No. 18-9043

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN BINKHOLDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction to resolve a pre-sentencing mandamus petition filed by an individual claiming to be a victim of petitioner's offenses under the Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771(d)(3) (2012 & Supp. V 2017), on the theory that the mandamus petition was untimely under 18 U.S.C. 3771(d)(5).

2. Whether petitioner's due process rights were violated by the court of appeals' resolution of the mandamus petition within the 72-hour period provided for in the CVRA, see 18 U.S.C. 3771(d)(3) (2012 & Supp. V 2017), when petitioner did not file a response during that period.

3. Whether the lower courts correctly classified an investor with immunity from prosecution who lost money as a result of petitioner's fraud offenses as a victim of those offenses.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Binkholder, No. 14-cr-247 (May 8, 2017)

United States Court of Appeals (8th Cir.):

In re Ursch, No. 15-1859 (Apr. 29, 2015) (victim's mandamus petition)

United States v. Binkholder, No. 15-2125 (Aug. 12, 2016)

United States v. Binkholder, No. 17-2688 (Nov. 20, 2018)

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OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.3d 215. A prior opinion of the court of appeals is reported at 832 F.3d 923.[1] The orders of the district court (Pet. App. 8-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2018. A petition for rehearing was denied on January 25, 2019.

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[1] The appendix to the petition for a writ of certiorari does not contain copies of the court of appeals opinions entered in conjunction with the judgment sought to be reviewed. See S. Ct. R. 14.1(i). Citations to those opinions in this brief are to the versions found in the Federal Reporter.

(Pet. App. 21). The petition for a writ of certiorari was filed on April 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 1. The district court sentenced petitioner to 108 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay $3,655,968.89 in restitution. Pet. App. 2-3, 5. The court of appeals vacated petitioner's sentence. 832 F.3d 923. On remand, the district re-imposed the same sentence after making additional factual findings. See Judgment 2-3. The court of appeals affirmed. 909 F.3d 215.

1. Petitioner was an investment advisor in the St. Louis area. He advised clients about investment strategies and financial planning through a business called "The Financial Coach," and he provided financial advice to the general public through his affiliated websites, YouTube channel, books and articles, and talk-radio show. See 832 F.3d at 925; Plea Agreement 2-3.

Between 2008 and 2012, petitioner engaged in a real-estate investment scheme that he referred to as "hard money lending," a term that he used to describe "a high-risk, high-interest type of loan secured by real property." 832 F.3d at 925 & n.1; Plea Agreement 3. Petitioner solicited approximately 20 investors to

participate in the venture, many of whom were unsophisticated people of retirement age interested in an investment for their retirement funds. Plea Agreement 3. Among the early participants in the hard money lending program was petitioner's partner in earlier business ventures, referred to in the proceedings below as M.U., who deeded to petitioner certain properties to be used in the program and also provided significant start-up capital. Ibid.

Petitioner told his prospective investors that he was working with residential real-estate developers who either could not or did not want to use traditional banks to finance their development projects. According to petitioner, he would serve as a bank by taking money from the investors and lending it out to those developers, who would pay a high rate of interest. Petitioner would then share the profit from those interest payments with his investors, whose principal payment would be secured by a deed of trust on real property. 832 F.3d at 925; Plea Agreement 4.

In reality, however, petitioner commingled the funds he received from investors with other money and used the funds to pay his own personal and business expenses. He also used funds received from one investor to make promised interest payments (or return of principal) to other investors. 832 F.3d at 925; Plea Agreement 5. Petitioner failed to inform the investors that he was using their funds for those purposes. He also failed to disclose that the hard money lending program had insufficient borrowers to deliver the rate of return that he had promised, and

he overstated the success of the program in order to induce continued investment or reinvestment of funds. For example, after the United States Postal Service notified some investors that they might be victims of a scheme, petitioner sent the investors two letters misrepresenting the financial stability of the program and assuring them that the program was doing well and generating income. 832 F.3d at 925-926; Plea Agreement 5-6. All told, M.U. lost more than $1 million that he had invested in the hard money lending program, and petitioner's other investors collectively lost more than $2 million. Pet. App. 12, 16.

