No. 10-738 DEC 1 - 2010

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Mandatory Victims Restitution Act (MVRA) generally requires federal district courts to order as part of a criminal defendant's sentence "that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1). If a district court refuses to do so, the Crime Victim Rights Act allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). "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." *Id.* The questions presented are:

1. Whether a sentencing court, confronted with the task of determining victims' losses pursuant to the MVRA, may deny restitution to the victims because it believes that the victims might be able to recoup their losses in an alternative forum.

2. Whether the Eighth Circuit's judgments denying mandamus relief should be reversed and remanded because it failed to provide any reasons for denying such relief, as required by 18 U.S.C. § 3771(d)(3).

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

This case arises from several related criminal prosecutions prosecuted in the U.S. District Court for the District of Minnesota by the United States.

Petitioners, parties that sought restitution in the courts below, are Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, Ltd., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. and Ritchie Capital Management, L.L.C.

Respondents are Thomas Petters, Deanna Lynn Coleman, Robert Dean White, Michael Catain, Larry Reynolds, Harold Alan Katz, and Gregory Malcolm Bell, defendants in the criminal cases; and the United States of America, the plaintiff in the criminal prosecutions from which this case arises. Because this case arises out of mandamus petitions, the United States District Court of the District of Minnesota is nominally a respondent as well.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court rule 29.6, petitioners Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, L.L.C., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd., and Ritchie Capital Management, L.L.C. state that they do not have parent corporations or publicly held companies owning 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Ritchie Special Credit Investments, Ltd., et al., respectfully seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The orders denying relief from the Eighth Circuit (Pet. App. 1 and 3) are unpublished. The relevant opinions from the district court (Pet. App. 6, 19 and 21) are unpublished.

JURISDICTION

The Eighth Circuit issued its orders denying relief on August 3, 2010 and September 24, 2010. Pet. App. 1 and 3. On October 21, 2010 Justice Alito extended the deadline for this petition through December 1, 2010. No. 10A399. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Mandatory Victim Restitution Act ("MVRA") and Crime Victims Rights Act ("CVRA"), codified at

18 U.S.C. §§ 3663A, 3664 and 3771, respectively, are fully reproduced in the Appendix at pages 31-50.

STATEMENT OF THE CASE

Petitioners are several investment funds and the fund manager, who together lost over $165 million as a result of a multi-billion-dollar fraud scheme orchestrated by Thomas Petters. As direct and proximate victims of Petters and his convicted co-conspirators, petitioners were eligible for restitution under the Mandatory Victim Restitution Act ("MVRA") and the Crime Victims Rights Act ("CVRA"). Yet the district court refused to award such restitution, because "[a]t bottom" it believed that petitioners could pursue alternative remedies. Pet. App. 16. The Eighth Circuit then compounded this error, denying mandamus without a written opinion, in direct contravention of the CVRA's requirement that any denials of mandamus regarding restitution must be accompanied by a written opinion explaining why relief was denied.

1. In this case – often called the biggest Ponzi scheme before Madoff – Petters and his co-conspirators bilked their victims by borrowing huge sums evidenced by promissory notes. Petters had built a reputation as an astute and successful businessman in the wholesale "diverting" industry, and owned a number of well-known companies including Polaroid, Fingerhut, and Sun Country Airlines – giving him the credibility and clout to borrow huge

sums from banks and investment funds to leverage various transactions. But as victims later learned, over time, Petters' diverting business, PCI, had ceased making the large wholesale transactions in consumer goods and eventually became a complete fraud; there were no real products changing hands, nor profits being made. Money borrowed from new lenders was used to pay prior lenders.

Between February and May 2008, in the early throes of economic recession and in the midst of an historic credit crunch, petitioners loaned a total of $189 million to Petters and his companies in a series of short term notes, supported by assets of Polaroid Corporation, among other substantial collateral. When Petters' empire crumbled several months later, Petters and his companies owed Ritchie entities more than $165 million exclusive of accrued and unpaid interest. Concurrently with a raid on Petters' offices, the government commenced a civil fraud injunction action, and obtained orders freezing all of the assets of Petters and all of his co-defendants and appointing a receiver. The receivership order was soon amended to include a litigation stay, barring all lawsuits by creditors, victims or others against Petters, his co-defendants, and their companies. This litigation stay remains in effect today. The repeatedly stated purpose of the receivership is to preserve assets for victim restitution.

