecutions of the defendants, and has not (and could not) properly "become [a] part[y]" to those prosecutions because nonparties may not intervene in a criminal case to litigate the merits. As such, ICE had no legal capacity to take an appeal from the final judgments against the defendants. This Court so held in its decision in *Franklin*, and that holding

is controlling here notwithstanding ICE's claims to the contrary.

The Crime Victims' Rights Act of 2004 reaffirms this longstanding rule. As every court of appeals that has reached the issue has held, the CVRA's text and purposes demonstrate that Congress gave nonparty crime victims the unprecedented ability to seek one specific and well-defined form of judicial review – extraordinary mandamus review – but reserved to the government, a party to the criminal case, the traditional prerogative of a party to seek a distinct form of judicial review – ordinary appellate review.

B. Nor may ICE appeal in No. 11-12802 from the parties' decision to enter into a deferred prosecution agreement. 28 U.S.C. § 1291 confers jurisdiction to appeal from final decisions, which in criminal cases means the judgment of conviction and sentence. But the very purpose of the DPA was to defer any criminal charges; as such, there has been no conviction or sentence, and hence no final, appealable judgment.

II. If this Court concludes that it has jurisdiction, it should reject ICE's newly-minted and admittedly unpreserved "procedural due process" claims for any (or all) of the following reasons. First, ICE has failed to carry its burden of showing that, as a foreign state-owned corporation, it is a "person" entitled to invoke the protection of the Fifth Amendment.

Second, ICE has failed to show that it has been deprived of a "property" interest protected by the due process clause. And third, ICE has failed to show that the procedures used by the district court to determine that it is not a victim were constitutionally inadequate. Finally, ICE's claims that it was unconstitutionally "adjudicated" guilty of criminal conduct misapprehends the limited nature of the district court's ruling.

ARGUMENT

I. This Court Lacks Jurisdiction To Entertain An Appeal By A Nonparty Crime Victim From The Final Judgment In A Criminal Case.

This Court lacks jurisdiction over ICE's appeals because of ICE's nonparty status and because, in No. 11-12802, there is no final judgment.

A. ICE May Not Appeal In No. 11-12716 Because It Is A Nonparty.

1. The "well settled" rule in federal court is that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (citing cases). The only parties to a federal criminal case thus are the government, who brings the charges, see *United States* v. *Armstrong*, 517 U.S. 456, 467 (1996) ("power to prosecute" is "one of the core powers of the Executive Branch"), and the defendant, the person against whom the charges are

brought. See *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, —, 129 S. Ct. 2230, 2234 (2009) ("A 'party' to litigation is one by or against whom a lawsuit is brought."). Crime victims have psychological, emotional, and financial interests in criminal prosecutions, but they are not "parties" to it. Cf. Black's Law Dictionary 1122 (6th ed. 1990) (distinguishing between "interested persons" and "parties"). Nor may a crime victim "properly become" a party to a prosecution because the Federal Rules of Criminal Procedure do not authorize nonparty intervention in criminal cases. See *United States* v. *Briggs*, 514 F.2d 794, 804 (5th Cir. 1975);[6/] see also *United States* v. *Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007) ("There is no provision in the Federal Rules of Criminal Procedure for intervention by a third party in a criminal proceeding; intervention in civil proceedings is governed by Rule 24 of the Federal Rules of Civil Procedure, which does not apply in a criminal case.").

2. This Court's precedent dictates the conclusion that ICE's appeal must be dismissed. In *United States* v. *Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (per curiam), the Court dismissed, "for want of

---

[6/] As a decision of the former Fifth Circuit, *Briggs* is binding precedent. See *Bonner* v. *City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

jurisdiction," an appeal by a crime victim from the final judgment in a criminal case precisely because "no statute * * * give[s] 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." *Id*. at 999-1000. In *Franklin*, the defendant, J.C. Franklin, pleaded guilty to transporting stolen goods valued at more than $5,000 in interstate commerce. At Franklin's sentencing, the district court ordered Franklin to pay $5,000 to Earle Myers, the person whose goods had been stolen, under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 3663. Dissatisfied with the amount of restitution it had been awarded, Myers appealed, but this Court dismissed the appeal for lack of jurisdiction. Myers, the Court concluded, was "not a party" to the criminal prosecution, nor had he become a party because he "never sought leave to intervene in the proceedings before the district court." *Id*. at 999 n.1. With respect to the latter ruling, the Court "intimate[d] no view on two issues not before" it: (1) whether a victim has an "implied right[3] to intervene in a sentencing proceeding," and (2) "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." *Id*. at 1000. In footnote 3, the Court

observed that the VWPA "contains no provision expressly granting a victim the right to intervene in the sentencing proceeding," and therefore, "if such a right exists, it must be implied." *Id*. at 1000 n.3. *Franklin*'s holding is applicable here and it compels the dismissal of this appeal. See, *e.g.*, *Fanin* v. *U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 874 (11th Cir. 2009) ("prior precedent rule" requires courts to abide by prior holdings).