2. a. A federal grand jury returned an indictment charging petitioner with four counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of bank fraud, in violation of 18 U.S.C. 1344. In January 2015, petitioner entered into a plea agreement pursuant to which he agreed to plead guilty to the four wire-fraud charges and to waive some of his appeal rights, and the government agreed to dismiss the bank-fraud charge. 832 F.3d at 926. The parties further agreed on an estimated amount of loss for purposes of calculating petitioner's advisory Sentencing Guidelines range, but they noted a dispute -- to be resolved by the district court -- about whether M.U. qualified as a victim whose lost funds should be included in the Guidelines calculations. Ibid. The agreement provided that petitioner's Guidelines range would be enhanced by 18 levels if M.U. qualified as a victim, and by 16 levels if he did not. Plea Agreement 11. The agreement

also memorialized petitioner's understanding that the "total loss" stated in it "is an estimate, and that the actual restitution he will be ordered to pay * * * at sentencing may be higher than the total loss calculated by the parties." Id. at 9.

After accepting petitioner's guilty plea, the district court held a hearing to determine M.U.'s status as a victim. The court heard testimony from M.U. and a law-enforcement agent who had investigated the case, 1/27/15 Tr. 5-101, and also received a post-hearing brief from petitioner, D. Ct. Doc. 101 (Feb. 2, 2015). On February 9, 2015, the court issued a written order concluding that M.U. was "a sophisticated businessperson" who was aware of the commingling of funds and was "complicit" in petitioner's scheme, and did not qualify as a victim. Pet. App. 9-10; see 832 F.3d at 928.

b. M.U. filed a motion for leave to intervene pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771 (2012 & Supp. V 2017), so that he could seek reconsideration of the district court's determination. D. Ct. Docs. 105, 106 (Feb. 27, 2015). The CVRA provides "crime victim[s]" -- that is, persons who have been "directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. 3771(e) (2012 & Supp. V 2017) -- with various statutory rights, including "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). Either the victim or the United States can seek to enforce the victim's CVRA rights by filing a motion in the district court.

See 18 U.S.C. 3771(d)(1) and (3) (2012 & Supp. V 2017). If such a motion is filed, the district court is required to "take up and decide" the motion "forthwith." 18 U.S.C. 3771(d)(3). If the district court "denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." Ibid. The court of appeals must generally "take up and decide" any mandamus petition within 72 hours after it is filed. Ibid.

Petitioner opposed M.U.'s motion the day after it was filed, D. Ct. Doc. 107 (Feb. 28, 2015), and the district court denied the motion on March 3, 2015, D. Ct. Doc. 110. The court found that M.U. could not seek relief under the CVRA because the court had already concluded that he did not qualify as a victim. Id. at 2. The court also stated that, even if M.U. did qualify as a victim, he had no right to intervene, but could instead seek relief by petitioning the court of appeals for a writ of mandamus. Ibid. (citing 18 U.S.C. 3771(d)(3)).

On April 27, 2015, M.U. filed a petition for a writ of mandamus in the court of appeals under the CVRA. See 832 F.3d at 928. On April 29, 2015, the court of appeals granted the petition and directed the district court to vacate its February 9, 2015 "order and to enter an order recognizing [M.U.] as a crime victim pursuant to the [CVRA]." 15-1859 C.A. Judgment (Apr. 29, 2015).[2]

[2] M.U.'s mandamus petition is stamped as having been received by the court of appeals on April 24, 2015, but it was not docketed in that court or the district court until April 27. Similarly, the court of appeals granted the mandamus petition on April 29, 2015, see 15-1859 C.A. Judgment, but that action was not

c. Following the court of appeals' ruling, the district court vacated its previous determination and entered an order finding that M.U. was "a victim pursuant to the [CVRA], 18 U.S.C. § 3771." 832 F.3d at 928-929.

At sentencing, the district court overruled petitioner's objection to counting M.U.'s losses for purposes of calculating the advisory Sentencing Guidelines range and awarding restitution. Sent. Tr. 8-9. The court then applied an 18-level enhancement based on an amount of loss that included M.U.'s losses, see Sentencing Guidelines § 2B1.1(b)(1)(J) (2013), and sentenced petitioner to 108 months of imprisonment, the bottom of the recommended guidelines range. Sent. Tr. 18, 51-52. The court also ordered petitioner to pay his victims, including M.U., more than $3.65 million in restitution. Pet. App. 5.

