No. 11-12716-G

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

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.

REPLY IN SUPPORT OF MOTION TO DISMISS NONPARTY APPELLANT'S APPEAL

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MICHAEL A. ROTKER
Attorney, Appellate Section

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

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

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1. ICE asserts that *Franklin* reserved the questions whether a nonparty could intervene at sentencing and, if intervention was denied, appeal that denial, Opp. at 14-15, but the relevance of that assertion is entirely unclear. Like the victim in *Franklin*, see *id.*, ICE did not seek to intervene below, and in any event, the issues the Court reserved have no bearing on *Franklin*'s holding that this Court lacks jurisdiction over a nonparty crime victim's post-judgment appeal of a restitution order. ICE tries to sidestep this problem by asserting that, unlike the victim in *Franklin*, it was a de facto intervenor below because it participated at sentencing; thus, ICE suggests, it can appeal as a result. Opp. 15. ICE is incorrect.[1/] Although a nonparty who intervenes generally obtains "the same rights of appeal from a final judgment as all

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2. ICE asserts that *Franklin*'s "underpinnings" have been "called into serious question" by the CVRA. Opp. 15. Yet the text of the CVRA – which

ICE stubbornly refuses to address – allows victims to seek mandamus review, but not to appeal. Nothing in the CVRA, therefore, casts doubt on pre-CVRA decisions, like *Franklin*, dismissing victim appeals. Gov't Mot. to Dismiss, at 2-4, 11-18 (citing *United States* v. *Monzel*, 641 F.3d 528, 540-544 (D.C. Cir. 2011); *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's attempts to distinguish *Hunter* (which the D.C. and First Circuits subsequently endorsed) are unconvincing. Opp. 18-20. First, ICE asserts that, unlike the victim in *Hunter*, it is appealing from the final judgment and the court's ruling denying it victim status and restitution. But regardless of what ICE is appealing, the relief it seeks – an order of restitution – would require reformation of the judgment. See 18 U.S.C. § 3663A(a)(1) (courts must order restitution "when sentencing a defendant convicted of" a qualifying offense); Fed. R. Crim. P. 32(k)(1) (written judgment "must set forth * * * the sentence"). And this concern – allowing nonparties to upset an otherwise-final judgment – led the Tenth Circuit to dismiss the victim's appeal in *Hunter*. 548 F.3d at 1312 ("To our knowledge, there is no precedent – nor any compelling justification – for allowing a non-party, post-judgment appeal that would reopen a defendant's sentence and affect

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Second, ICE asserts that the Tenth Circuit's decision in *Hunter* relied on a provision of the CVRA that precludes crime victims from seeking to reopen a final judgment except in limited circumstances, one of which is that the victim must have previously obtained a writ of mandamus. See 18 U.S.C. § 3771(d)(5)(A). ICE observes that the Tenth Circuit did not mention that Section 3771(d)(5) also states that "[t]his paragraph does not affect the victim's right to restitution as provided in title 18, United States Code," language it interprets to mean that "Congress did not want any burden placed on crime victims attempting to protect their right to restitution." Opp. 14. But whatever this sentence means,[2/] it is irrelevant here: ICE is not seeking to reopen a plea or sentence following the issuance of a writ of mandamus. (In fact, ICE's petitions for writs of mandamus were denied.)

Third, ICE contends that the Tenth Circuit's analysis in *Hunter* is inapplicable because it is appealing from a ruling denying it victim status, which, it claims, is not an appeal from the judgment. Semantics aside, ICE's appeal seeks to upset an otherwise-final judgment; after all, ICE is not

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seeking to appeal the denial of victim status as an end unto itself, but is instead seeking to appeal that issue because it is the gateway through which ICE can obtain restitution. ICE's proffered distinctions provide no basis for rejecting the well-reasoned decisions of other circuits.

2. Unable to counter *Franklin* or avoid the force of a wall of circuit precedent declaring that the CVRA did not disturb the preexisting ban on nonparty post-judgment appeals, ICE asserts that this Court should simply decline to follow *Franklin*. Opp. 15-16. This astonishing assertion turns the law of *stare decisis* on its head. "Under the prior panel precedent rule, [this Court is] bound by earlier panel holdings * * * unless and until they are overruled en banc or by the Supreme Court." *United States* v. *Smith*, 122 F.3d 1355, 1359 (11th Cir.1997) (per curiam). *Franklin*'s holding is on point and has not been overruled; hence, it is binding on this panel in this case.[3/]

Even if *Franklin* was not controlling, the three cases ICE cites are inapposite. In *United States* v. *Kones*, 77 F.3d 66 (3d Cir. 1996), the court of

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[3/] ICE's observation that *stare decisis* is not an "inexorable command" (Opp. 15 n.9), and its related suggestion that this Court need not follow *Franklin*, is wide of the mark because it relies on cases addressing the Supreme Court's adherence to its own precedents. Those cases do not speak to the question here, which is whether a three-judge panel is bound by prior circuit precedent. Cases like *Smith* answer that question affirmatively.