a. Like the VWPA at issue in *Franklin*, the CVRA "makes no reference to intervention" by a nonparty crime victim. *Brandt* v. *Gooding*, 636 F.3d 124, 136 (4th Cir. 2011). Rather, the CVRA's "carefully crafted and detailed enforcement scheme," *United States* v. *Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011), allows a crime victim, or the prosecutor on the victim's behalf, see 18 U.S.C. § 3771(d)(1), to assert the victim's rights by filing a "motion," which the district court must "take up and decide . . . forthwith." 18 U.S.C. § 3771(d)(3). But the CVRA neither requires nonparty crime victims to intervene as a precondition to asserting their rights, cf. 26 U.S.C. § 6110(d)(3) (allowing nonparty intervention in certain tax proceedings to protect a taxpayer's identity), nor disturbs the preexisting prohibition against nonparty intervention in a criminal case recognized by the former Fifth Circuit in *Briggs*. Instead, the statute allows

victims to assert their participatory rights *despite* their nonparty status. The CVRA thus "grants no privilege, much less an unconditional right, to intervene." *Brandt*, 636 F.3d at 136.

b. Nor does the CVRA create an implied right to intervene. "[L]egislative intent is the principal factor in determining the existence of implied rights of action," *Alabama Fed. Sav. & Loan Ass'n* v. *Merrill Lynch*, 680 F.2d 1384, 1385 (11th Cir. 1982) (per curiam), and there is no basis for concluding that Congress intended to allow crime victims to intervene. To the contrary, the statutory text and structure reveal that Congress created a regime in which victims could exercise their participatory rights notwithstanding their nonparty status, and that they could seek redress – as ICE did here – by filing a mandamus petition or by way of a government appeal of the denial of their rights. Nor is there any basis for concluding that Congress intended to radically revamp this Nation's longstanding history and tradition of public prosecutions conducted by executive branch officials by allowing victims to intervene in criminal cases. In fact, the pertinent statutory text points in exactly the opposite direction by cautioning that nothing in the CVRA should be "construed to impair the [government's] prosecutorial discretion." 18 U.S.C. § 3771(d)(6).

3. ICE seeks to distinguish *Franklin* by claiming that, unlike Mr. Myers (Franklin's victim), ICE "formally intervened in the lower proceedings by filing a Petition for Relief Pursuant to [the CVRA]." Br. 3 (citing footnote 3 in *Franklin*). The unstated premise of ICE's claim is that, by "intervening," it acquired the right to appeal from the final judgments in No. 11-12716. That premise, however, is doubtful. In *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 107 S. Ct. 1177 (1987), the Supreme Court concluded that a nonparty to an environmental clean-up action who had successfully intervened in the district court proceedings acquired "the right to appeal an adverse final judgment by a trial court." *Id.* at 375-376. But *Stringfellow* was a civil case, not a criminal case; and, in a post-*Stringfellow* criminal case, this Court held that a nonparty crime victim who had (erroneously) been permitted to intervene in the criminal case in the district court nevertheless lacked the capacity to appeal from an order rescinding the defendant's obligation to pay it restitution. See *United States* v. *Johnson*, 983 F.2d 216, 217-219 (11th Cir. 1993); see *id.* at 221 (dismissing appeal).

Although *Johnson* undercuts the foundation of ICE's position, that position suffers from an even more fundamental problem, which is that

ICE neither sought to intervene below nor was it granted permission to intervene below. ICE participated in the proceedings by filing a CVRA motion setting forth its view that it was a "crime victim" and invoking certain of its rights. Nothing in the motion or the lengthy prayer for relief included therein requested permission to intervene, and ICE has not cited anything in the record, such as a separate motion to intervene, that suggests otherwise. At the June 1st hearing, moreover, ICE's counsel made a lengthy oral request for specific forms of relief, but made no mention of a request for permission to intervene, Dkt. 80, at 39,[7/] perhaps owing to the fact that there is no authority for a nonparty to intervene in a criminal case. And ICE's current view – that the mere act of filing a CVRA motion, by itself and without more, constitutes a request to intervene in a criminal case – reflects a misunderstanding of the CVRA. A motion asserting rights

---

[7/] ICE'S COUNSEL: "Judge, we ask for the following: We ask that the plea be rejected. We ask that you find that we are a victim. We ask that the Justice Department be ordered to use its best efforts to attempt to gather information relating to harm and victim status and that we be able to present evidence of the harm directly to the Court or the determiner without the intervention pf the Department of Justice. [¶] We believe that an award of restitution is clearly appropriate, and based on all those things, Judge, we would ask you to reject the plea as it is presented because it does not meet the appropriate standards as I have outlined." Dkt. 80, at 39. The omission of any request by ICE to be allowed to intervene from its laundry list of specific requests confirms that no such request was made.

under the CVRA does not seek to alter a victim's legal status from that of a nonparty to that of a party; rather, such a motion is the procedural mechanism by which a victim (or an entity seeking victim status) asserts their statutory rights, which they may do *notwithstanding* their nonparty status.