3. A divided panel of the court of appeals vacated petitioner's sentence. 832 F.3d at 928-931. As relevant here, the majority agreed with petitioner "that the CVRA victim status determination and the victim status determination under the Sentencing Guidelines are distinct inquiries, and that the district court erred by not conducting a separate analysis under each." Id. at 929. In particular, the majority took the view that the district court had improperly interpreted the writ of mandamus as requiring it to treat M.U. as a victim not just under

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docketed in the district court until the next day, see 832 F.3d at 928; D. Ct. Docs. 129, 130 (Apr. 30, 2015).

the CVRA but also "for Guidelines purposes." Ibid. The court of appeals therefore remanded "so that the district court may determine in the first instance whether M.U. was a victim under the Guidelines and, if necessary, proceed to resentencing." Id. at 930.

In reaching that result, the court of appeals majority noted as "[a]n additional relevant factor * * * that [petitioner] apparently did not contest, and may not have had the opportunity to contest, M.U.'s [mandamus] petition" because of the statutory requirement to resolve the petition within 72 hours. 832 F.3d at 929 n.4. The majority noted "significant concerns about the due process implications of the writ effectively increasing [petitioner's] Guidelines range by two years if he did not have the opportunity to contest the petition." Ibid.

Judge Gruender dissented in relevant part. 832 F.3d at 931-933. He observed that petitioner had not claimed that the mandamus "panel's mandate violated due process," and reasoned that the district court correctly construed that mandate as directing the court to treat M.U. as a victim for both restitution and Guidelines purposes. Id. at 932-933 & n.9.

4. a. On remand, petitioner and the government made supplemental submissions addressing M.U.'s status as a victim under the Sentencing Guidelines. See D. Ct. Docs. 203 (Oct. 12, 2016), 204 (Nov. 14, 2016). Based on those submissions and the record from the initial sentencing proceedings (which included a

42-page Presentence Investigation Report), the district court determined that M.U. qualified as a victim under the Guidelines, and accordingly reinstated petitioner's sentence. Pet. App. 16-17. The court found "that M.U.'s money was used to further [petitioner's] scheme, without the knowledge of M.U.," and that petitioner had not rebutted the government's "evidence that M.U. was unaware of [petitioner's] scheme and suffered a loss in excess of a million dollars as a result of that scheme." Id. at 16. The court also noted that the court of appeals had already found that M.U. was a victim under the CVRA's definition, which the district court understood to be "narrower" than the one in the Guidelines. Ibid. And the court observed that petitioner had "provided no evidence to rebut the evidence adduced at the hearing that M.U. was a victim." Ibid.

b. The court of appeals affirmed. 909 F.3d at 216-219. The court disagreed with the district court that its opinion in petitioner's first appeal had "describe[d] the CVRA definition of victim as 'narrower' than the Guidelines definition." Id. at 218. However, the court of appeals saw no clear error in the district court's findings that M.U. sustained a monetary loss when M.U.'s funds were used to perpetrate petitioner's fraudulent scheme without M.U.'s knowledge. Id. at 217-218. Those findings, the court of appeals explained, supported the determination that M.U. was a victim under the Guidelines, which "define[ ] a victim as 'any person who sustained any part of' the 'reasonably foreseeable

pecuniary harm that resulted from the offense.'" Id. at 218 (quoting Sentencing Guidelines § 2B1.1, comment. (nn.1, 3(A)(i)) (2013)).

The court of appeals separately rejected, on procedural grounds, petitioner's contention that M.U. should not be awarded restitution because he was complicit in the fraud scheme. 909 F.3d at 219; see Pet. C.A. Br. 22. The court explained that petitioner could have raised that challenge in his first appeal and that, under circuit precedent, litigants are barred from presenting in a second appeal following a remand issues that could have been presented in an initial appeal. 909 F.3d at 219.

5. Petitioner filed a petition for panel rehearing, arguing for the first time that M.U.'s April 2015 mandamus petition was untimely under 18 U.S.C. 3771(d)(5) and should have been dismissed. Pet. for Reh'g 1. The court of appeals denied the petition without calling for a response.

ARGUMENT

Petitioner contends (Pet. 15-32) that (1) the court of appeals lacked jurisdiction to consider a presentencing mandamus petition filed by a victim of his offenses on the theory that the petition was untimely under 18 U.S.C. 3771(d)(5); (2) his due process rights were violated when the court of appeals granted the mandamus petition without petitioner responding to it; and (3) the courts below erred in treating an individual who was granted immunity from prosecution, but who had not been accused of a crime, as a

victim under the CVRA. Those fact-bound contentions -- none of which was squarely addressed by the court of appeals -- lack merit. Further review is unwarranted.

