March 12, 2019

White Collar Roundup - March 2019

No Excessive Fines in State Prosecutions Either

In *Timbs v. Indiana*, the U.S. Supreme Court unanimously held that the Eighth Amendment's prohibition on excessive fines applies to the states. In the case, Tyson Timbs pleaded guilty to a minor controlled substance offense, but Indiana used civil forfeiture laws to forfeit his $42,000 SUV, which it claimed he had used to commit his crime. Timbs claimed the forfeiture was an excessive fine and violated his Eighth Amendment rights. The Excessive Fines Clause of that amendment had not yet been incorporated by—or applied to—the states. *Timbs* changes that. In her opinion for the Court, Justice Ruth Bader Ginsburg reasoned, "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's putative or criminal-law-enforcement authority." She noted the prohibition on excessive fines traces its lineage to the Magna Carta. Justice Ginsburg also recounted that "[f]ollowing the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain prewar racial hierarchy" by imposing "draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses." The framers of the Fourteenth Amendment sought to thwart such abuses, which further supports the notion that the right is incorporated against the states. "In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming." Justice Clarence Thomas agreed with the result, but wrote separately to justify the incorporation based not on the Fourteenth Amendment's Due Process Clause as Justice Ginsburg had, but on its Privileges and Immunities Clause.

Appellate Waivers in Plea Agreements Are Not Bulletproof

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the U.S. Supreme Court held that when an attorney ignores his or her client's directive to file an appeal after a guilty plea or conviction at trial, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." As a follow-on to *Flores-Ortega*, the Court in *Garza v. Idaho* extended that presumption to cases in which the guilty plea was pursuant to a plea agreement that contains a plea waiver. Criminal defendants who challenge their conviction based on ineffective assistance of counsel must satisfy the familiar two-pronged inquiry under *Strickland v. Washington*, 397 U.S. 759 (1970): (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) that any such deficiency was "prejudicial to the defense." To show prejudice, defendants typically have to prove the outcome of their case would have been different but for the attorney's conduct. But in some cases, the courts are to presume that the conduct was prejudicial to the defense, such as "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Flores-Ortega*, 528 U.S. at 484. Before *Garza*, that had been the rule when it came to convictions, but there was a circuit split as to whether it applied even in the event of a guilty plea to a plea agreement with a concomitant appeal waiver. *Garza* resolved that split by holding that the *Flores-Ortega* presumption applies even when there is an appeal waiver. Notably, Justice Clarence Thomas dissented. In part of his opinion, joined only by Justice Neil M. Gorsuch, Justice Thomas took more general exception to the Court's interpretation of the Sixth Amendment. He noted, "Yet, the Court has read the Constitution to require not only a right to counsel at taxpayers' expense, but a right to *effective* counsel." He argued, "Because little available

evidence suggests that this reading is correct as an original matter, the Court should tread carefully before extending our precedents in this area."

Agents Goof in Warrant Execution, but Evidence Not Suppressed

U.S. District Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York denied the motions to suppress filed by Sebastian Pinto-Thomaz and Jeremy Millul in their prosecution for securities fraud. During the investigation of the case, agents obtained a warrant for Pinto-Thomaz's Apple iCloud account. That warrant "contained an apparent internal inconsistency in its text" because it placed a time limit of between March 8 and 20, 2016, on some information to be provided, but not on all information. The agent who swore to the warrant affidavit didn't alert Apple to the time limit when he discussed the production with Apple employees. In his order, Judge Rakoff noted, "In response to the iCloud Warrant, Apple produced messages outside of the scope of the time limit for message content." The agent then reviewed the material produced and, based on his misunderstanding, marked as responsive all items created between March 1 and June 30, 2016. Upon learning of the error, the government agreed not to offer into evidence any of the messages seized outside the date limitation, but Pinto-Thomaz argued that *all* the seized evidence should be suppressed. Judge Rakoff denied that request, finding "no grounds for imposing the 'extreme remedy' of blanket suppression." He noted, "The executing agent did not 'grossly exceed' the terms of the warrant, which generally authorized widespread seizure of a number of broadly defined categories of evidence." As for Millul, he argued the agents obtained his iPhone passcode in violation of his Fifth and Sixth Amendment rights. After lengthy analysis, Judge Rakoff found "no grounds for suppression," because it was unclear at the time of the questioning regarding the passcode whether Millul had invoked his right to remain silent or to seek counsel.