Furthermore, if, as ICE claims, it had sought to intervene, the government would have opposed its request because it is procedurally unauthorized, as the government has recently done in other cases where nonparty crime victims have tried to intervene in cases pending on appeal. See, *e.g.*, *United States* v. *Burgess*, No. 09-4584 (4th Cir.) (government's opposition to motion of nonparty crime victim to intervene on appeal) (filed Feb. 21, 2012);[8/] *United States* v. *Crawford*, No. 11-5544 (6th Cir.) (government's opposition to motion of nonparty crime victim to intervene on appeal) (filed Dec. 2, 2011). The government filed no such pleading here, however, because none was necessary: no one – not the government, the defendants, the district court, or ICE itself – understood ICE to be seeking permission to intervene.

[8/] In an order dated February 23, 2012, the Fourth Circuit agreed with the government and denied the victim's motion to intervene.

Even if ICE's CVRA motion could somehow be interpreted as a *request* to intervene, moreover, ICE's statement that it "formally intervened," Br. 3, which implies that the court in fact allowed it to intervene, is as incorrect as it is misleading. A nonparty has no power to unilaterally intervene, but must obtain court approval. Cf. Fed. R. Civ. P. 24(a) ("On timely motion, the court must permit anyone to intervene who [meets certain criteria]."); Fed. R. Civ. P. 24(b) ("On timely motion, the court may permit anyone to intervene who [meets certain criteria]."). ICE points to nothing in the record suggesting that the district court granted its "motion" to intervene, and it did not. Instead, the district court, consistent with the CVRA and ICE's own request, allowed ICE to participate and be heard – but the court did not, as ICE now claims, allow it to intervene.[9/] ICE's feeble, eleventh-hour attempt to distinguish this Court's binding precedent in *Franklin* by claiming that it intervened below thus fails on its own terms. As a result, ICE stands in the identical posture as the victim,

---

[9/] The fact that the captions of the cases were not amended to reflect ICE's supposed "intervention" further confirms that ICE did not intervene. Cf. *Williams* v. *Frey*, 551 F.2d 932, 934 (3d Cir. 1977) (noting that the district court had amended the caption of a civil case to add the names of two intervening plaintiffs), abrogated on other grounds, 487 U.S. 312 (1987).

Earle Myers, in *Franklin*: it cannot appeal because of its nonparty status.

* * *

For the reasons set forth above and in our pre-briefing motions to dismiss these appeals, this Court's decision in *Franklin* compels the conclusion that it lacks jurisdiction over this appeal: ICE is not a party to the government's prosecution of the defendants and cannot (and did not) seek to become a party to it. Nothing in the CVRA disturbs this fundamental principle; indeed, all three circuits that have considered the issue after the CVRA agree that the statute does not alter the preexisting rule that nonparty crime victims lack the capacity to appeal, and that their exclusive remedy is by way of a petition for a writ of mandamus. See *Monzel*, 641 F.3d at 542; *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 54-55 (1st Cir. 2010); *United States* v. *Hunter*, 548 F.3d 1308, 1311 (10th Cir. 2008). ICE availed itself of the mandamus remedy; it may not now seek a second bite of the judicial-review apple by taking an appeal that Congress has not authorized.

B. ICE May Not Appeal In No. 11-12802 Because There Is No Final Judgment.

ICE's purported appeal in No. 11-12802 must be dismissed due to the absence of a final judgment. Contrary to ICE (Br. 1), Section 1291 does not provide a basis for appellate jurisdiction, not only because that statute does not permit a nonparty to appeal in a criminal case, but also because there is no final judgment against the Parent Defendant from which an appeal may be taken. Section 1291 authorizes the courts of appeals to review "all final decisions of the district courts of the United States." This statute establishes a "final judgment rule," *Flanagan* v. *United States*, 465 U.S. 259, 263, 104 S. Ct. 1051 (1984), which, "[i]n a criminal case * * * prohibits appellate review until conviction and imposition of sentence," *id.*; see also *Abney* v. *United States*, 431 U.S. 651, 656-657, 97 S. Ct. 2034 (1977). But in No. 11-12802, there has been no conviction or sentence, and hence no final judgment from which an appeal may be taken, because the charges against the Parent Defendant were deferred.[10/]

[10/] There is a narrow exception to the final-judgment rule, the so-called "collateral order" doctrine, which permits appeal of district court 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." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454 (1978). ICE has not

II. ICE's Unpreserved Due Process Arguments Lack Merit.

If this Court concludes that it has jurisdiction over these appeals, it should affirm the district court's order denying ICE's CVRA motion for victim status and restitution.

A. Standard of Review.

As ICE acknowledges (Br. 9), it forfeited the due process argument it now raises on appeal by failing to present it below. This Court's review is thus circumscribed by the plain error standard. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993). To satisfy this demanding standard, ICE must establish (1) an error that is (2) plain, in the sense of being clear or obvious under current law that (3) affects its substantial rights (resulted in prejudice) and that (4) seriously

---

invoked this exception or otherwise attempted to carry its burden of showing that it has been satisfied, see, *e.g. Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994), and it has therefore waived the point. See *United States* v. *Lopez*, 649 F.3d 1222, 1246 (11th Cir. 2011) (reiterating that arguments may not be raised for the first time in a reply brief). The exception does not apply in any event for two reasons. First, the collateral order doctrine is an interpretation of Section 1291's final-decision rule, and therefore, ICE's inability to appeal from the DPA against the Parent Defendant makes the collateral order doctrine inapplicable. See *Monzel*, 641 F.3d at 544 n.16. Second, the collateral order doctrine does not apply because, at the very least, the district court's order denying restitution is inextricably bound up with the merits of the underlying case.

affects the fairness, integrity or public reputation of judicial proceedings. *Olano*, 507 U.S. at 730-733.