1. Petitioner first contends (Pet. 15-21) that the court of appeals violated "a jurisdictional time requirement" in 18 U.S.C. 3771(d)(5) when, in 2015, it granted a mandamus petition that M.U. filed more than 14 days after the district court rejected M.U.'s claim to victim status under the CVRA. Pet. 19.

As a threshold matter, petitioner did not move the court of appeals to recall its mandamus mandate based on that contention. Nor did he raise that objection in the district court or in his briefs before the court of appeals panels that decided his first appeal in 2016 or his second appeal in 2018. And while petitioner did raise the statutory time limit in a rehearing petition following the decision below, that was too late to preserve the argument under this Court's "traditional practice" of "declin[ing] to review claims raised for the first time on rehearing in the court below." Wills v. Texas, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring); see Yankton Sioux Tribe v. Podhradsky, 606 F.3d 985, 993 (8th Cir. 2010) ("[W]e do not ordinarily consider arguments raised for the first time in a petition for rehearing."), cert. denied, 5645 U.S. 1019 (2011). As "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), this Court's standard practice is not to consider issues that were not pressed or passed upon below. See United States v. Williams,

504 U.S. 36, 41 (1992). Review of petitioner's first question presented should be denied on that ground alone.

In any event, petitioner's untimeliness argument under Section 3771(d)(5) lacks merit. This "Court has characterized as nonjurisdictional," and thus subject to standard rules of waiver and forfeiture, several "time prescriptions for procedural steps in judicial or agency forums." Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1849-1850 (2019). The Second Circuit has found "considerable reason to doubt that" Congress intended the CVRA's 14-day "time limit * * * to be jurisdictional." Federal Ins. Co. v. United States, 882 F.3d 348, 362 (2018). But even assuming that Section 3771(d)(5) establishes a "jurisdictional" limit, and could be invoked despite petitioner's almost four-year delay in raising the issue, that time limit applies by its terms only when a victim "make[s] a motion to re-open a plea or sentence." 18

U.S.C. 3771(d)(5).[3] M.U.'s request for relief in district court and subsequent mandamus petition did not seek either of those remedies. To begin with, M.U.'s filings preceded petitioner's sentencing by weeks and thus could not have requested "re-open[ing]" of petitioner's yet-to-be-imposed "sentence." See ibid.; see also In re Allen, 701 F.3d 734, 735 (5th Cir. 2012) (per curiam) (pre-sentencing mandamus petition filed by individuals seeking victim status under the CVRA was not subject to the 14-day time limit where the mandamus petitioners were "not seeking to reopen a plea or sentence") (cited at Pet. 20); United States v. Aguirre-González, 597 F.3d 46, 55 (1st Cir. 2010) (stating that the 14-day limit applies when a victim "move[s] to disturb a defendant's plea or sentence") (cited at Pet. 17-18).

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[3] Section 3771(d)(5) provides in full:

> (5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—
>
> (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
>
> (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and
>
> (C) in the case of a plea, the accused has not pled to the highest offense charged.
>
> This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

18 U.S.C. 3771(d)(5).

Nor did M.U. seek to re-open petitioner's guilty plea. As petitioner acknowledges (Pet. 20-21), the plea agreement left the question of M.U.'s victim status for resolution by the courts and recognized that resolution of that question would affect the advisory Guidelines range and restitution amount calculated at sentencing. See 832 F.3d at 926, 928; see also Plea Agreement 9 (memorializing petitioner's understanding that the loss total in the agreement was "an estimate, and that the actual restitution he will be ordered to pay * * * at sentencing may be higher"). M.U.'s motion and mandamus petition thus addressed an issue explicitly left open in the plea agreement, namely, whether M.U. qualified as a victim under the CVRA, and sought a result (clarification of M.U. as a victim) that the plea agreement specifically contemplated as a possibility. A pre-sentencing motion that asks a court to make one of two possible determinations listed in a plea agreement is not "a motion to re-open a plea" within the meaning of 18 U.S.C. 3771(d)(5).[4] Accordingly, the

[4] Petitioner suggests (Pet. 20-21) that, if M.U.'s motion and mandamus petition are construed as seeking to protect only M.U.'s right to restitution and procedural rights under the CVRA, then the court of appeals should have limited its grant of relief accordingly. Cf. 832 F.3d at 932 n.9 (Gruender, J., concurring in part and dissenting in part) (describing the "question" whether the mandamus panel should have ordered the district court "to recognize M.U. as a victim only for purposes of awarding restitution" as "difficult"). But the court of appeals subsequently construed its mandamus judgment to have addressed only the CVRA, and ordered further proceedings to ensure that petitioner was not prejudiced by any contrary interpretation. Id. at 929-931 (majority opinion); see p. 15, infra.