appeals considered an appeal brought by a victim who was denied restitution. But the court did not address the significance of the victim's nonparty status on the victim's right to appeal. Nor did the court examine its own statutory authority to entertain the appeal, which the government had not contested. Instead, the court merely concluded that it had jurisdiction pursuant to 28 U.S.C. 1291, *id.* at 68, but this type of "drive-by jurisdictional ruling[] * * * ha[s] no precedential effect." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).[4/] Indeed, even the Third Circuit likely would decline to follow that portion of *Kones* in a future case where jurisdiction was contested. Cf. *Chong* v. *District Director, INS*, 264 F.3d 378, 383 (3d Cir. 2001) (rejecting the argument that the court should entertain an appeal simply because it exercised jurisdiction in another case because the jurisdictional issue was not presented in the earlier case).

As we explained, *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004), is even more irrelevant. See *Monzel*, 2011 WL 1466365, at *12 (agreeing with the government's distinctions of *Perry*). And, even though these

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[4/] The fact that the government mistakenly cited Section 1291 as a source of jurisdiction in that case is beside the point because subject-matter jurisdiction cannot be conferred by the consent of the parties. See *Morrison* v. *Allstate Indemnity Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000).

distinctions are determinative, ICE ignores them and opts instead to emphasize the fact that *Perry* highlighted the "pro-victim" nature of federal restitution statutes. But in matters of statutory interpretation, of the sort at issue here, courts "must respect the compromise embodied in the words chosen by Congress"; "[i]t is not [the Court's] place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other." *Mohasco Corp.* v. *Silver*, 447 U,.S. 807, 826 (1980). In the CVRA, the balance Congress struck is clear: victims have the right to seek mandamus review but not to appeal.

The final case ICE cites is *United States* v. *Doe*, 666 F.2d 43 (4th Cir. 1980), which held that Fed. R. Evid. 412 gave a rape victim the "implicit" right to appeal an order allowing the defendant to admit evidence of the victim's past sexual behavior at trial. *Id.* at 46. A contrary ruling, the court held, would "frustrate[]" the purposes behind Rule 412. *Id.* But *Doe*'s conclusion that Rule 412 created an implicit right of appeal is flawed because judge-promulgated rules, like the Federal Rules of Evidence, cannot "create * * * federal jurisdiction." *Kontrick* v. *Ryan*, 540 U.S. 443, 452-453 (2004); see also *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 n.13 ("[T]he Federal Rules of Civil Procedure do not expand the jurisdiction of federal

courts."). Nor, contrary to *Doe*, would a ruling that a nonparty victim cannot appeal frustrate the purposes of Rule 412 because the government, as a party to the prosecution, would retain the ability to appeal. And *Doe* is inapposite because it involved a pretrial appeal, not a post-judgment appeal of the sort here at issue. See *Hunter*, 548 F.3d at 1314 (distinguishing *Doe* as involving a pretrial appeal, not, as there, a post-judgment appeal).

* * *

The CVRA was intended to give victims greater participatory rights relative to criminal proceedings. One of the central means by which Congress sought to achieve that goal was to allow victims to seek immediate mandamus review of an adverse ruling. ICE contends (Opp. 12) that this mandamus remedy is a "supplemental" remedy for victims, not their "exclusive" remedy. More precisely, ICE appears to contend that victims have the option to seek *either* expedited mandamus review *or* ordinary appellate review. Even putting to one side the fact that the CVRA does not give victims the right to appeal, ICE's own actions belie its stated view. ICE invoked its statutory right to seek mandamus review, and this Court denied its petitions. Under ICE's professed view, that election should preclude an appeal – but it has not, as ICE has now appealed as well. ICE's actions thus

suggest that it believes, not (as it claims) that Congress gave victims the right to choose between mandamus or appellate review, but rather, that Congress gave victims the right to seek *both* mandamus *and* appellate review. While the CVRA was designed to remedy certain imbalances in the criminal justice system's treatment of victims, ICE cites nothing to support its sweeping conclusion that Congress intended to allow victims to have two bites – *i.e.*, mandamus review followed by appellate review – at the proverbial apple.

CONCLUSION

The parties to this prosecution have manifested their intent to bring this matter to a close and allow the judgment to become final. Having previously sought mandamus review, as permitted by law, ICE should not be permitted to proceed with its jurisdictionally-defective appeal – one that is doomed to fail anyway. Gov't Mot. to Dismiss, at 11 n.7 (noting the law-of-the-case bar to successive appellate review and ICE's inability to prove clear error). Indeed, allowing this appeal to move forward will not only consume further time and resources of the parties and the Court, but it will also prevent the judgment from truly attaining the finality that is "essential to the retributive and deterrent functions of the criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). This appeal should be dismissed.

Respectfully submitted,

MYTHILI RAMAN
Acting Assistant Attorney General[*/]

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Acting Deputy Assistant Attorney General

/s Michael A. Rotker

By: _____

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed and served on all counsel of record by email on July 20, 2011. 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.