B. Analysis.

1. ICE May Not Relitigate The Determination That It Is Not A Victim Entitled To Restitution.

ICE's appeal raises unusual – not to mention procedurally irregular and admittedly unpreserved – challenges to a garden-variety ruling by the district court, made after a lengthy hearing in which ICE was a full participant, that ICE failed to show that it was a victim entitled to restitution. Dissatisfied, ICE exercised its statutory right to challenge that fact-intensive ruling in a CVRA petition for a writ of mandamus, which this Court denied on the merits, holding that the district court had not clearly erred in finding that ICE failed to show it was a victim of the defendants' offenses and that ICE, as a practical matter, functioned as an unindicted coconspirator.

ICE has now appealed, seeking to relitigate the very same issues under the aegis of a "procedural due process: claim; and in doing so, it asserts that it "establish[ed] that it was a victim as a matter of law." Br. 14. The district court, of course, found that ICE was not a victim, and that this Court declined to disturb that ruling. Under the law-of-the-case doctrine,

"the findings of fact and conclusions of law by [this Court] are generally binding in all subsequent proceedings . . . on a later appeal," *Heathcoat* v. *Potts*, 905 F.2d 367, 370 (11th Cir. 1990), and, as this Court has explained, these principles are equally applicable to prior merits-based rulings declining to issue a writ of mandamus. See *United States* v. *Dean*, 752 F.2d 535, 542 (11th Cir. 1985). Thus, although ICE is wrong on the merits of its claim, the larger point to be made here is that ICE may not relitigate the factual or legal determinations undergirding the district court's determination, which this Court found not to be clearly erroneous, that it is not a "crime victim," much less argue that it is a victim as a matter of law.

Perhaps to avoid the obvious fact that it cannot relitigate the exact same issue a second time, ICE shifts gears in its appeal: it seeks to transform a routine, factbound CVRA victim-status determination into a question of constitutional moment. Contrary to its statutory, CVRA-based arguments below, ICE now contends that "the district court's conduct below violated [its] constitutional due process rights." Br. 9. ICE's due process claim is ill-conceived for many reasons, any one of which suffices to compel affirmance.

2. ICE Has Not Clearly Shown That It Is Entitled To Due Process Protections In Light Of Its Status As A Wholly State-Owned Foreign Corporation.

The Due Process Clause of the Fifth Amendment states that "no person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The threshold question is whether a wholly state-owned foreign corporation such as ICE, Br. 10, is a "person" entitled to due process protections. In this regard, it bears repeating that, on plain-error review, ICE does not meet its burden by showing that its status as a "person" is debatable; rather, it must point to "unequivocally clear" constitutional text or binding precedent endorsing its position. See, *e.g.*, *United States* v. *Schmitz*, 634 F.3d 1247, 1270, 1271 (11th Cir. 2011) (so interpreting the "plainness" requirement of plain error). It has not done so.

a. Despite ICE's confident declaration that it is "entitled to due process protections," Br. 10, ICE does not bother to analyze the constitutional text, much less show that it unequivocally compels the conclusion that a wholly state-owned foreign corporation is a "person." And the text does not meet that exacting standard. Indeed, even the constitutional personhood of a *domestic* corporation under the Fifth Amendment is unsettled. Such entities have been permitted to invoke the

Fifth Amendment's protection against double jeopardy, see *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349 (1977), but they do not possess a Fifth Amendment privilege against self-incrimination, see *Braswell* v. *United States*, 487 U.S. 99, 105, 108 S. Ct. 2284, 2288 (1988). A fortiori, the text of the Fifth Amendment does not unequivocally extend its protections to foreign corporations.

b. Unable to point to constitutional text, ICE relies on case law interpreting the Fifth Amendment, but those cases do not support its position. As ICE recognizes, Br. 10 n.8, the closest the Supreme Court has come to addressing the issue is the statement "[a]ssum[ing], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 619, 112 S. Ct. 2160, 2169 (1992), but that assumption involved the constitutional status of a foreign *state*, not a foreign *corporation*. And the better view is that foreign states are not persons: the States of the Union are not Fifth Amendment "persons," see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324, 86 S.Ct. 803 (1966), so "it would make little sense to view foreign states as 'persons' under the Due Process Clause." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). And if a foreign

state is not a person, then neither are its agents or instrumentalities; otherwise, those entities would receive a constitutional protection "that is denied to the sovereign itself." *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296, 301 (D.C. Cir. 2005); see also, *e.g.*, *Frontera Resources Azerbaijan Corp.* v. *State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009) ("[I]f SOCAR is an agent of the Azerbaijani state . . . then, like Azerbaijan, SOCAR lacks due process rights.").