14-day period in Section 3771(d)(5) would be inapplicable even if that period were a jurisdictional limit that petitioner was entitled to invoke for the first time after the court of appeals decided his second appeal.

2. Petitioner separately contends (Pet. 21-28) that the court of appeals' grant of M.U.'s mandamus petition violated due process. First, petitioner argues that the grant of mandamus relief within the 72-hour period provided for in the CVRA, 18 U.S.C. 3771(d)(3) (2012 & Supp. V 2017), violated due process because the court acted before petitioner responded to allegedly misleading assertions in the mandamus petition. Second, petitioner asserts that the court's grant of mandamus relief resulted in petitioner being sentenced based on materially false information. Neither of those fact-bound arguments was squarely addressed by the court of appeals, and neither provides a basis for further review.

a. As an initial matter, petitioner's due process claim rests on the mistaken premise (Pet. 27) that the court of appeals' grant of mandamus relief to M.U. "disturbed" petitioner's guilty plea and resulted in his being "sentenced using a higher sentencing guideline range." As explained above, however, pp. 4-5, supra, the grant of mandamus relief at most could have established which of two loss amounts contemplated by petitioner's already accepted plea agreement governed the advisory Guidelines range to be used at sentencing.

Moreover, the court of appeals' mandamus ruling ultimately did not have even that effect, because the court in petitioner's first appeal interpreted the mandamus ruling not to govern M.U.'s victim status under the Guidelines and the court remanded for the district court to make an independent Guidelines determination. 832 F.3d at 928-930. Later, the court of appeals affirmed the district court's determination that M.U. was a victim for Guidelines purposes not because the appellate court's mandamus ruling had so dictated, but because the district court -- after receiving post-remand submissions from the parties, Pet. App. 14-16 -- made a factual finding that M.U. qualified as a victim under the Guidelines. 909 F.3d at 217-218. Those subsequent proceedings ensured that petitioner suffered no prejudice from the court of appeals' grant of mandamus relief to M.U.

b. In any event, the court of appeals' resolution of M.U.'s mandamus petition within the 72-hour period provided by statute did not violate due process.[5] Assuming that M.U.'s mandamus petition implicated a liberty interest subject to due process protection, cf. Irizarry v. United States, 553 U.S. 708, 713-714 (2008), the Due Process Clause would require at most that petitioner be afforded notice of the mandamus petition's filing and an opportunity to respond to it. See id. at 714-715; Cleveland

[5] Petitioner states in passing (Pet. 21) that his rights under the Sixth Amendment's Confrontation Clause were violated as well. But the Confrontation Clause does not apply at sentencing, see Williams v. New York, 337 U.S. 241, 251 (1949), and a fortiori does not apply to appellate proceedings ancillary to sentencing.

Bd. of Educ. v Loudermill, 470 U.S. 532, 546 (1985). Petitioner does not dispute that he received timely notice of the mandamus petition's filing, if not when it was submitted to the court of appeals on April 24, 2015, then when it was docketed in the district court on April 27, 2015, see p. 6 & n.2, supra. Petitioner also does not deny that he was aware of the statutory time period for the court of appeals to resolve the petition. Cf. Mandamus Pet. 1, 19 (citing 18 U.S.C. 3773(d)(3), setting forth the time period).

Given that petitioner was provided with notice, he does not explain how he was deprived of an opportunity to respond before the court of appeals resolved the mandamus petition on April 29. This Court and the lower federal courts regularly require that litigants file responses on short deadlines in fast-moving matters requiring immediate resolution, such as requests for stays. Cf. S. Ct. R. 23. And petitioner has demonstrated his ability to file promptly when he submitted a written opposition to M.U.'s motion to intervene in the district court the day after M.U. filed that motion. D. Ct. Docs. 107, 110.

