

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 11-12707-G

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

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**OPPOSITION TO PETITIONER’S MOTION TO WAIVE 72-HOUR
REQUIREMENT IMPOSED BY 18 U.S.C. § 3771(d)(3)**

INTRODUCTION

Petitioner Instituto Costarricense de Electricidad, S.A. (“ICE”), yesterday filed a mandamus petition and a motion to waive the 72-hour requirement imposed by the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771(d)(3).^{1/} The petition and instant motion by petitioner arise from two

^{1/} The government was alerted to the mandamus petition and motion by the Clerk’s Office this morning at 9:51 am. More than an hour later ICE provided copies of the petition and motion by email this morning.

criminal cases: *United States v. Alcatel-Lucent France, S.A., et al.*, No. 10-cr-20906 (S.D. Fla.), and *United States v. Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.). The government is filing this consolidated opposition to the petitioner's instant motion, because even though the Court may exceed the 72-hour requirement, the 72-hour requirement is not the petitioner's right to waive.^{2/}

In the district court, ICE asserted that it was a victim of the offense committed by Alcatel Lucent France, S.A., Alcatel-Lucent Trade International, A.G., and Alcatel Centroamerica, S.A. (collectively, the "Defendant Subsidiaries"), that is, conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), in violation of 18 U.S.C. § 371 (Count 1). ICE therefore argued that it was entitled to an order of restitution from the defendants under the Mandatory Victims' Restitution Act, 18 U.S.C. § 3663A ("MVRA"), for business-related losses which, ICE claimed, were the direct and proximate result of the Defendant Subsidiaries' conviction on Count 1. See 18 U.S.C. § 3663A(a)(2) (defining victim).

The government countered that, under the facts and circumstances, which reflected profound and pervasive corruption at the highest levels of ICE

^{2/} While these cases do not appear to have been formally consolidated, the Clerk's Office advised the government that it could file a single response applicable to both cases.

during the time period charged, the government did not believe it was appropriate to consider ICE a victim in these cases. For example, nearly half of the Board of Directors of ICE received millions of dollars in bribes in just this case alone, and there was evidence that ICE board members were receiving bribes from other companies during this time period. Moreover, the government argued that even if ICE was considered a victim, there is no reasonable way to determine the amount of loss in a non-speculative manner. Said differently, because the underlying conduct involved a corrupted tender process dating back a decade, the government argued that no reasonable approximate of the loss, if any, could be determined since it was not possible to determine what company would have won and at what price. In addition, the government argued that the process would be deeply complex and involve significant delays in the sentencing process. For instance, the government pointed out that this same conduct was the subject of civil litigation by ICE in Costa Rica, which has been ongoing for more than six years and just resulted in the conclusion of a year-long trial after which the Costa Rican court did not award ICE any damages. Finally, the government argued that, regardless of whether ICE was, in fact, a victim, the district court, the Probation Office, and the government had accorded ICE the rights enumerated under the CVRA.

At the Defendant Subsidiaries' June 1, 2011, change of plea and sentencing hearing, the district court (Cooke, *J.*) denied ICE's request for victim status finding ICE was complicit in the corruption that gave rise to the FCPA charges against the Defendant Subsidiaries and denied ICE's restitution request, finding that its claimed losses were unclear and that determining complex issues of fact related to the cause or amount of the ICE's purported losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to ICE was outweighed by the burden on the sentencing process. Tr. at 51-53. In spite of rejecting ICE's request for victim status, the district court did note that ICE was afforded victim rights, Tr. at 52, which included the full right of participation throughout the court proceedings. In accordance with the court's oral ruling, the final written judgment against the Defendant Subsidiaries, did not include an award of restitution.

STATEMENT

1. The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 ("CVRA"), gives "crime victims," 18 U.S.C. § 3771(a), *i.e.*, "person[s] directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. § 3771(e), eight enumerated rights, one of which is "[t]he right to full

and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6).^{3/} The CVRA also contains a “carefully crafted and detailed enforcement scheme,” *United States v. Monzel*, ___ F.3d ___, 2011 WL 1466365, at *11 (D.C. Cir. 2011), that allows crime victims and the United States to enforce the victim’s rights. A crime victim, see 18 U.S.C. § 3771(d)(1), may assert the victim’s rights by filing a “motion,” which the district court must “take up and decide * * * forthwith.” 18 U.S.C. § 3771(d)(3). The CVRA provides for judicial review of orders denying a crime victim’s motion asserting their rights. It permits “the movant” (*i.e.*, the victim or the United States) to “petition the court of appeals for a writ of mandamus,” *id.*, and requires that court to “take up and decide” the petition within 72 hours (subject to certain limited exceptions), *id.*