ICE argues that the constitutional status of foreign states and their agents are irrelevant here because it is not a state or an agent of one. Br. 10. Although the former is true, the latter likely is not. In one reported case, ICE successfully argued that it *was* "an agency or instrumentality of the Costa Rican government." *Millicom. Intern. Cellular* v. *Republic of Costa Rica*, 995 F. Supp. 14, 16 (D.D.C. 1998). *Millicom* and others brought a civil suit for damages under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, naming ICE and others as defendants. ICE moved to dismiss the suit, arguing that it was immune under the FSIA because it was an "agency or instrumentality of" the Costa Rican government, and the district court agreed with that conclusion and granted its motion to dismiss. *Id.* ICE's own view of its legal status as an agent of the Costa Rican

government under the FSIA does not dictate its constitutional status as such, but it does, at the very least, cast doubt on ICE's current assertion that it is not an "agent" of Costa Rica for due process purposes.

And even if ICE were correct that it is not an agent or instrumentality of the Costa Rican government, that conclusion would not resolve the question posed here, which is whether ICE, as a wholly state-owned foreign corporation, is a "person." ICE argues that cases applying the due process-based "minimum contacts" test for personal jurisdiction to what ICE calls "foreign corporations" in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and *Helicopteros Nacionales de Colombia S.A.* v. *Hall*, 466 U.S. 408, 104 S. Ct. 1868 (1984), shows that it is a person for due process purposes. Br. 10. ICE is sorely mistaken. Initially, these decisions interpreted the due process clause of the Fourteenth Amendment (which applies to "states," not "persons"), and in any case, the "foreign" corporation in *International Shoe* was a Delaware corporation, see 326 U.S. at 311, and the foreign corporation in *Hall* was a private corporation, see *Hall* v. *Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870, 871 (Tex. 1982), rev'd, 466 U.S. 408 (1984); see also *Frontera*, 582 F.3d at 401 (citing *Helicopteros* as a case involving the exercise of jurisdiction over a "privately

owned foreign corporation[]"). These decisions do not clearly declare that a wholly state-owned foreign corporation is a Fifth Amendment "person."

Nor has ICE identified any binding Eleventh Circuit precedent on this issue. Cf. *S & Davis Intern., Inc.* v. *The Republic of Yemen*, 218 F.3d 1292, 1303-1304 (11th Cir. 2000) (declining to decide "the precise constitutional status of a foreign sovereign"). And, even though out-of-circuit decisions cannot establish a clear or obvious rule binding on this Court, nothing in the only two such reported decisions supports ICE's position. In *TMR Energy*, the D.C. Circuit called it "far from obvious" that a state-owned foreign corporation would be a "person" entitled to due process protection, see *TMR Energy*, 411 F.3d at 302 n.*, and in *Frontera*, the Second Circuit noted that it "has not been decided . . . [w]hether, and to what extent . . . state-owned foreign corporations" are "persons" under the Due Process Clause, *id*., and declined to decide the question, *id*. ("premature" to address this question).[11/]

[11/] ICE's claim that *Frontera* "distinguished" foreign states and their agents from state-owned foreign corporations, Br. 11 n.8, is beside the point: *Frontera* did not decide the issue and could not, in any event, have decided the issue in a way that would establish that the district court in this case committed clear or obvious error.

In sum, ICE has failed to clearly show that it is a "person" entitled to Fifth Amendment protections. That failure obviates the need to go further and justifies affirmance of the district court's rulings.

3. The District Court Did Not Deprive ICE Of Its "Property" Without "Due Process Of Law."

Even if ICE is a "person," its claim that the district court denied its motion without according it "procedural due process," Br. 11, is fanciful. ICE has not clearly shown that the district court deprived it of a constitutionally-protected property interest, and the district court accorded ICE ample pre-deprivation process in any event.[12/]

[12/] A claimant like ICE alleging a violation of its right to procedural due process must also make two additional showings – that (1) it has been "deprived" of its rights by (2) a governmental actor. In this case, ICE alleges that the district court effectuated a deprivation of its rights by not affording it an evidentiary hearing. For present purposes, we do not dispute that courts qualify as governmental actors within the meaning of the Fifth Amendment, cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 15-16, 68 S. Ct. 836, 843-844 (1948) (actions of "state courts" and its "judicial officers" are actions of the state within the meaning of the Due Process Clause of the Fourteenth Amendment), or that ICE's claim asserts a type of intentional conduct that can constitute a "deprivation," cf. *Daniels* v. *Williams*, 474 U.S. 327, 333-334, 106 S. Ct. 662, 665-666 (1986) (holding that mere negligent conduct by a state actor does not amount to a "deprivation" under the Fifth Amendment).

a. ICE Does Not Have A Property Interest.