Petitioner also does not explain why, even if he was unable to respond as quickly in the court of appeals, he failed to take other procedural steps that would have preserved his ability to be heard. For example, petitioner did not move the court of appeals for an extension of time to file a response, as other litigants have successfully done in CVRA mandamus cases. See Federal

Insurance, 882 F.3d at 359 n.5; cf. United States v. Monzel, 641 F.3d 528, 531-532 (D.C. Cir.) (holding that, although a mandamus petitioner "may not unilaterally waive the statutory deadline," a court of appeals' failure to issue a decision within that deadline does not deprive the court of jurisdiction to resolve the petition), cert. denied, 565 U.S. 2072 (2011). Petitioner also did not move the court of appeals to recall its mandate in the mandamus case, cf. Calderon v. Thompson, 523 U.S. 538, 549-550 (1998), or seek to undo the mandamus panel's decision in one of his two subsequent appeals, even though showing that a prior decision was clearly erroneous and resulted in injustice -- as petitioner claims the mandamus decision to have been, Pet. 22-26 -- would have provided an exception to the law-of-the-case doctrine under circuit precedent, United States v. Bartsh, 69 F.3d 864, 866 (8th Cir. 1995). Having failed to avail himself of any of those procedural mechanisms, petitioner cannot now show that he was deprived of an opportunity to be heard when the court of appeals resolved the mandamus petition by a statutory deadline of which he had notice.

c. Contrary to petitioner's suggestion, the court of appeals' mention of due process "concerns" in his first appeal, 832 F.3d at 929 n.4, does not conflict with the "approach[ ]" (Pet. 15) taken by the Ninth Circuit in Kenna v. United States Dist. Court, 435 F.3d 1011 (2006). Rather, in both cases the courts of appeals took account of the due process rights of defendants who

had not participated in the mandamus proceedings when deciding the scope of the relief afforded to victims in those proceedings.

In Kenna, the Ninth Circuit granted the mandamus petition of a victim who had been denied the opportunity to allocute at the defendant's sentencing hearing, but the court declined to vacate the defendant's sentence in the first instance when the defendant had not been a party to or participated in the mandamus proceedings. 435 F.3d at 1017. The court also observed that, if the district court decided to reopen and alter the sentence, the defendant would "be able to contest any change in his sentence through the normal avenue for appeal (assuming he has not waived such rights as part of the plea bargain)." Id. at 1018. That approach is fully consistent with petitioner's first appeal here, in which the court viewed the absence of an opportunity for petitioner "to contest the [mandamus] petition" as "[a]n additional relevant factor" in narrowly construing the mandamus mandate, and interpreted that mandate in a way that ensured that petitioner would have a chance to be heard before his advisory Sentencing Guidelines range was increased. 832 F.3d at 929 n.4.[6] Accordingly, no basis exists to conclude that another circuit would

[6] Petitioner also cites the Tenth Circuit's decision in United States v. Hunter, 548 F.3d 1308 (2008). See Pet. 26-27. But as petitioner appears to acknowledge (ibid.), Hunter did not address any due process issues arising from the 72-hour time period in Section 3771(d)(3), and reasoned only that victims have no right to appeal a defendant's sentence and must proceed exclusively through mandamus petitions under the CVRA. 548 F.3d at 1314-1316.

have handled the unique circumstances of petitioner's case in a meaningfully different way.

d. Petitioner additionally contends (Pet. 23-24, 27) that the courts below violated his due process rights by affirming a sentence that was based on materially false information introduced through the mandamus proceeding. Petitioner is correct that this Court has "sustained due process objections to sentences imposed on the basis of 'misinformation of constitutional magnitude.'" Roberts v. United States, 445 U.S. 552, 556 (1980) (quoting United States v. Tucker, 404 U.S. 443, 447 (1972)); see Townsend v. Burke, 334 U.S. 736, 740–741 (1948). The Court has applied that principle, however, in only two contexts. In Townsend, the Court found a due process violation where an uncounseled defendant "was sentenced on the basis of assumptions concerning his criminal record [that] were materially untrue" and that could have been "prevent[ed]" if he had the assistance of counsel. 334 U.S. at 740, 741. And in Tucker, the sentencing judge mistakenly relied on prior uncounseled "convictions [that] were wholly unconstitutional under Gideon v. Wainwright, 372 U.S. 335 [(1963)]." 404 U.S. at 447. Petitioner's claim -- that M.U. used inaccurate information (or "one-sided arguments," Pet. 23) to persuade the court of appeals to make a determination that affected future sentencing and appellate proceedings -- does not fit within the narrow due process rule of Townsend and Tucker.

