No. 10-738

In the Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., *et al.*,
Petitioners,

v.

THOMAS PETTERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THOMAS PETTERS

Jon M. Hopeman
Counsel of Record
FELHABER, LARSON,
FENLON & VOGT, P.A.
220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402
(612) 339-6321

Counsel for Respondent
Thomas Petters

2011 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

Blank Page

QUESTIONS PRESENTED

1. Whether the Mandatory Victims Restitution Act (MVRA) "complexity exception" permits a district court to decline an order of restitution where the victims number in the hundreds and each claim would require a separate hearing to resolve highly-complex issues regarding loss.

2. Whether the Crime Victims' Rights Act (CVRA) "written opinion" mandate is waived by the complainant's failure to preserve the issue below and by failure to employ the appropriate procedural vehicle in seeking review of the matter.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Blank Page

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Thomas Petters opposes the Petition for Writ of Certiorari submitted by the conglomerate of hedge funds known as Ritchie Special Credit Investments, Ltd., *et al.* ("Ritchie Entities").

STATEMENT OF THE CASE

I. The PCI fraud

Following a cooperating witness's proffer to federal law enforcement officials, including the United States Attorney's Office for the District of Minnesota ("Government"), a fraudulent scheme was uncovered at the Minnesota company known as Petters Company, Inc. ("PCI"). Briefly stated, PCI would borrow money from certain investment entities (*e.g.*, hedge funds), asserting that the loan funds would be used to purchase consumer goods for resale to retailers. In reality, though, PCI was not purchasing consumer goods with the loan funds, but rather was using the funds for other purposes and to pay off prior lenders—a Ponzi scheme.

PCI would funnel a portion of the profits from the scheme to Petters Group Worldwide ("PGW"), a Minnesota umbrella company controlling many legitimate companies. PGW, in turn, would distribute PCI's illicit profits to its subsidiaries.

The Government's above-mentioned principal cooperator, Deanna Coleman, pled guilty to her role in the scheme. Over time, additional individuals also

pled guilty and began cooperating with the Government: Robert White; Michael Catain; Larry Reynolds; Greg Bell; and Harold Katz.

II. The legal actions

Parallel criminal and civil actions ensued: (a) criminal actions brought by the Government against Mr. Petters and others; (b) a civil action brought by the Government against Mr. Petters and others, freezing the assets of said individuals and imposing a receivership ("Receivership Action"); and (c) a number of bankruptcy actions, wherein PCI, PGW, and a number of PGW-controlled entities filed for bankruptcy protection ("Bankruptcy Actions").

III. Order with respect to restitution

Mr. Petters pled not guilty and defended against the Government's criminal charges at trial. He did not defend on the basis that there was no fraudulent scheme—for their was one. Rather, his defense was that his trusted lieutenants concocted and ran the scheme without Mr. Petters' knowledge. A jury found Mr. Petters guilty, though the conviction is currently being reviewed on appeal, *United States v. Thomas Joseph Petters*, No. 10-1843 (8th Cir.).

After the jury returned its verdict, the district court delayed entry of a restitution order. The Government conducted an extensive restitution investigation and analysis, ultimately identifying 475 victims of the PCI fraud.

In its final proposed restitution order the Government acknowledged that, based upon the funds available at the time, each victim would receive perhaps one cent on the dollar in restitution. The Government also noted that additional funds might later be available through the remission process relating to criminal forfeiture, and/or the pending Bankruptcy Actions.

The Ritchie Entities objected to the Government's proposed restitution order, claiming that only direct investors were victims within the meaning of the federal restitution regime. The Government countered that this cramped view of what constitutes a victim did not conform to the law, and would have the perverse result of cutting the most vulnerable victims (*e.g.*, elderly individual investors) out of the restitution calculus. Mr. Petters took the position that no restitution order ought to be made because victims would receive perhaps a penny on the dollar, and such an order would only complicate the process in the Receivership Action and Bankruptcy Actions for victims to be compensated as fully and fairly as possible.

Ultimately, the district court issued an order denying restitution based on the MVRA's "complexity exception." Pet. App. at 6-22.

IV. Coordination agreement

Subsequently, the Government, Receiver, and Bankruptcy Trustees entered into a coordination agreement, approved by the district courts in the Receivership Action and Bankruptcy Actions.