Not so Fast ...

U.S. District Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida granted a motion for summary judgment filed by two Jane Does in their suit against the United States for violating the Crime Victims' Rights Act (CVRA) by agreeing to a nonprosecution agreement (NPA) with billionaire sex offender Jeffrey Epstein without notifying his victims. Epstein sexually abused more than 30 minor girls, including the two Jane Doe plaintiffs, at his mansion in Palm Beach, Florida, and elsewhere. Because he engaged in interstate travel to sexually abuse the girls, his conduct violated federal law. Epstein also paid others to find minor girls. According to the court's opinion, "Epstein worked in concert with others to obtain minors not only for his own sexual gratification, but also for the sexual gratification of others." Eventually, the FBI learned of the abuse and interviewed Jane Doe 1 and Jane Doe 2, who were abused by Epstein. Epstein engaged in discussions with the U.S. Attorney's Office for the Southern District of Florida (USAO) to try to dispose of the matter short of indictment. During that time, the USAO notified potential victims about the investigation and their rights under the CVRA. Ultimately, the parties agreed Epstein could enter into an NPA. According to Judge Marra, "From the time the FBI began investigating Epstein until September 24, 2007—when the NPA was concluded—the [U.S. Attorney's] Office never conferred with the victims about a[n] NPA or told the victims that such an agreement was under consideration." In fact, "Epstein's counsel was aware that the Office was deliberately keeping the NPA secret from the victims and, indeed, had sought assurances to that effect." Judge Marra explained that compounding the problem, "[a]fter the NPA was signed, Epstein's counsel and the Office began negotiations about whether the victims would be told about the NPA."

Guidance Isn't Enough for DOJ

As we reported here and here, the DOJ has been keen on limiting the use of guidance documents to govern its prosecution decisions. That concept has been enshrined in the first chapter of the DOJ's Justice Manual. New Section 1-20.000 sets forth the Department's view. It begins, "Criminal and civil enforcement actions brought by the Department must be based on violations of applicable legal requirements, not mere noncompliance with guidance documents issued by federal agencies,

because guidance documents cannot by themselves create binding requirements that do not already exist by statute or regulation." The DOJ will no longer consider a party's failure to comply with guidance documents as a violation of a statute or regulation, but will "continue to rely on agency guidance documents for purposes, including evidentiary purposes that are otherwise lawful and consistent with the Federal Rules of Evidence." So, for example, "[w]here a guidance document describes a relevant statute or regulation, the Department may use awareness of the guidance document (or its contents) as evidence that the party had the requisite scienter, notice, or knowledge of the law." The DOJ might also "use a guidance document as probative evidence that a party has satisfied, or failed to satisfy, professional or industry standards or practices relating to applicable statutory or regulatory requirements." It specifically notes the usefulness of guidance from the Centers for Medicare and Medicaid Services, which issues its own policy manual. The usage of such materials "does not give these documents the force of law, but rather aids in demonstrating that the standards in the relevant statutory and regulatory requirements have been or have not been satisfied." Consistent with its aversion to guidance documents and "[m]anagement-by-memo," the new section "fully implements, clarifies, and supersedes prior Department memoranda on this topic."

Would you like to receive our *White Collar Roundup* newsletter? Sign up here.

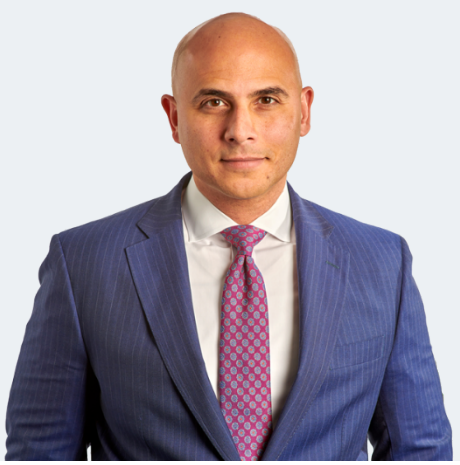
Authors

Helen Harris

Partner

Stamford, CT | (203) 977-7418

hharris@daypitney.com



Mark Salah Morgan

Partner

Parsippany, NJ | (973) 966-8067

New York, NY | (212) 297-2421

mmorgan@daypitney.com

Stanley A. Twardy, Jr.

Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com