

Case No. 11-12716-G; 11-12802-G
Southern District of Florida Docket No. 10-CR-20906, 10-CR-20907

U.S. COURT OF APPEALS
RECEIVED
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IN RE: INSTITUTO COSTARRICENSE DE ELECTRICIDAD
ATLANTA, GA.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 15 2011
JOHN LEY
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners.

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA

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

Respondents.

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

MOTION TO DISMISS DUE TO LACK OF JURISDICTION

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

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

The following are the relevant corporate disclosures:

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

Lucent Participations, which in turn is wholly owned by Alcatel Lucent, S.A.

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

The following are the interested persons:

1. Alcatel Centroamerica, S.A.
2. Alcatel-Lucent, S.A. (NYSE: ALU)
3. Alcatel-Lucent France, S.A.
4. Alcatel-Lucent Trade International, A.G.
5. Brombacher, Randolph
6. Cassell, Paul G.
7. Cooke, The Honorable Marcia G.
8. Duross, Charles E.
9. Gadboury, Mario T.
10. Gentin, Andrew
11. Govin, James
12. Guerra, George L.

13. Instituto Costarricense de Electricidad
14. Maglich, Jordan D.
15. Meyer, Robert J.
16. Morello, Gianluca
17. Pearlman, Dominique H.
18. Rotker, Michael A.
19. Saavedra, Damaso
20. Saavedra, Pelosi, Goodwin & Hermann, A.P.A.
21. Sale, Jon A.
22. Sale & Weintraub, P.A.
23. Smith, Julie A.
24. Weinstein, Martin J.
25. Wiand Guerra King P.L.
26. Willkie Farr & Gallagher LLP

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I. INTRODUCTION

These appeals arise from Instituto Costarricense de Electricidad's ("ICE") efforts to obtain restitution in two criminal cases brought by the Department of Justice against, respectively, Alcatel-Lucent, S.A., and three of its subsidiaries, Alcatel-Lucent France, S.A.; Alcatel-Lucent Trade International, A.G.; and Alcatel Centroamerica, S.A. (hereinafter the "ALU Subsidiaries").¹ During sentencing proceedings below, ICE sought restitution under the Crime Victims' Rights Act ("CVRA") as a condition of acceptance of Alcatel-Lucent S.A.'s deferred prosecution agreement and the guilty pleas of the ALU Subsidiaries. The District Court denied ICE's motions for restitution, rendered sentence and final judgment as to the ALU Subsidiaries, and accepted the terms of the Deferred Prosecution Agreement between Alcatel-Lucent, S.A. and the government. ICE then pursued the specific avenue for appellate review afforded to it under the CVRA: a petition

¹ The government moved to consolidate these appeals on July 8, 2011. *See* Government's Mot. to Consol. Appeals, *United States v. Alcatel-Lucent, S.A. et al.*, Nos. 11-12716-G & 11-12802-G (11th Cir. July 8, 2011). ICE filed its consent to that relief on July 12, 2011. *See* Appellant's Consent to Relief Requested in Government's Mot. to Consol. Appeals, *United States v. Alcatel-Lucent, S.A.*, No. 11-12716 (11th Cir. July 12, 2011).

for writ of mandamus. This Court denied ICE's consolidated mandamus petitions on June 17, 2011.²

ICE now purports to file direct appeals from the District Court's rulings. But ICE has no right to do so. It is well settled in this Circuit that a non-party cannot appeal the denial of restitution in a criminal sentence. Moreover, the CVRA makes clear that mandamus is ICE's exclusive remedy for seeking review of any denial of its purported rights under that statute, a remedy that ICE has already pursued. Therefore, ICE has no right to pursue these direct appeals of the District Court's rulings, and we respectfully submit that these appeals should be dismissed.

II. BACKGROUND

This appeal involves ICE's attempts to obtain restitution from the Alcatel-Lucent defendants under the CVRA in two criminal cases brought by the Department of Justice alleging violations of the Foreign Corrupt Practices Act ("FCPA"). In the first case, *United States v. Alcatel-Lucent, S.A.*, No. 1:10-CR-20907 (S.D. Fla. June 1, 2011) ("*Alcatel-Lucent, S.A.*"), the ultimate corporate parent of the Alcatel-Lucent Subsidiaries entered into a Deferred Prosecution

² Order, *In re Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. June 17, 2011) (unpub.) (attached hereto as Exhibit 1), pet. for reh'g en banc pending (filed July 7, 2011).

Agreement with the government. In the second case, *United States v. Alcatel-Lucent France S.A. et al.*, No. 10-20906-CR (S.D. Fla. June 1, 2011) (“*Alcatel-Lucent France S.A.*”), three Alcatel-Lucent subsidiaries pled guilty to criminal violations of the FCPA and were sentenced. Both cases are part of a global settlement by the Alcatel-Lucent defendants with the Department of Justice and the Securities & Exchange Commission regarding violations of the FCPA. ICE is a party to neither of the cases.

