July 2, 2012

White Collar Roundup - July 2012

A Fine Revolution

The U.S. Supreme Court ruled that only a jury, not a judge, may make findings that enhance the maximum fine exposure for a convicted defendant. The Court applied to criminal fines its prior holding in *Apprendi v. New Jersey*, which held that "[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence." In the case, the jury convicted the defendant-company for violating a law that authorized a $50,000 per-day fine. The jury was not asked to--and did not--specify how many days the law was violated. At sentencing, the government sought to impose a fine substantially in excess of the one-day total. The district court ruled that the jury necessarily found a violation of 762 days (making the potential fine $38.1 million) and imposed a fine of $6 million. The U.S. Court of Appeals for the First Circuit affirmed, holding that *Apprendi* does not apply to criminal fines. The Supreme Court disagreed, reversed and remanded for resentencing.

Don't Take That Third Point for Granted

The Sixth Circuit held that the government may refuse to move, under Section 3E1.1(b) of the U.S. Sentencing Guidelines, for a third point for acceptance of responsibility as long as it has a rational basis for its decision. The court rejected the rulings of the Second and Fourth Circuits, which have limited the government's discretion to refuse to make such a motion after a guilty plea to circumstances where the delay in deciding to plead guilty caused the government to expend resources to prepare for trial. In this case, the government's basis for refusing the Section 3E1.1(b) motion was the defendant's motion to suppress evidence, which required the government to prepare for and conduct a suppression hearing.

Beware the Appeal Waiver

Defendants who agree in their plea agreements to waive the right to appeal their sentences also forfeit the right to appeal a denial of a motion to modify the conditions of supervised release under 18 U.S.C. 3583(e)(2), according to the Fifth Circuit. The court reasoned that because the conditions of supervised release are part of the original sentence, any appeal relating to those terms is foreclosed by an appeal waiver in a plea agreement. The Fifth Circuit's holding is at odds with those from the Tenth and Eleventh Circuits.

Not Getting Hung Up on the Details

The core allegations of an indictment required to notify defendants of the charges against them come from the language in the statutes, regardless of what is set forth in any "to wit" clause. In the case, the indictment charged the defendant with using a "facility and means of interstate commerce" to sexually entice a minor in violation of 18 U.S.C. 2422(b). The "to wit" clause of the indictment highlighted the defendant's use of a computer and the Internet but did not mention his use of a telephone. At trial, the government introduced evidence of telephone conversations too. The defendant claimed this evidence--along with the proposed jury charge including the telephone as a facility of interstate commerce--constructively amended the indictment. The district court ultimately agreed and ordered a new trial. The Second Circuit reversed, holding that the core of the indictment was notifying the defendant of his use of a facility of interstate commerce and the details after the "to wit" clause were merely examples of those facilities.

Confronting Hearsay

Further muddying the scope of the Confrontation Clause in the wake of *Crawford v. Washington*, the U.S. Supreme Court held that an expert's hearsay testimony about the results of laboratory work performed by others does not run afoul of the Sixth Amendment.

An Offense Is an Offense Is an Offense

A conspirator who continues to participate in the conspiracy while awaiting trial on that very conspiracy could find his sentence enhanced upon conviction, according to the Second Circuit. Section 3147 of Title 18 allows a court to enhance a sentence by up to 10 years for violating the law while on pretrial release. In the case, the district court applied that enhancement to the conviction of a securities lawyer awaiting trial for his involvement in a client's long-term fraudulent-investment scheme. While on pretrial release, the lawyer was recorded on the telephone continuing the scheme. The defendant argued that ? 3147 applied only if a defendant awaiting trial for one offense committed an unrelated offense. Both the district court and Second Circuit disagreed.

Still Reeling From the Stevens Debacle

The Senate Committee on the Judiciary held a hearing on whether to codify the rules governing prosecutors' obligations under *Brady v. Maryland* and its progeny to ensure that the government produces all exculpatory evidence to criminal defendants. The hearing explored the Department of Justice's failures in the case against former Senator Ted Stevens, R-Alaska.

True Lies

After the jury convicted four defendants at trial before Judge William H. Pauley of the U.S. District Court for the Southern District of New York, one juror sent a peculiar letter to the government. Subsequently, it became clear that the juror had brazenly lied during voir dire, including by failing to disclose that she had been an attorney who had been sanctioned for misconduct. Thereafter, the defendants moved to vacate their convictions. Ultimately vacating the convictions of three of the four defendants and ordering new trials, the judge criticized the conduct of the fourth defendant's attorneys, whom he found had failed to apprise the court when they began to suspect that the juror had lied. As a result, he held that the fourth defendant had waived his objections to the improperly seated juror and his conviction stands.