"The necessary first step in evaluating any procedural due-process claim is determining whether a constitutionally protected interest has been implicated." *Tefel* v. *Reno*, 180 F.3d 1286, 1299-1300 (11th Cir. 1999); see also *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of . . . property.").[13/]

Property rights are not created by the Constitution. *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709. Rather, the rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure

---

[13/] ICE argues only that the court deprived it of its property interests, see Br. 10-12, and raises no claim concerning life or liberty; we limit our discussion accordingly. Although ICE elsewhere in its brief makes passing reference to the alleged "stigmatization" it has incurred as a result of the district court's determination that it effectively functioned as a coconspirator, see, *e.g.*, Br. 19-20, ICE does not assert that this characterization deprived it of a constitutionally protected liberty interest – perhaps because such a claim is not viable as a matter of law. See, *e.g.*, *Rehberg* v. *Paulk*, 623 F.3d 828, 851 (11th Cir. 2010) ("The Supreme Court has held that injury to reputation, by itself, does not constitute the deprivation of a liberty . . . interest protected under the Fourteenth Amendment.") (citing, inter alia, *Paul* v. *Davis*, 424 U.S. 693, 701-702, 96 S. Ct. 1155, 1160-1161 (1976)).

certain benefits and that support claims of entitlement to those benefits." *Id*. The cornerstone of a property right is a "legitimate claim of entitlement" to a benefit previously bestowed by the government. *Id*. at577, 92 S. Ct. at 2709. As the Court described it, the Constitution's "procedural protection of property is a safeguard of the security of interests that a person has *already acquired in specific benefits*." *Id*. (emphasis added). Thus, a person who receives public benefits pursuant to a governmental program has acquired a constitutionally-protected "property" interest in the continued receipt of those benefits that they may not be deprived of without due process of law. See *Mathews* v. *Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976) ("[T]he interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment."); cf. *Roth*, 408 U.S. at 576, 92 S. Ct. at 2709-2710 (public employees may have a constitutionally-protected "property" interest in "continued employment").

In this case, the alleged source of ICE's asserted "property" right is the CVRA itself. Br. 13 (ICE's claim is that it has "protected property interests in the rights enumerated in the CVRA"); see also Br. 11-12. This argument is misguided for at least three reasons. First, the CVRA creates

participatory rights, not *property* rights. ICE points to no language in the CVRA that gives it, or any crime victim (or person seeking that status) any "legitimate claim of entitlement" to any previously-conferred benefit. ICE's "argument" consists of nothing more than listing these rights and then saying that they create property interests. Br. 13. Such *ipse dixit* avoids the critical question of what property right, if any, exists in the first place.

And even if the CVRA could be understood to create property rights, those rights would only flow to "crime victims," 18 U.S.C. § 3771(a), yet ICE is not a victim. ICE tries to deflect this uncomfortable reality by arguing that a colorable claim to victim status is enough. Br. 11-12 (citing *Roth*, 408 U.S. at 579) (stating that the welfare recipients entitled to a hearing in *Goldberg* v. *Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011 (1970), "had not yet shown that they were, in fact, within the statutory terms of eligibility")). The plaintiffs in *Goldberg*, however, were in fact within the welfare statute's coverage – that is why they were called welfare "recipients" and not welfare "applicants" – and that is why they were not claiming a constitutional right to *receive* welfare payments in the first place but instead were challenging the adequacy of the procedures used to *terminate* benefits previously conferred. 397 U.S. at 262. The Supreme

Court more recently confirmed this understanding, explaining that, in *Goldberg*, "an individual's entitlement to benefits *had been established*, and the question presented was whether predeprivation notice and a hearing were required before the individual's interest in *continued payment of benefits* could be terminated." *American Manufacturers Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60, 119 S. Ct. 977, 990 (1999). At a minimum, *Sullivan* demonstrates that ICE has not shown a clear or obvious right to rely on the CVRA as the source of some as-yet-unidentified property right in light of the district court's finding that ICE is not within the CVRA's coverage.

Third, even assuming that the right to an evidentiary hearing – the right claimed by ICE, see Br. 15-17 – could somehow be conceptualized as a "property" right, the CVRA does not create an entitlement to such a hearing. Nothing in the CVRA's carefully-crafted enforcement provisions requires a hearing, much less clearly give a victim right to an evidentiary hearing; as such, they do not establish a "legitimate claim of entitlement" to, or "mutually explicit understanding" about, such a hearing. Cf. *Doe* v. *Florida State Bar*, 630 F.3d 1336, 1344 (11th Cir. 2011) (looking to the text of the pertinent rules to determine if a property right exists). Instead, those provisions state that a crime victim may assert their rights by filing a

"motion" in the district court, and instruct the district court to "take up and decide" any such motion "forthwith." 18 U.S.C. § 3771(d)(3). Congress knows how to require or permit "evidentiary hearings" when it so desires,[14/] and the absence of any comparable "hearing" language in the CVRA confirms that Congress did not intend to require such hearings. In fact, the statutory directive to district courts to "take up and decide" CVRA motions "forthwith" can arguably be read to imply that Congress did not expect district courts to hold protracted hearings on these matters. See Black's Law Dictionary 654 (6th ed. 1990) (first definitions of "forthwith" are "immediately" and "without delay"); cf. *Dickerson* v. *Northern Trust Co.*, 176 U.S. 181, 192-193, 20 S. Ct. 311, 315 (1900) ("forthwith" in a contract ordinarily means "as soon as by reasonable exertion, confined to the object, it may be accomplished").