2. The United States brought federal criminal charges against Petters and his co-conspirators in the U.S. District Court for the District of Minnesota.

Early in the prosecution, the government identified petitioners as victims of Petters' fraud. When Petters' chief co-conspirator, Deanna Coleman, went to the U.S. Attorney's Office and offered her cooperation, she gave them a list of twenty-one institutional lenders, who were owed a total of $3.5 billion (including interest) under the promissory notes which formed the basis of the alleged fraud. Petitioners were on the list. The government's theory at Petters' trial was that Petters' fraud scheme was executed through the sale of these promissory notes from Petters' companies. Promissory notes that Petters issued to petitioners were the subject of testimony at Petters' criminal trial.

Petters was convicted of twenty counts of mail fraud, wire fraud, money laundering, and conspiracy. He was sentenced to 50 years in prison. His co-defendants – Deanna Coleman, Michael Catain, Larry Reynolds, Robert Dean White, Gregory Malcolm Bell, and Harold Alan Katz – all pleaded guilty to various fraud charges and received sentences ranging from 366 days to eleven years in prison. In their plea agreements, each of Petters' co-defendants had agreed that the MVRA "applies and that the Court is required to order the defendant to make restitution," and they asked that the government allow proceeds from any forfeited assets to be used for restitution.

3. The MVRA generally requires a sentencing court to impose restitution to all victims "directly and proximately harmed" as a result of the commission of the offense. 18 U.S.C. § 3663A(a)(2). In the lead case,

United States v. Petters, D. Minn. No. 08-364 (RHK/AJB), the district court outlined an *in camera* restitution claim and objection process, and set a date for a restitution hearing two months after Petters' sentencing. Petitioners and other putative victims filed victim impact statements and claims, and the U.S. Attorney's Office compiled preliminary and final proposed restitution orders. The government included petitioners among its proposed restitution list.[1]

The district court, however, refused to order restitution to petitioners or any other victim. Despite the word "[m]andatory" in the title of the MVRA, the district court reasoned that the MVRA "signal[s] that the Court need not – and *should* not – undertake th[e] task [of restitution] under the circumstances here." Pet. App. 12 (emphasis in original). Specifically, the district court observed that under the MVRA's "complexity exception," a court need not impose restitution:

> if the court finds, from the facts on the record, that determining complex issues of fact related to the cause or amount of the victim's

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[1] In addition to the direct victims identified at Petters' trial, the government's proposed restitution list also included hundreds of "indirect victims" who were not direct lenders to the Petters' Ponzi scheme, but rather equity investors in investment funds that loaned money to Petters, including funds that had netted profits from the Petters' scheme. Petitioners objected that indirect victims should not be included because the MVRA limits its definition of victims to those "directly and proximately harmed." The district court never ruled on this motion.

> 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). In the district court's view, this provision "call[ed] for 'a weighing of the burden of adjudicating the restitution issue against the desirability of *immediate* restitution – or, otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies.'" Pet. App. 16 (quoting *United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996)).

Applying this balancing test, the district court first asserted that "[d]etermining the validity of the amounts claimed by each victim on the Government's final proposed restitution list . . . would take significant time and would be inherently complex." Pet. App. 14. The court then noted, on the other hand, "that alternative avenues of recovery are available to victims" here because: (1) the government has suggested that "absent a restitution order," it would institute proceedings to "remit forfeited assets"; and (2) victims might recover money in "bankruptcy proceedings involving [Petters'] companies." Pet. App. 15-16. "Hence," the district court continued, "victims have several means to recoup their losses other than restitution, before decision-makers better equipped to

resolve their claims." Pet. App. 16. The court then declined to order restitution.

The court later entered two more orders denying restitution in the co-defendants' cases for the same reasons. Pet. App. 19 ("[T]he Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the remission process. . . ."); Pet. App. 22 (same).