2. a. On December 27, 2010, a criminal Information was filed against the Defendant Subsidiaries charging them with conspiracy to commit offenses against the United States, to wit: violating the anti-bribery provisions, the

^{3/} The “as provided by law” clause indicates that the CVRA operates as a procedural vehicle for crime victims to enforce their right to receive restitution, and that a victim’s substantive right to restitution must be “provided by” some other source of positive “law,” such as the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663 (VWPA), or the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A (MVRA).

books and records provisions, and internal controls provisions of the FCPA, as amended, Title 15, United States Code, Section 78dd-1, *et seq.*, in violation of Title 18, United States Code, Section 371. The Information against the Defendant Subsidiaries alleges that the three entities entered into agreements with business “consultants” who were retained primarily to pay bribes to government officials for assistance in obtaining or retaining contracts, falsely recording such payments in their books and records, and knowingly circumventing internal accounting controls in the process. The charges were based on the Defendant Subsidiaries’ conduct in Costa Rica, Honduras, Taiwan, and Malaysia.

b. In addition, the government also filed a criminal Information against Defendant Alcatel-Lucent, S.A. (“Alcatel-Lucent”), the parent company of the Defendant Subsidiaries, on December 27, 2011, in *United States v. Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla.). The Information charged Defendant Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA, Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

c. On February 22, 2011, plea agreements for each of the Defendant Subsidiaries were filed in which each agreed to plead guilty to conspiring to

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

d. The case against the Defendant Subsidiaries and the related case against Defendant Alcatel-Lucent were consolidated before the district court, which set a status hearing for March 9, 2011. 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 and memorandum of law which, in part, objected to the proposed overall resolution and sought protection of its rights as a purported victim, including the right to restitution. On May 11, 2001, the district court heard further from the government, counsel for ICE,

and counsel for Defendant Alcatel-Lucent and Defendant Subsidiaries. The district court then set June 1, 2011, for a change of plea and sentencing hearing for the Defendant Subsidiaries at which time the district court indicated that it would hear further from the parties on victim and restitution issues.

e. On June 1, 2011, the district court heard argument from ICE and the government concerning ICE's objections to the proposed overall resolution and request for victim status and for restitution. The district court denied ICE's request for victim status, finding, as a factual matter, that ICE was complicit in the corruption that gave rise to the FCPA charges against the defendants:

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

I think you have, even though not a charged conspirator coconspirator relationship, that's essentially what went on here; that given the high-placed nature of the criminal conduct within the organization, the number of people involved, that basically it was "Bribery Is Us," meaning that everybody was involved in it. Even though you didn't know specifically, it's enough to say that the principals were involved here.

Tr. at 51-52. The district court also denied ICE's restitution request, finding,

as a factual matter, that its claimed losses were unclear and that determining complex issues of fact related to the cause or amount of ICE's purported losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to ICE was outweighed by the burden on the sentencing process. Tr. at 52-53. In spite of rejecting ICE's request for victim status, the district court did note that ICE was afforded by the government many of the rights typically reserved for victims. Tr. at 52. Thereafter the district court accepted the guilty pleas of the Defendant Subsidiaries and imposed a sentence in accordance with the proposed overall resolution. Consistent with the district court's oral ruling, the final written judgment against the Defendant Subsidiaries did not include an award of restitution. ICE filed a notice of appeal from the final judgment against the Defendant Subsidiaries.

ARGUMENT

ICE's motion to waive the 72-hour requirement imposed by the CVRA should be denied. The 72-hour rule imposed by Section 3771(d)(3) does not confer a right in the victim, which the victim can unilaterally waive. Rather, it serves broader institutional purposes in the timely and conclusive resolution of criminal matters. That said, while a victim cannot unilaterally waive the time period, the Court itself is not inexorably bound to decide the petition in

72 hours because the 72-hour period, while phrased in mandatory terms, does not specify a consequence in the event of non-compliance. Assuming, then, that the Court elects not to decide the petition within the 72-hour period provided, because there are sound reasons for expeditiously deciding this issue, if the Court determined that exceeding the 72-hour period was necessary and appropriate, the government would respectfully request that such period be relatively limited.

1. The CVRA's provision allowing nonparties to seek mandamus review, see 18 U.S.C. § 3771(d)(3), represents a dramatic and extraordinary departure from pre-CVRA precedent holding that nonparty crime victims could not invoke the All Writs Act to seek mandamus review of a ruling in a criminal case adversely affecting their rights. See, e.g., *United States v. McVeigh*, 106 F.3d 325, 328-329 (10th Cir. 1997). At the same time, Section 3771(d)(3) does provide an important requirement related to such mandamus review: requiring that the "court appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." While ICE claims that this "time limitation is designed for the benefit of the victim," Mot. at 4, nowhere in the CVRA is it suggested that this 72-hour requirement is a right of the victim, much less that a victim has the unilateral right to waive this

requirement. See 18 U.S.C. § 3771(d)(3). ICE's reliance on *Dolan v. United States*, 130 S. Ct. 2533 (2010), is misplaced, as it neither concerns the CVRA nor does it suggest that victims have the right to unilaterally waive the CVRA's 72-hour requirement.