In *Alcatel-Lucent, S.A.*, the District Court accepted the Department of Justice’s decision to charge Alcatel-Lucent, S.A. with criminal violations of the books and records and internal controls provisions of the FCPA and to defer prosecution of those charges for a three-year period. In *Alcatel-Lucent France, S.A. et al.* the District Court accepted the guilty pleas of the Alcatel-Lucent Subsidiaries to conspiracy to commit anti-bribery, books and records, and internal controls violations of the FCPA. The Alcatel-Lucent defendants agreed to pay \$92 million in criminal fines (including fines of \$500,000 each to be paid by the ALU Subsidiaries). *United States v. Alcatel-Lucent, S.A.*, No. 10-20907-CR, Deferred Prosecution Agreement (S.D. Fla. Feb. 22, 2010) (the “DPA”); *United States v. Alcatel-Lucent France, S.A. et al.* No. 1:10-CR-20906, Plea Agreement (S.D. Fla.

Feb. 22, 2011).³ A total of \$25 million of the \$92 million criminal fine was payable within ten days of sentencing and has been paid by Alcatel-Lucent. As part of the disposition, Alcatel-Lucent also agreed to retain an independent corporate monitor to monitor and report on its compliance with the FCPA for the three-year term of the DPA.

The District Court's rulings in these two criminal cases followed several months of proceedings, in which ICE pressed its claim for restitution under the CVRA in motion papers and at oral argument over the course of two status conferences and the plea hearing. The District Court denied ICE's motions for restitution on June 1, 2011, and accepted the Deferred Prosecution Agreement of Alcatel-Lucent, S.A. and the guilty pleas of the Alcatel-Lucent Subsidiaries.

ICE filed petitions for writs of mandamus pursuant to the CVRA in this Court on June 15, 2011. On June 17, 2011, this Court denied the petitions for mandamus brought by ICE pursuant to the CVRA. Order, *In re Instituto Costarricense de Electricidad, S.A.*, Nos. 11-12707-G & 11-12708-G, at 2 (11th Cir. 2011) (unpub.) (attached hereto as Exhibit 1), pet. for reh'g en banc pending (filed July 7, 2011).

³ In its settlement with the Securities & Exchange Commission, Alcatel-Lucent agreed to pay an additional \$45.372 million in disgorgement of profits and prejudgment interest.

III. ARGUMENT

The Court lacks jurisdiction over ICE's appeals because neither of the statutes that ICE relies upon for jurisdiction—28 U.S.C. § 1291 or the CVRA—permits a direct appeal of a district court's sentencing determination by a purported crime victim. The Court lacks jurisdiction pursuant to 28 U.S.C. § 1291 because, as a non-party, ICE cannot appeal a sentence and judgment in a criminal case. In addition, all three circuits that have considered the issue whether crime victims may bring a direct appeal under the CVRA have concluded that the sole mechanism to seek such review is a petition for mandamus pursuant to 18 U.S.C. § 3771(d)(3), a remedy that ICE has already pursued.

A. A Non-Party Such As ICE Has No Standing To Appeal A Criminal Sentence And Judgment.

The general rule is that only the parties to a case may appeal the decisions of a District Court. A number of exceptions to the general rule have been recognized,⁴ but only where no other mechanism for review of an adverse decision exists. This is not such a case, for ICE has already obtained appellate review through its designated CVRA remedy, a petition for mandamus.

Indeed, prior to the enactment of the CVRA in 2004, this Court made clear that crime victims did not have standing to appeal the denial of restitution as part

⁴ See, e.g., *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (permitting unnamed class member to appeal class action settlement).

of a criminal sentence. *See United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993); *United States v. Franklin*, 792 F.2d 998 (11th Cir. 1986). In *Johnson*, a defrauded bank sought to appeal a district court order rescinding a prior order requiring payment of restitution. This Court held that the Victim and Witness Protection Act (“VWPA”) did not provide standing for the bank to appeal an order rescinding an order of restitution that had been rendered as part of a defendant’s criminal sentence. *Johnson*, 983 F.2d at 221.

Likewise, in *Franklin*, a defendant convicted of transporting stolen goods was ordered to pay restitution of \$5,000 to the victim. The victim filed a notice of appeal to challenge the amount of restitution ordered. This Court dismissed the appeal for lack of jurisdiction, stating: “[a]ppellant cites no statute, including the [Victim and Witness Protection] Act, and we find none, that would give us the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding in the district court.” *Franklin*, 792 F.2d at 999-1000.