Petitioners filed motions objecting to these denials of restitution, arguing that they denied them their rights under the MVRA and the CVRA. Operating under an *ad hoc* victim motions screening process that the district judge apparently created for this case only, the district court initially ignored and later denied the motions on the record. Pet. App. 23, 27.[2]

3. When a district court has denied a victim's request for restitution, the CVRA allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). Accordingly, Ritchie filed timely mandamus petitions in the Eighth Circuit from each of the district court's orders denying restitution.

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[2] Victims were not allowed to e-file motions to the district court. Instead, each document presented by a victim to the clerk's office for filing was instead sent to Judge Kyle's chambers. Judge Kyle would then decide whether the clerk should file it or not. Petitioners' motions asking the court to vacate its orders denying restitution were among the victim motions handled in this manner. At co-defendant Deanna Coleman's sentencing, the district court acknowledged on the record the receipt of petitioners' motions and denied them *nunc pro tunc*.

The CVRA provides that "[i]f 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 Eighth Circuit, however, responded to each of petitioners' petitions with the following: "The petition for writ of mandamus has been considered by the court and is denied." Pet. App. 1, 3-4.

REASONS FOR GRANTING THE WRIT

This case seeks enforcement of victims' rights conferred upon them by the Mandatory Victim Restitution Act of 1996 and the Crime Victims Rights Act of 2004. These two statutes made revolutionary changes in the way business should be done in criminal courts – for the first time, giving crime victims enforceable rights in criminal cases. Yet federal courts are now divided over a fundamental issue that arises in implementing these new statues: whether courts may deny restitution based on a belief that the victims have alternative avenues in which they could obtain relief. This Court should use this case – in which petitioners suffered over one hundred million dollars of monetary losses as a direct result of a criminal Ponzi scheme but the district court denied restitution on the ground that "alternative avenues of recovery are available to victims," Pet. App. 15 – to resolve this conflict. The very point of the MVRA, absent tightly circumscribed exceptions, is to impose a *mandatory* requirement

that courts impose restitution. Allowing courts to abdicate that duty based on speculation that victims might obtain recompense some other way would effectively render the Act a nullity, for victims have always had the right to pursue alternative avenues of relief.

At the very least, this Court should reverse the Eighth Circuit's unreasoned denial of petitioners' mandamus petition on the ground that it flouts the CVRA's requirement that "[i]f 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 Eighth Circuit's decision not only deprived petitioners of any meaningful appellate review but is so contrary to plain statutory requirements that summary reversal would be appropriate.

I. This Court Should Resolve The Circuit Split Over Whether Courts May Deny Restitution Based on the Availability of Other Remedies for Possible Victim Compensation.

A. The Circuits Are Split Over This Issue.

The MVRA requires a sentencing court to impose restitution unless, as is pertinent here, "the court finds, from the 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). Invoking this so-called "complexity exception," the district court here held that the burden of determining the amount of restitution due would outweigh "the need to provide restitution" because "alternative avenues of recovery are available to victims." Pet. App. 15. This reasoning and holding – which the Eighth Circuit summarily ratified, Pet. App. 1 & 3, and which comports with prior case law from that district court[3] – implicates an acknowledged circuit split over whether a court may deny restitution under the MVRA based on the availability of other remedies for possible victim compensation.

1. The Ninth Circuit has held that the availability of alternative remedies may *not* be considered in declining restitution under the complexity exception. In *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), the district court denied restitution, as here, in part because it believed the victims could obtain relief in an alternative forum. The Ninth Circuit squarely rejected the district court's belief that this was permissible under the MVRA:

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[3] In *United States v. Kline*, 199 F. Supp. 2d 922, 923-928 (D. Minn. 2002), after awarding restitution to victim individuals the court declined restitution for corporate victims by invoking the complexity exception and telling corporate victims they could pursue a private lawsuit, and that if no assets remained after forfeiture the corporate victims could petition for remission to collect their judgments.

> [U]nder the MVRA the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution. . . . Thus, the district court abused its discretion by relying on the perceived complexity of the restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income.