A more relevant precedent squarely addressing this issue is the D.C. Circuit's recent decision in *Monzel*, 2011 WL 1466365 at *2. In *Monzel*, a victim filed a motion to waive the 72-hour statutory deadline for deciding the victim's mandamus petition. *Id.* The government opposed that motion arguing "the time limit cannot be waived at the sole discretion of the crime victim." *Id.* Agreeing with the government, the *Monzel* court held that nothing in the statute supports the view that "the CVRA gives a crime victim a personal, waivable right to a decision on a petition for mandamus within 72 hours." *Id.*

2. While rejecting the motion and finding that "the statute leaves us no room to set aside the 72-hour deadline," the *Monzel* court noted that the "deadline does not defeat our jurisdiction" to decide the petition and that under the circumstances, the court was forced to decide the issue "past the deadline." *Id.* Said differently, while the statute's use of the vocabulary of obligation directs that the court decide such petitions within the allotted time

frame, it does not provide a consequence in the event a court of appeals does not act within that time frame. Analogous precedent thus suggests that the Court retains some residual discretion (to be used sparingly) to exceed that limitation in exceptional cases as the court did in *Monzel*. For instance, several courts of appeals have addressed a similarly-worded time limitation that requires the courts of appeals to decide prisoner applications for permission to file a second or successive habeas corpus petition “not later than 30 days” after the application is filed. See 28 U.S.C. 2244(b)(3)(D). Though the statute speaks in obligatory terms, the courts of appeals that have considered the question agree that the 30-day time period is “precatory, not mandatory,” *In re Williams*, 330 F.3d 277, 280 (4th Cir. 2003) (collecting cases), because the statute does not specify a consequence for the court’s failure to act within the required time period. *Id.* at 280. Thus, while courts should make a “diligent, good-faith effort” to comply with this requirement in all cases, see *Rodriguez v. Superintendent*, 139 F.3d 270, 263 (1st Cir. 1998), the courts “retain the flexibility” (*id.*) to exceed that time limitation in “sufficiently complex or novel” cases that “demand[ed] more time.” *Id.* at 273 (listing, as examples, cases where additional documents must be gathered or supplemental briefing or oral argument is desired); see also, e.g., *Browning v. United States*, 241 F.3d

1262, 1263-1264 (10th Cir. 2001) (en banc) (endorsing First Circuit's reading of the time limitation and collecting cases). Accordingly, this Court could rationally and readily extend the reasoning of these cases to the CVRA's materially-indistinguishable time limitation and, while not granting the petitioner's motion,^{4/} the Court could exceed the deadline as the D.C. Circuit did in *Monzel*.

3. If this Court were inclined to decide the petitioners' mandamus petition outside the 72-hour period in the CVRA, there are practical reasons to decide the matter sooner than six months from now. The Defendant Subsidiaries and Defendant Alcatel-Lucent have already paid \$25 million in criminal penalties, and an independent corporate monitor is in the process of being selected. In fact, a meeting is scheduled with a French magistrate judge next week to discuss the monitorship and the appropriate transmittal by the monitor to the Department of Justice and the U.S. Securities and Exchange Commission in light of the French Blocking Statute (a French law limiting the transmission of certain information outside of France). In short, because there

^{4/} This Court did grant a similar motion in *In re Stewart*, No. 08-16753-G (Dec. 2, 2008), in an unpublished (and hence non-precedential) order. The government submits that the better procedural approach is to deny the motion under the logic and reasoning set forth in *Monzel*.

are a number of different ongoing obligations under the plea agreements and deferred prosecution agreement, timely resolution of this matter would be important for all parties.

CONCLUSION

The motion should be denied.

Respectfully submitted,

LANNY A. BREUER
Assistant Attorney General

GREG D. ANDRES
Acting Deputy Assistant Attorney General

Michael A. Rotker

By:

MICHAEL A. ROTKER
Attorney, Appellate Section

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

CHARLES E. DUROSS
Deputy Chief, Fraud Section
ANDREW GENTIN
Trial Attorney, Fraud Section

United States Department of Justice

*Criminal Division
1400 New York Avenue, N.W.
Washington, D.C. 20005
(202) 353-7691*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed on June 16, 2011, using the Court's ECF system, which will serve counsel, and by electronic mail. 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.

Michael A. Rotker

By: _____

MICHAEL A. ROTKER
Attorney, Appellate Section

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