[14/] See, *e.g.*, 7 U.S.C. § 2025 (c)(8)(G) (administrative law judge shall decide an appeal "after an evidentiary hearing"); 8 U.S.C. § 1229a(b)(2)(B) (permitting telephonic evidentiary hearings in immigration matters); 10 U.S.C. § 1034(f)(2)(C) (military corrections board may "if appropriate, conduct an evidentiary hearing"); 18 U.S.C. § 3401(i) (magistrate judge may be designated to conduct "evidentiary hearings" relating to supervised release violations); 28 U.S.C. § 1446(c)(5) (requiring "evidentiary hearing" in certain removed cases); but cf. 28 U.S.C. § 2254(e)(2) (precluding courts from holding an "evidentiary hearing" in certain habeas corpus cases).

b. ICE Received Adequate Process.

Even if ICE had a property interest, the district court accorded ICE adequate process before "depriving" it of that right, so ICE's claim fails for this reason as well. See *Carey* v. *Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 1050 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property").

ICE does not dispute that it received notice and that it was given multiple opportunities to be heard – both in writing (through the submission of numerous written pleadings) and orally (through counsel's extensive participation at the plea and sentencing proceeding). The guarantee of fair process embodied in the due process clause requires nothing more. See *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985) (due process is generally satisfied by written notice and an opportunity for the aggrieved person to "present reasons, either in person or in writing" as to why the proposed action should not be taken and to otherwise "present his side of the story").

For the first time on appeal, ICE now claims that the opportunities it was given below were constitutionally inadequate and that the "hearing"

it was given was insufficient because it was not an "evidentiary" hearing. Br. 17-19. What ICE inexplicably neglects to mention is that it did not ask the district court to hold an evidentiary hearing. Nor did ICE in any way dispute the procedures accorded to it by the court in connection with its ruling on ICE's motion: ICE voiced no objection to the quality, extensiveness, or adequacy of those procedures. ICE cannot colorably contend now that the district court committed an obvious constitutional error by failing to hold a hearing that ICE never requested.

The procedures used by the district court to decide ICE's status, moreover, were constitutionally adequate in any event. To determine whether the process was sufficient, courts weigh: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335, 96 S. Ct. at 893.

ICE's interests – a status interest in being classified as a victim and a monetary interest in receiving restitution – are not weighty. As to its

alleged status interest: the district court expressly found that the government accorded ICE the rights of a victim even though it was not actually a victim, so its status interest is marginal. And, while ICE has an interest in receiving restitution, its corporate monetary interest is qualitatively less substantial than the monetary interest at issue for the welfare recipients in *Goldberg*. Cf. *Mathews*, 424 U.S. at 340, 96 S. Ct. at 893 (distinguishing between benefits "not based upon financial need" and welfare assistance "given to persons on the very margin of subsistence"). That is especially so in light of the court's finding that ICE had unclean hands in the bribes. On the other side of the scale, the nature of governmental interest – avoiding unnecessarily burdensome and protracted evidentiary hearings, clogging the dockets, and impairing the swift resolution of pending cases – has been recognized as a substantial societal interest. See *Chrysler Intern. Corp.* v. *Chemaly*, 280 F.3d 1358, 1360 (11th Cir. 2002) (emphasizing "the authority of the district court to control the pace of litigation before it" and "the broad discretion district courts have in managing their cases" to "ensure that their cases move to a reasonably timely and orderly conclusion").

Perhaps most importantly, ICE has not shown that the procedures used by the district court – procedures ICE deemed satisfactory below – created the risk of an erroneous denial of their interests, or that the procedures they are now seeking would minimize that risk. Although ICE now asserts that the district court should have held an evidentiary hearing at which it could cross-examine two witnesses who revealed the bribery scheme, Christian Sapsizian and Jose Antonio Lobo, and that such a hearing allegedly would have changed the court's eventual finding that ICE was not a victim, it is mistaken. An evidentiary hearing would have had no such effect, for a number of reasons. First, neither of these foreign-national witnesses was available to testify in the United States at the time of the June 1, 2011 hearing: Sapsizian had been released from U.S. custody in March 2011 and was in France and thus unavailable, and Lobo was in Costa Rica, where he has been prosecuted by Costa Rican authorities. Second, during the period that Sapsizian was in U.S. custody, attorneys for ICE had equal access to Sapsizian and, in fact, took his deposition as part of ICE's civil lawsuit against Alcatel-Lucent. This deposition occurred after prosecutors last communicated with Sapsizian. Attorneys for ICE thus had the opportunity at this deposition to question Sapsizian about his dealings with