Id. at 1163; *see also United States v. Edwards*, 595 F.3d 1004, 1013 (9th Cir. 2010) (holding that a prior bankruptcy settlement does not preclude restitution under the MVRA because the MVRA requires restitution in the full amount of the victims' losses and the "settlement did not compensate [the] victims in the full amount they lost at his hands").

The Fourth Circuit has similarly rejected a defendant's request to reduce his restitution obligations by the value of forfeited property that might be made available to victims through a future remission proceeding. *United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000). The Fourth Circuit reasoned that whatever amount victims might receive through remission could only be used as an offset, noting that a restitution offset provided by "§ 3664(j)(2), by its terms, only comes into play after the district court has already ordered restitution in the full amount of the victim's loss." *Id.*

Finally, the First Circuit has held that a bankruptcy award, discharge or settlement cannot be taken into account in determining restitution under

the MVRA. *United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007). Relying on the MVRA's provision making restitution mandatory "[n]otwithstanding any other provision of law," 18 U.S.C. § 3663A, the court ruled that "neither Massachusetts law nor the Bankruptcy Code restricts the reach of the MVRA's clear language." *Hyde*, 497 F.3d at 108. If a prior bankruptcy discharge or settlement of the victim's loss cannot preclude an award of restitution under the MVRA's complexity exception, it follows that the availability of a possible remedy in a pending bankruptcy action is also irrelevant to the balancing analysis that the exception contemplates.

2. Expressly acknowledging that it disagreed with the Ninth Circuit on the issue, the Tenth Circuit has held a district court may decline to order restitution under the MVRA's complexity exception based on the availability of other remedies. *United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008). Rejecting the government's argument to the contrary, the Tenth Circuit reasoned: "While the availability of other relief is deemed irrelevant to the process of calculating the *amount* of a restitution award, it is not necessarily irrelevant to the *availability* of such an award under § 3663A." *Id.* at 1254. The Tenth Circuit thus upheld a district court's denial of restitution based in part on the availability of alternative remedies, explaining that the availability of such remedies was "relevant to the balancing test established by § 3663A(c)(3)(B)'s complexity exception" because it "lessen[s] to some degree" a victim's "need to rely

upon the sentencing process for compensation." *Id.* at 1254.

Judge Tacha wrote separately to say that although she agreed with the court's disposition on other grounds, she disagreed with its interpretation of the MVRA: "I would . . . hold that a court may not consider other sources of compensation in invoking the [MVRA's complexity] exception. In addition, because the district court in the present case clearly considered the FDIC's pending civil suit in deciding whether to apply the exception, I would hold that the court committed a legal error." *Id.* at 1255 (Tacha, J., concurring).

District courts in the Second, Third, and Sixth Circuits also have held, like the Tenth Circuit, that a court may consider availability of alternative remedies as part of the MVRA's complexity exception's balancing test. *See United States v. Schwartz*, 2006 U.S. Dist. LEXIS 33806, at *17-21 (D. Conn. May 25, 2006) (balancing burden that determining restitution would impose against the burden "that would be imposed on the victim by leaving him or her to other available legal remedies"); *United States v. Collardeau*, 2005 U.S. Dist. LEXIS 45020, at *22-23 (D.N.J. Apr. 28, 2005) (denying restitution because determining the cause and amount of losses "would prolong an already lengthy sentencing period" and "[t]hese issues are better left to the civil securities fraud action pending in the Southern District of New York"); *United States v. Warshak*, 2008 U.S. Dist. LEXIS 85888, at *2-3 (S.D. Ohio Aug. 27, 2008) (denying restitution

because "C.F.R. Part 9 provides a process whereby victims may petition for the remission of forfeited property").

B. This Issue Is Extremely Important to the Proper Operation of the MVRA.

For two primary reasons, the question presented here – whether a court may deny restitution based on the availability of other alternative remedies – is extremely important.