The Second, Ninth and Tenth Circuits are in accord. *See United States v. Grundhoefer*, 916 F.2d 788 (2d Cir. 1990) (appeal of bankruptcy trustee from order denying restitution under the VWPA at criminal sentencing dismissed for lack of jurisdiction); *United States v. Mindel*, 80 F.3d 394 (9th Cir. 1996) (dismissing appeal by crime victim of order rescinding restitution under the VWPA; crime victim lacked standing to appeal the district court’s order or to petition the

appellate court for mandamus review); *United States v. Kelley*, 997 F.2d 806 (10th Cir. 1993) (dismissing victim's appeal of denial of restitution in criminal proceeding for lack of jurisdiction). As discussed below, the CVRA provides a specific statutory mechanism for mandamus review, but did not change the underlying principle that a non-party such as ICE lacks standing to pursue a direct appeal of a criminal sentence.

B. Under The CVRA, Mandamus Is The Sole Mechanism For Appellate Review Of CVRA Issues.

ICE's direct appeals must be dismissed for lack of jurisdiction because the sole mechanism for appellate review of decisions under the CVRA is a petition for writ of mandamus. The statute provides that the enumerated rights of crime victims "shall be asserted in the district court in which a defendant is being prosecuted for the crime" and that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).

Every circuit to have decided the issue has held that a mandamus petition pursuant to Section 3771(d)(3) is the only vehicle for challenging CVRA decisions. The first court to address the question, the Tenth Circuit, dismissed a direct appeal challenging the denial of a motion for recognition as a victim under the CVRA, explaining that "the CVRA does not provide for victim appeals," but rather "explicitly provides for a single avenue through which individuals may seek

appellate review of the district court's application of the statute: mandamus." *United States v. Hunter*, 548 F.3d 1308, 1311, 1315 (10th Cir. 2008). The First Circuit subsequently dismissed a similar appeal challenging a district court's denial of a request for restitution under the CVRA and "join[ed] the Tenth Circuit to hold that 'individuals claiming to be victims under the CVRA may not appeal from the alleged denial of their rights under that statute except through a petition for a writ of mandamus.'" *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52-55 (1st Cir. 2010) (quoting *Hunter*, 548 F.3d at 1309). The D.C. Circuit recently agreed that "mandamus is a crime victim's only recourse for challenging a restitution order" under the CVRA. *United States v. Monzel*, 641 F.3d 528, 540-44 (D.C. Cir. 2011).

Consistent with this rule, this Court has previously dismissed two direct appeals of district court CVRA rulings. Citing the provision for mandamus review in Section 3771(d)(3), the Court dismissed the appeals "for lack of jurisdiction." Order, *United States v. Coon*, No. 08-16719-GG (11th Cir. July 16, 2009) (attached hereto as Exhibit 2); Order, *United States v. Coon*, No. 10-12236-E (11th Cir. July 16, 2010) (attached hereto as Exhibit 3). The Court explicitly stated that "[t]he portion of the district court's order that denied the [claimants'] motion to be recognized as victims" under the CVRA "is not appealable." Order, *United States v. Coon*, No. 08-16719-GG (11th Cir. July 16, 2009) (Exhibit 2). Here, too, this Court should dismiss ICE's direct appeals of the district court's denial of its

request for victim status and restitution under the CVRA on the ground that the only mechanism for obtaining review of such decisions is mandamus.

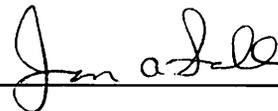
Indeed, dismissal is even more strongly warranted in this case because ICE has *already* exercised its statutory right to mandamus review of the CVRA rulings at issue in these direct appeals. In those proceedings, this Court swiftly heard and ultimately denied ICE's mandamus petitions on the merits. Order, *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G & 11-12708-G (11th Cir. June 17, 2011). ICE has thus already received the appellate review to which it is entitled.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the present appeals should be dismissed due to a lack of jurisdiction.

July 14, 2011

Respectfully submitted,

By: 

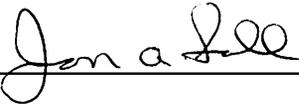
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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief, excluding exempted sections, contains 2,817 words. This brief was prepared using Microsoft Word in Times New Roman 14-pt font.



Certificate of Service

I hereby certify that on July 14, 2011 a true and correct copy of the foregoing Motion to Dismiss in case numbers 11-12716 and 11-12802 was served via Federal Express on all counsel or parties of record on the Service List below.