ICE and attempt to elicit testimony that might somehow demonstrate that ICE was a victim. They chose not to do so, and they cannot now claim that they were deprived of an opportunity to question Sapsizian. And in any event, the government's factual recitations in its response to ICE's CVRA motion and during the ensuing June 1, 2011 hearing opposing ICE's request for victim status were not based solely on the information provided to the government by Sapsizian and the statements made by Lobo to Costa Rican authorities. This information was verified by the voluminous evidence in the government's possession, including emails, reports of government interviews, Alcatel-Lucent's business records, agent agreements and invoices, and various other forms of evidence, all of which confirm that ICE as an organization had a deeply ingrained culture of corporation and was not a victim in this case. Lastly, ICE's assertions regarding the supposed need for an evidentiary hearing also fail to recognize that the district court made independent findings that it would not exercise its discretion to award restitution anyway due to the speculative nature of the restitution sought and the undue burden that the request would have had on the sentencing process. Dkt. 80, at 53 (noting the practical difficulties associated with "the ability for this Court to accurately, within a reasonable amount of time" o

ascertain "what damages would be, in which country, how they would flow" without "lengthy months of hearings"); see also 18 U.S.C. § 3663A (3)(B) (permitting court to deny restitution on this basis); 18 U.S.C. § 3663(a)(1)(B)(ii) (same).

At bottom, ICE's claim is that the same reasons a full-blown hearing was required in *Goldberg* require a hearing in this case, but the analogy is flawed. *Goldberg* is the high-water mark of procedural due process analysis, and in the four decades since the decision, the Supreme Court has consistently refused to hold that an "opportunity to be heard" is inadequate unless accompanied by a full-blown hearing of the sort given in *Goldberg* and sought here. Instead, what must be provided is "some kind of hearing," *Goss* v. *Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738 (1975), appropriate to the circumstances. See *id*. ("the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"). To that end, the Court has upheld informal hearing procedures in a wide range of contexts, emphasizing the burdens associated with full-blown hearings of the sort at issue in *Goldberg*. See *id*. (upholding informal school-disciplinary procedures); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 16 n.7, 98 S. Ct. 1554, 1564 n.7 (1978)

(opportunity for "informal consultation" prior to termination of utility service sufficient).

4. ICE's Remaining Claims Lack Merit.

ICE raises two final claims, neither of which merits extended discussion. First, ICE invokes the axiom (Br. 19) that "a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process," *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979), but this reliance is entirely beside the point: the district court's denial of ICE's requests for victim-status and restitution based in part on its findings that ICE functioned as an unindicted coconspirator did not "convict" ICE of a crime. Rather, the district court simply employed this phrase to capture the fact that ICE played a role in the bribery conspiracy.

Second, ICE contends that "the record evidence in the District Court did not support a conclusion that [it] was a co-conspirator," Br. 20, but that is incorrect for the reasons noted above. Nor, in any event, may ICE relitigate this issue in this proceeding. As noted, this Court denied ICE's mandamus petition, concluding that the district court did not clearly err in finding that ICE functioned as an unindicted coconspirator. The Court thus necessarily determined that the evidence sufficed to permit the district court

to make that finding. Cf. *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-574, 105 S. Ct. 1504, 1511 (1985) (clear error standard of review requires that factual findings reflect a "plausible . . . account of the evidence . . . in light of the record viewed in its entirety"). The law of the case doctrine thus bars ICE from attempting to relitigate this issue here and now. See *Klay* v. *All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004) (law of the case doctrine applies "not only as to matters decided explicitly but also as to those decided by necessary implication").

CONCLUSION

The appeals in No. 11-12716 should be dismissed for lack of jurisdiction due to the appellant's nonparty status; alternatively, the judgments should be affirmed. The appeal in No. 11-12802 should be dismissed for lack of jurisdiction due to the appellant's nonparty status and the lack of a final judgment; alternatively, the ruling should be affirmed.

Respectfully submitted,

MYTHILI RAMAN
Acting Assistant Attorney General[*/]

CHARLES E. DUROSS
Deputy Chief, Fraud Section

JOHN D. BURETTA
Acting Deputy Assistant Attorney General

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

By: */s Michael A. Rotker*

MICHAEL A. ROTKER
Attorney, Appellate Section

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

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing Brief for the United States is set in a proportionally spaced typeface (Calisto MT, 14-point type) and that it contains 11,712 words, as determined by WordPerfect 12 software.

/s Michael A. Rotker

MICHAEL A. ROTKER
Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of this brief to be served this 5th day of March 2012, by first-class mail, postage prepaid, on:

Burton Wiand, Esq.
WIAND GUERRA KING PL
3000 Bayport Drive, Suite 600
Tampa, FL 33607

Randolph Brombacher, Esq.
SAAVEDRA, PELOSI, GOODWIN & HERMANN, A.P.A.
312 Southeast 17th Street, 2d Floor
Fort Lauderdale, FL 33316

Professor Paul G. Cassell
S.J. Quinney College of Law at the University of Utah
332 South 1400 East, Room 101
Salt Lake City, UT 84112-0730
Counsel for Appellants

Robert J. Meyer, Esq.
Martin J. Weinstein, Esq.
WILLKIE, FARR & GALLAGHER LLP
1875 K Street NW
Washington, DC 20006

Jon A. Sale, Esq.
SALE & WEINTRAUB PA
Wachovia Financial Center
200 South Biscayne Blvd, Suite 4300
Miami, FL 33131
Counsel for Defendants-Appellees.

I further certify that (1) required privacy redactions have been made;

and (2) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s Michael A. Rotker

MICHAEL A. ROTKER
Attorney
United States Department of Justice