1. The question arises frequently, and allowing courts to deny restitution based on the availability of alternative remedies threatens to drain the MVRA of any vitality. An alternative remedy of some kind almost always exists for crime victims who are eligible for restitution under the MVRA. In order to qualify as a victim entitled to restitution under the MVRA, the person "must have standing to bring a civil action for the . . . injuries proximately caused by . . . the conduct underlying the offense of conviction." *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (internal quotation marks omitted); *accord United States v. Reifler*, 446 F.3d 65, 137 (2d Cir. 2006). Accordingly, now as before the enactment of the MVRA, bringing a civil action is always a theoretical possibility for a crime victim. Furthermore, the remission process, whereby a Department of Justice official decides victim petitions and has discretion to remit to victims some of the ill-gotten gains it has seized and forfeited from criminal defendants, exists in all federal criminal

cases in which forfeiture is awarded. Finally, especially in white collar cases, defendants or some of their companies sometimes find themselves in bankruptcy proceedings, where victims can seek to recover a portion of their losses.

The very purpose of the MVRA, however, is to relieve victims of having to pursue these assorted alternative remedies. Prior to its enactment, courts had the authority to impose restitution, but all too often they declined to do so. Under the press of heavy case loads, courts simply did not want to bother with restitution. *See, e.g., United States v. Vaknin,* 112 F.3d 579, 582 (1st Cir. 1997) (noting that, prior to the MVRA, courts invoked their power to impose restitution "sparingly"). The MVRA seeks to correct that situation by *compelling* sentencing courts to award restitution when imposing criminal sentences. *United States v. Aguirre-Gonzalez,* 597 F.3d 46, 51 (1st Cir. 2010); *see also United States v. Perry*, 360 F.3d 519, 530 (6th Cir. 2004) (describing this "fundamental shift" that MVRA imposed). Hence, if the MVRA's complexity situation were to allow district courts to shirk that new responsibility upon a mere finding of complexity, then work Congress invested in enacting the MVRA would be all for naught. Sentencing courts, just as before the MVRA, could simply require victims to pursue their own remedies in any case in which the courts believe determining restitution would be burdensome.

2. Alternative remedies typically fall far short of the MVRA's guarantee of a restitution award for

the "full amount of each victim's losses," 18 U.S.C. § 3664(f)(1)(A), and the CVRA's guarantee of "full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6). Bringing a civil suit can cost substantial money and can take years to generate relief – especially if victims want to obtain a judgment making them whole instead of a settlement giving them a fraction of what they are due. And it sometimes takes years for victims even to be allowed to bring civil suits; when faced with widespread and large-scale harm, district courts can freeze wrongdoers' assets and stay civil litigation until all criminal proceedings are complete.

The remission remedy, for its part, is a matter of executive grace, over which the Attorney General exercises unreviewable discretion. Remission petitions are decided by the chief of the Justice Department's Asset Forfeiture and Money Laundering Section ("AFMLS") – without a hearing. Among other requirements, the victim must demonstrate that he "does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property." 28 C.F.R. § 9.8(a)(5). Remission regulations further allow the chief of AFMLS to give preference to some victims over others, based on perceived need. Awards may be made to law enforcement agencies, 28 U.S.C. § 524(c)(1)(C), and even to informants, who may be paid up to 25% of the proceeds of forfeiture. 19 U.S.C. § 1619(a). Those amounts to law enforcement may be paid out of the gross forfeiture proceeds before victims are

compensated at all. Victim-petitioners may not appeal adverse decisions to any court.

Finally, when victims pursue recovery through bankruptcy proceedings, they typically have access to only a slice of a wrongdoer's assets. Even within that slice, distribution rules can vary dramatically from restitution proceedings. What is more, bankruptcy is a potential remedy that one might call a "one shot deal." Victims can recover only from the wrongdoer's pool of *then-existing* assets. "Restitution liability," by contrast, "lasts for 20 years after incarceration (or until defendant's death)," *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998) and is non-dischargeable in bankruptcy. *Id.*

3. This case vividly illustrates these shortcomings. The victims of the Petters' Ponzi scheme did not have the option of filing civil suits against the defendants to recover their losses. At the outset of the criminal litigation, the government filed a civil fraud injunction and receivership action pursuant to 18 U.S.C. § 1345, and the court imposed a litigation stay preventing anyone from suing any of the defendants. That litigation stay remains in effect today.