By: /s Michael A. Rotker

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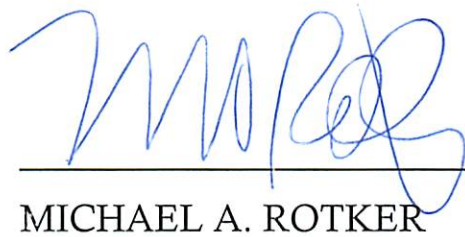

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[4/] The fact that the government mistakenly cited Section 1291 as a source of jurisdiction in that case is beside the point because subject-matter jurisdiction cannot be conferred by the consent of the parties. See *Morrison* v. *Allstate Indemnity Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000).

distinctions are determinative, ICE ignores them and opts instead to emphasize the fact that *Perry* highlighted the "pro-victim" nature of federal restitution statutes. But in matters of statutory interpretation, of the sort at issue here, courts "must respect the compromise embodied in the words chosen by Congress"; "[i]t is not [the Court's] place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other." *Mohasco Corp.* v. *Silver*, 447 U,.S. 807, 826 (1980). In the CVRA, the balance Congress struck is clear: victims have the right to seek mandamus review but not to appeal.

The final case ICE cites is *United States* v. *Doe*, 666 F.2d 43 (4th Cir. 1980), which held that Fed. R. Evid. 412 gave a rape victim the "implicit" right to appeal an order allowing the defendant to admit evidence of the victim's past sexual behavior at trial. *Id.* at 46. A contrary ruling, the court held, would "frustrate[]" the purposes behind Rule 412. *Id.* But *Doe*'s conclusion that Rule 412 created an implicit right of appeal is flawed because judge-promulgated rules, like the Federal Rules of Evidence, cannot "create * * * federal jurisdiction." *Kontrick* v. *Ryan*, 540 U.S. 443, 452-453 (2004); see also *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 n.13 ("[T]he Federal Rules of Civil Procedure do not expand the jurisdiction of federal

courts."). Nor, contrary to *Doe*, would a ruling that a nonparty victim cannot appeal frustrate the purposes of Rule 412 because the government, as a party to the prosecution, would retain the ability to appeal. And *Doe* is inapposite because it involved a pretrial appeal, not a post-judgment appeal of the sort here at issue. See *Hunter*, 548 F.3d at 1314 (distinguishing *Doe* as involving a pretrial appeal, not, as there, a post-judgment appeal).

* * *

The CVRA was intended to give victims greater participatory rights relative to criminal proceedings. One of the central means by which Congress sought to achieve that goal was to allow victims to seek immediate mandamus review of an adverse ruling. ICE contends (Opp. 12) that this mandamus remedy is a "supplemental" remedy for victims, not their "exclusive" remedy. More precisely, ICE appears to contend that victims have the option to seek *either* expedited mandamus review *or* ordinary appellate review. Even putting to one side the fact that the CVRA does not give victims the right to appeal, ICE's own actions belie its stated view. ICE invoked its statutory right to seek mandamus review, and this Court denied its petitions. Under ICE's professed view, that election should preclude an appeal – but it has not, as ICE has now appealed as well. ICE's actions thus

suggest that it believes, not (as it claims) that Congress gave victims the right to choose between mandamus or appellate review, but rather, that Congress gave victims the right to seek *both* mandamus *and* appellate review. While the CVRA was designed to remedy certain imbalances in the criminal justice system's treatment of victims, ICE cites nothing to support its sweeping conclusion that Congress intended to allow victims to have two bites – *i.e.*, mandamus review followed by appellate review – at the proverbial apple.

CONCLUSION

The parties to this prosecution have manifested their intent to bring this matter to a close and allow the judgment to become final. Having previously sought mandamus review, as permitted by law, ICE should not be permitted to proceed with its jurisdictionally-defective appeal – one that is doomed to fail anyway. Gov't Mot. to Dismiss, at 11 n.7 (noting the law-of-the-case bar to successive appellate review and ICE's inability to prove clear error). Indeed, allowing this appeal to move forward will not only consume further time and resources of the parties and the Court, but it will also prevent the judgment from truly attaining the finality that is "essential to the retributive and deterrent functions of the criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). This appeal should be dismissed.

Respectfully submitted,

MYTHILI RAMAN
Acting Assistant Attorney General[*/]

GREG D. ANDRES
Acting Deputy Assistant Attorney General

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was served on July 20, 2011, by first-class mail, postage prepaid, on:

Burton Wiand
George Guerra
Gianluca Morello
Dominique Heller
Jordan Maglich
WIAND GUERRA KING PL
3000 Bayport Drive, Suite 600
Tampa, FL 33607

Robert J. Meyer
Martin J. Weinstein
Willkie, Farr & Gallagher LLP
1875 K Street NW
Washington, DC 20006

Jon A. Sale
Sale & Weintraub PA
Wachovia Financial Center
200 South Biscayne Blvd, Suite 4300
Miami, FL 33131

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.

By: _____
MICHAEL A. ROTKER
Attorney, Appellate Section
United States Department of Justice