The coordination agreement notes: "[T]here is a significant overlap between victims of the fraud and creditors of the PCI Estates and PGW Estate, and competing litigation would result in overall diminishment of recovery for victims and creditors alike and undue delay in the distribution of assets." It was agreed that, as to individual defendants in the criminal actions, the Government will use its statutory authority to forfeit assets for eventual return to victims through the Department of Justice administrative remission process. The Receiver and Bankruptcy Trustees will pursue civil clawback actions, and funds from these actions will either go to the bankruptcy estates or the Government for payment to victims via the remission process.

ARGUMENT

Candidly speaking, this Court's decision with respect to the Ritchie Entities' Petition matters little to Mr. Petters. He has disputed and continues to dispute his conviction and sentence, not the district court's restitution order. Having said that, a major fraud occurred here and many victims were harmed. Mr. Petters wishes to do what he can to assist the most victims in the fairest way possible, which is why he takes the following position:

I. The Petition must be denied because the District Court correctly stated the clear and unanimously-held law with respect to the MVRA's "complexity exception"; The Ritchie Entities' quarrel is with District Court's factual findings, which is not a rationale for certiorari review.

A. Standard for certiorari review

Review on a writ of certiorari is discretionary and only to be granted for "compelling" reasons, such as a circuit split with respect to an important legal question. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. SUP. CT. RULE 10.

The Ritchie Entities assert that there is some legal question as to how the MVRA's "complexity exception", 18 U.S.C. § 3663A(c)(3)(B), is applied. In truth, though, the statute is plain on its face, there is no disagreement among the circuits as to its

application, and the district court properly followed its plain language in denying restitution here.

B. Unambiguous statutory language

The principal issue raised by the Ritchie Entities is whether a sentencing court may invoke the MVRA's complexity exception to "deny restitution to the victims." Pet. at 8-10. The plain language of the statute provides that the answer is yes. The MVRA compels district courts to order restitution in cases involving violence, property, and consumer protection. But the statute also makes an explicit "complexity exception":

> This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) [property and fraud offenses] if the court finds, from facts on the record, that . . . determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B).

C. Application of law to facts

The Ritchie Entities do not seriously dispute the clarity of the statutory language, nor do they cite contrary authority. They do not even dispute that the district court went through an extensive list of reasons why the complexity exception should apply: (i) there were a large number of victims; (ii) the list

of victims and claimed damages continually changed without obvious explanation or documentation; (iii) the restitution process would require literally hundreds of evidentiary hearings, a process that would delay final resolution of the matter; and (iv) even if the district court were to engage in the process, it would result in perhaps a penny on the dollar per victim.

D. Absence of circuit split

The Ritchie Entities complain that the district court improperly considered the existence of alternative remedies in invoking the complexity exception. First, they incorrectly suggest that the district court heavily relied on the existence of alternative remedies. As noted above, the district court merely mentioned the availability of alternative remedies in passing, probably to make clear that it was not leaving victims unprotected. It was not a major consideration in the district court's reasoning.

But even if the district court partially relied on the existence of alternative remedies, courts have permitted a district court to consider this as a factor in determining whether the complexity exception should apply. *United States v. Gallant*, 537 F.3d 1202, 1254 (10th Cir. 2008).

The Ritchie Entities wrongly state that there is a circuit split as to whether it is appropriate to consider alternative remedies, though the proposition does not withstand scrutiny.

They principally rely on *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006). But *Cienfuegos* is a manslaughter case—a crime of violence for which the complexity exception plainly does not apply. The Ninth Circuit said as much. *Id.* at 1168.

Next, the Ritchie Entities cite *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000). This is not a complexity exception case either, nor is the applicable statutory provision cited therein. Rather, *Alalade* stands for the unremarkable proposition that the district court is generally required to order the full amount of restitution even where the Government has forfeited certain property that will may be available for restitution at some future time.

Last, the Ritchie Entities cite *United States v. Hyde*, 497 F.3d 103 (1st Cir. 2007), which again has nothing to do with the complexity exception. Rather, that case simply affirms the district court's authority to enforce its restitution order through a writ of garnishment.