Consequently, the "alternative avenues of recovery" the district court relied upon in denying restitution were limited to the pending bankruptcy cases and the remission process. Pet. App. 15-16. Yet here there are several pending bankruptcy cases involving Petters' companies. Each bankruptcy estate had its separate set of secured and unsecured creditors, and

in many instances direct victims of Petters' and his co-conspirators' fraud would have claims against only one of them. As things now stand, the assets in the bankruptcy estates fall far short of an amount sufficient to make victims whole, and once those debts are discharged in bankruptcy, without restitution orders victims will have no further recourse.

In addition, the pending bankruptcy cases will not reach the personal assets of Petters and his co-defendants, which are being held in the separate receivership action. None of the individual defendants have declared bankruptcy, and because the receivership litigation stay is still in effect, their victims cannot force them into bankruptcy. Thus, all of Petters' and his co-defendants' personal assets in the receivership estate – comprising $10-$50 million in assets – exist outside the bankruptcy estates. The coordination agreement that the district judge approved in the receivership case forfeits these assets to the federal government, which was not a victim of the fraud scheme.

It is true, as the district court suggested, that "through the remission process victims will have the opportunity to seek restitution from the same funds from which Court-ordered restitution would be made" – that is, the funds forfeited to the federal government. Pet. App. 15. But that is all petitioners have: the *opportunity to seek* compensation from the Justice Department in the remission process. Petitioners, like any victims, have no statutory right to remission at all. In the receivership case the prosecutor submitted

a letter from the AFMLS Chief, stating that "AFMLS intends to authorize the return of the *net proceeds* forfeited in this case to qualified victims." *United States v. Petters*, No. 08-CV-5348, Doc. 1454-1 (emphasis added). By using "net proceeds" instead of "gross proceeds" the government signaled that it intends to pay law enforcement costs first, before any discretionary awards to victims.

Finally, even if petitioners could obtain some money from a bankruptcy court or some amount of remission from the government, they could not obtain relief that would be enforceable against Petters' or his co-defendants' future earnings and assets. In particular, four of the co-defendants received sentences of less than seven and one-half years in prison. Two were sentenced to 366 days (meaning they will be eligible for good time credit and could be released within ten and one-half months). Unless petitioners are able to secure relief though a restitution order, these defendants will be released from prison debt-free, long before their income-earning years come to an end.

C. The Courts Below Erred in Denying Restitution Based on the Possibility of Alternative Remedies.

The Eighth Circuit's decision condoning the district court's denial of restitution based on the availability of alternative remedies contravenes the text, structure, and purpose of the MVRA.

The MVRA's complexity exception allows courts to forego imposing restitution only if they find that the burden of determining the proper amount of restitution outweighs "the need to provide restitution to [a] victim." 18 U.S.C. § 3663A(c)(3)(B). The plain import of this language is that courts may weigh the burden of calculating restitution only against whether a victim's losses are so insubstantial or speculative that restitution is not important. The question of whether a victim who has suffered substantial losses could try to recover those losses in some other forum is irrelevant to this equation.

Other provisions of the MVRA confirm this analysis. As an initial matter, the MVRA requires courts to impose restitution "[n]otwithstanding any other provision of law." 18 U.S.C. § 3663A(a)(1). Accordingly, the possibility that another provision of law might allow a victim to seek compensation is irrelevant to whether a court must award restitution.

More specifically, subsection 3664(f)(1)(B) of the MVRA provides that "[i]n no case shall the fact that a victim has received or is entitled to receive compensation for a loss from insurance or any other source be considered in determining the amount of restitution." 18 U.S.C. § 3664(f)(1)(B). This prohibition against considering whether a victim "is entitled to receive compensation . . . from any other source" obviously covers alternative remedies. The Tenth Circuit tried to avoid the import of this provision by asserting that it applies only to determining the *amount* of restitution, not to *whether* restitution should be awarded in

the first place. *Gallant,* 537 F.3d at 1254. But as Judge Tacha responded in her separate opinion, this parsing of the statutory language makes no sense: if courts cannot reduce a restitution award to some lower amount based on the availability of alternative remedies, they surely cannot reduce such an award to zero by denying restitution altogether on this ground. *Id.* at 1255 (Tacha, J., concurring).