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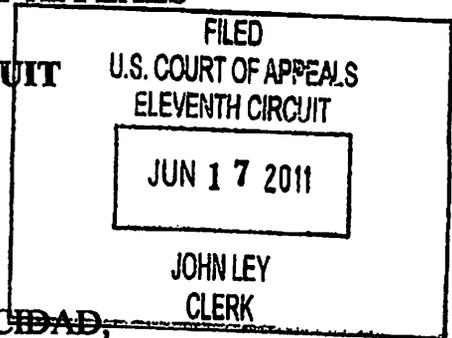
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<p>Martin J. Weinstein Robert J. Meyer Julie A. Smith WILLKIE FARR & GALLAGHER LLP 1875 K St. NW (202) 303-1000 mweinstein@willkie.com rmeyer@willkie.com jasmith@willkie.com</p>	

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12707-G



In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

No. 11-12708-G

In re: INSTITUTO COSTARRICENSE DE ELECTRICIDAD,

Petitioner.

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

Before: WILSON and MARTIN, Circuit Judges

BY THE COURT:

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

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

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

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

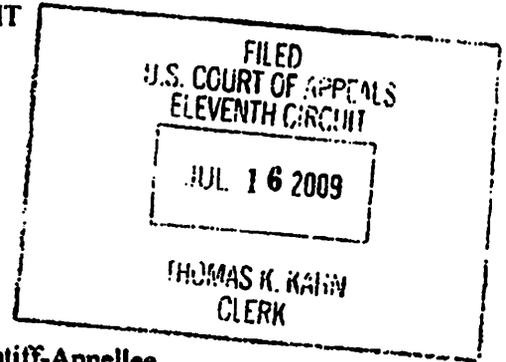
**Petitioner's Petitions for Writ of Mandamus are DENIED. The Motion to
Extend the 72 hour deadline established by 18 U.S.C. § 3771(d)(3) is also
DENIED.**

EXHIBIT 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-16719-GG



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHILIP WILLIAM COON,

Defendant-Appellee,

COAST BANK BORROWERS,

Movant-Appellant.

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

Before TJOFLAT, MARCUS, and WILSON, Circuit Judges.

BY THE COURT:

This appeal is **DISMISSED IN PART**, sua sponte, for lack of jurisdiction. The portion of the district court's order that denied the Coast Bank Borrowers' motion to be recognized as victims under the Criminal Victims' Rights Act, 18 U.S.C. § 3771, is not appealable. See 18 U.S.C. § 3771(c)(3). The portion of the district court's order that overruled the Coast Bank Borrowers' objections to the magistrate judge's report and recommendation is not final or immediately

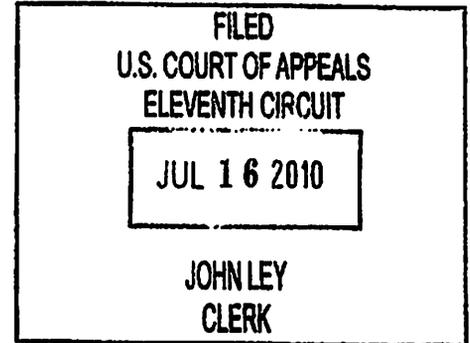
appealable. See 28 U.S.C. §§ 1291, 1292; Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978); Atl. Fed. Sav. & Loan v. Blythe Eastman Paine Webber, 890 F.2d 371, 375-76 (11th Cir. 1989); United States v. Curry, 760 F.2d 1079 (11th Cir. 1985). This appeal may PROCEED IN PART as to the portion of the district court's order that denied the Coast Bank Borrowers' motion to disclose portions of Philip William Coon's pre-sentence investigation report. See United States v. Ochoa-Vasquez, 428 F.3d 1015, 1026 n.7 (11th Cir. 2005); United States v. Valenti, 987 F.2d 708, 712 (11th Cir. 1993).

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-12236-E



UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PHILIP WILLIAM COON,

Defendant,

COAST BANK BORROWERS,

Movant - Appellant.

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

Before: CARNES, BARKETT and PRYOR, Circuit Judges.

BY THE COURT:

Plaintiff - Appellee's motion for leave to exceed page limitation in its combined response to Movant- Appellant's "Motion to Consolidate Appeal with Mandamus Petition Raising Identical Issues, to Treat the Petition as an Opening Brief on the Merits of the Appeal, and to expedite Decision on the Appeal" is GRANTED. Plaintiff - appellee's motion to dismiss the appeal for lack of jurisdiction is GRANTED. See 18 U.S.C. § 3771(d)(3). Movant- Appellant's

**“Motion to Consolidate Appeal with Mandamus Petition Raising Identical Issues, to Treat the
Petition as an Opening Brief on the Merits of the Appeal, and to expedite Decision on the
Appeal” is DENIED AS MOOT.**

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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www.ca11.uscourts.gov

July 16, 2010

Sheryl L. Loesch
United States District Court
801 N FLORIDA AVE RM 200
TAMPA, FL 33602-3849

Appeal Number: 10-12236-E
Case Style: USA v. Coast Bank Borrowers, et al
District Court Docket No: 8:08-cr-00441-EAK-MAP-1

The enclosed certified copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

Enclosure(s)

DIS-4 Multi-purpose dismissal letter