Put simply, the district court did not rely heavily on existence of alternative remedies. But even if it had done so, the law states that it is a permissible factor and there is no disagreement among the circuits on the point.

E. Impropriety of certiorari review

In sum, the Ritchie Entities cannot point to any legal question worthy of this Court's certiorari review. Their real complaint is one of application of clearly-established law to facts in this particular

case—a situation where certiorari review is rarely appropriate. U.S. SUP. CT. RULE 10. This Court grants certiorari review to resolve federal questions of importance to the public, not to add an extra layer of review to matters of interest only to individual litigants. *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1955).

Moreover, the Ritchie Entities' true goal is apparent—they discern some strategic advantage in a restitution order that places them in a superior position *vis-à-vis* other victims. This is hardly a compelling rationale for this Court's discretionary review. It is telling that the Government has not appealed the district court's order regarding restitution, though it could have done so. This Court should not grant discretionary review here.

II. The Petition must be denied with respect to the CVRA's "written opinion" provision because the Ritchie Entities waived the issue for failure to raise it before the Court of Appeals, and moreover there is nothing in the record indicating the result would be different if a written opinion were to issue.

A. Failure to preserve issue

The CVRA gives crime victims the authority to petition a district court to enforce statutory rights. "If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

The Ritchie Entities now claim the Eighth Circuit violated this "written opinion" provision. But they never made the argument to the Eighth Circuit Court of Appeals, precluding this Court's review. *Glover v. United States*, 531 U.S. 198, 205 (2001).

Notably, the written opinion matter appears nowhere in the Ritchie Entities' list of issues submitted to the Eighth Circuit, *In re Ritchie Special Credit Investments, Ltd.*, No. 10-3050 (8th Cir.) (Pet. for Mandamus, Docket No. 3703994 at 3-4), effectively abandoning the matter, *Anderson Marketing, Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (8th Cir. 1995). Nor did they submit a petition for panel rehearing or rehearing *en banc* after the Eighth Circuit issued its opinion. FRAP 35, 40. The

issue was simply not raised, and this Court does not grant certiorari review where the claimed error is not preserved below. *Glover*, 531 U.S. at 205.

The Ritchie Entities may rely on a handful of references to the written opinion rule in their Petition for Mandamus. But passing references do not suffice to raise or preserve an issue. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1066 (3d Cir. 1991). The rules properly place the burden on an appealing party to set out clear issues for the Court of Appeals to decide. FRAP 28(a)(5), (9). Were it otherwise, appellants would propound ever-shifting theories in seeking this Court's review.

In short, the issue has not been preserved. Certiorari review would be an exercise in futility.

B. Improper appeal procedure

The Ritchie Entities seek to compel a lower court to perform a claimed mandatory duty—an action that requires a petitioner to proceed by extraordinary writ rather than petition for certiorari review. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978); *see also* U.S. SUP. CT. RULE 20. Thus, the Petition for Certiorari at issue here is not the appropriate vehicle by which to raise the "written opinion" issue.

Moreover, the Ritchie Entities' failure to raise the issue before the Court of Appeals would foreclose a petition for extraordinary writ in the same way that it forecloses the Petition at issue here. *In re Blodgett*, 502 U.S. 236, 240 (1992).

C. Impropriety of certiorari review

Even ignoring the fatal procedural defects, there is no need for this Court to wade into the issue, certainly not in this case.

First, the statute is clear on its face, so there exists no important point of federal law to consider, nor a conflict in the law to resolve.

Second, the district court issued a lengthy, well-reasoned opinion. The Ritchie Entities then briefed a lengthy Petition for Mandamus to the Eighth Circuit, clearly setting out their arguments which were ultimately rejected. Thus, all sides of the argument have been laid out. There is no reason to suppose a "written opinion" by the Court of Appeals would alter the result in any way.

Last, the Eighth Circuit no doubt would have issued a written opinion had the matter been brought to Court of Appeals' attention more explicitly. It was not, and now the Ritchie Entities improperly seek to use unpreserved error as a wedge into this Court.

Based on all these fatal deficiencies, the Ritchie Entities' Petition must be denied.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari must be denied.

Respectfully submitted,

Jon M. Hopeman
Counsel for Respondent Thomas Petters

April 13, 2011

Blank Page