Indeed, as suggested just above, considering the availability of alternative remedies in conducting the balancing that the MVRA's complexity exception requires would defeat the whole purpose of the MVRA, as well as the CVRA's provisions relating to restitution. The objective of the MVRA is to "ensure" that courts award restitution, *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010), in contrast to the previous system in which courts had discretion over whether to do so or to simply leave victims to seek compensation on their own. The CVRA likewise emphasizes that victims have "[t]he *right* to full and timely restitution as provided by law." 18 U.S.C. § 3771(a)(6) (emphasis added). If courts, just as before the enactment of these major pieces of legislation, could deny restitution whenever they believed, on balance, that leaving crime victims to seek alternative remedies was a reasonable result, then the MVRA and CVRA would have accomplished nothing.

The district court's own reasoning here proves the point. The district court claimed the authority to consider the availability of alternative remedies as a factor in the MVRA's complexity exception based on

the Third Circuit's opinion in *United States v. Kones*, 77 F.3d 66 (3rd Cir. 1996). *See* Pet. App. 13-14, 16. The Third Circuit stated there that courts should "weigh[ ] the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Kones*, 77 F.3d at 69. The Third Circuit, however, was discussing *the pre-MVRA discretionary restitution statute*, 18 U.S.C. § 3663 (1982), under which the availability of alternative remedies was a legitimate consideration.[4] The district court overlooked this fact and, by doing so, rendered the MVRA a nullity.

II. The Eighth Circuit Flouted The CVRA's Written-Opinion Requirement By Denying Petitioners' Mandamus Petitions Without a Written Opinion.

When a district court denies a victim's request for restitution, the CVRA allows the victim to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). The CVRA further provides in the same provision that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be

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[4] The statute that *Kones* construed *prohibited* courts from imposing "restitution with respect to a loss for which the victim has received *or is to receive compensation.*" 18 U.S.C. § 3663(e) (1982) (emphasis added).

clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

Senator Jon Kyl of Arizona (with two co-authors) explained in a recent law review article that the purpose of this provision of the CVRA is to ensure that victims may obtain appellate review of denials of restitution and to ensure that courts of appeals take these appeals seriously. *See* Jon Kyl et al., *On The Wings Of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims' Rights Act,* 9 Lewis & Clark L. Rev. 581, 587 (2005). As Senator Kyl further made clear on the Senate floor in support of the CVRA's passage: "[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights." 150 Cong. Rec. S10912.[5] A written opinion, of course, also enables meaningful review by a higher court regarding whether the court properly interpreted and applied the MVRA.

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[5] In other contexts, the mandamus remedy is an extraordinary and discretionary remedy. The CVRA alters this general rule and mandates that the writs be "take[n] up and decide[d]." This is consistent with the CVRA's goal of testing the rights established and creating a body of case law construing them.

Kyl, Twist & Higgins, p. 619.

The Eighth Circuit, however, responded to each of petitioners' petitions for mandamus with the following: "The petitions for writ of mandamus have been considered by the court and are denied." Pet. App. 1, 4. It did this despite petitioners' having explained in their final mandamus petition that "[p]ursuant to the Crime Victims Rights Act, . . . '[i]f 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)." Petrs. CA8 Br. 4.

This defiance of federal law is inexcusable and demands reversal – either in conjunction with plenary review and a ruling on the merits of the first question presented or at least on its own. If this Court takes the latter approach, summary reversal may be appropriate.

Other courts of appeals have had no difficulty understanding and abiding by the CVRA's written-opinion requirement. *See, e.g., United States v. Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (denying mandamus in written opinion and noting at the outset that "if we deny the relief sought, 'the reasons for the denial shall be clearly stated on the record in a written opinion'") (quoting § 3771(d)(3)); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52 (1st Cir. 2010) (same). This Court should require the Eighth Circuit to abide by this law as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

RESPECTFULLY SUBMITTED this 1st day of December, 2010.

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