Moreover, petitioner had ample opportunity to point out any material misstatements or false information bearing on his sentence or restitution in his two briefs to the court of appeals and his post-remand submission to the district court, D. Ct. Doc. 203, all of which were made with the assistance of counsel. With the benefit of the parties' submissions and the full sentencing record, the district court found "that M.U.'s money was used to further [petitioner's] scheme, without the knowledge of M.U.," and that petitioner had not rebutted the government's "evidence that M.U. was unaware of [petitioner's] scheme and suffered a loss in excess of a million dollars as a result of that scheme." Pet. App. 16. The court of appeals saw no clear error in those findings, 909 F.3d at 218, and this Court's settled practice is to defer to a factual determination in which both courts below have concurred. See, e.g., United States v. Doe, 465 U.S. 605, 614 (1984); United States v. Reliable Transfer Co., 421 U.S. 397, 401 n.2 (1975). Petitioner provides no basis to deviate from that practice. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

3. Finally, petitioner argues (Pet. 28-31) that the existence of an immunity agreement between M.U. and the government establishes M.U.'s complicity in the fraud scheme and precludes M.U. from qualifying as a victim under the CVRA or the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A and 3664.

Petitioner's position that M.U. was a knowing participant in the fraud scheme is inconsistent with the district court's finding that petitioner committed the fraud "without [M.U.'s] knowledge." Pet. App. 16. Furthermore, the court of appeals found that petitioner's arguments stemming from the immunity agreement were barred because he could have raised them in his first appeal but instead failed to do so until the second appeal, following the remand. 909 F.3d at 219. The court therefore did not address those arguments, and this Court should not do so in the first instance. See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2056 (2019) (reiterating that this Court is a court of "review," not of "first view") (quoting Cutter, 544 U.S. at 718 n.7).

Petitioner's argument would not warrant review in any event. Petitioner first invokes a provision in the CVRA stating that "[a] person accused of the crime may not obtain any form of relief under th[e CVRA]." 18 U.S.C. 3771(d)(1). But by referring to an individual "accused of [a] crime," ibid., that provision covers persons the government has charged or named as perpetrators of or participants in the crime. See, e.g., In re Wellcare Health Plans, Inc., 754 F.3d 1234, 1239 (11th Cir. 2014) (Section 3771(d)(1) barred relief where the corporation had been accused in a criminal information of "participating in the fraud conspiracy"). The statute does not foreclose relief where, as here, the government not only refrains from lodging a formal accusation against an

individual such as M.U., but affirmatively represents that the individual did not knowingly participate in the crime and was not a target of law enforcement's investigation. See Gov't C.A. Br. in No. 17-2688, at 16.

Petitioner also analogizes (Pet. 29-30) M.U.'s immunity agreement to cases in which courts have declined to award co-conspirators restitution under the MVRA. That analogy is inapt. In all the cases cited by petitioner, the courts denied restitution to individuals and entities formally charged or identified by the government as conspirators complicit in the criminal scheme that caused the losses. See Wellcare Health Plans, 754 F.3d at 1235-1236, 1239-1240 (denying restitution to a company charged with conspiracy in a criminal information and which admitted to that charge in a deferred prosecution agreement); United States v. Lazarenko, 624 F.3d 1247, 1252 (9th Cir. 2010) (denying restitution to an individual who "willingly participated in most of the conspiracy" and was "named * * * as the primary co-conspirator in the indictment"); United States v. Reifler, 446 F.3d 65, 123-127 (2d Cir. 2006) (reversing order that could have allowed individuals the government acknowledged to be coconspirators to collect restitution); see also Federal Insurance, 882 F.3d at 353-354, 367-368 (affirming refusal to treat company as a victim of a scheme where it had admitted responsibility in a deferred prosecution agreement and "ultimately profited" from the scheme).

This case does not present comparable circumstances. M.U. was not charged or named as a co-conspirator in petitioner's fraud scheme. Nor does M.U.'s immunity agreement with the government contain any allegation or admission that he was complicit in that scheme. To the contrary, the government has explained that the agreement reflected a strategic decision by M.U.'s counsel to seek additional protections that the government believed were "unneeded," Gov't C.A. Br. in No. 17-2688, at 16, and the district court ultimately found that M.U. was not a knowing participant in the charged scheme, Pet. App. 16. Given that case-specific factual finding, as well as petitioner's acknowledgement that no other court has addressed the effect of an immunity agreement on victim status under the CVRA and MVRA, see Pet. 15, 28 (describing case law on that point "non-existent"), further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

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