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White Collar Roundup - May 2014

No Lawyer? No Problem

The U.S. Court of Appeals for the Second Circuit held in *United States v. Griffiths* that the defendant's Sixth Amendment right to counsel was not impinged by the appointment of substitute counsel at the end of his trial. Defendant David Griffiths was on trial for various counts including making a false statement to the government, obstructing justice, and committing mail fraud. Mid-trial, his lawyer suffered two strokes, which incapacitated him. Rather than declaring a mistrial, which Griffiths sought, the court appointed substitute counsel to deliver the defense summation, even though that lawyer did not witness any of the evidence at trial. Griffiths was convicted and appealed. In rejecting his Sixth Amendment claim, the court stated, "Because, in the circumstances presented, the district court's decision to appoint substitute counsel was reasonable, and Griffiths has shown no prejudice arising from that appointment, his Sixth Amendment claim fails."

Bribing a Public Official in Vain Is Still a Crime

In *United States v. Bencivengo*, the Third Circuit held that the defendant's belief that a public official can influence a government decision, even if the defendant is mistaken, can support a Hobbs Act conviction for extortion under color of official right. John Bencivengo was the mayor of Hamilton Township, New Jersey. He was convicted for violating the Hobbs Act for accepting money from an insurance broker in exchange for agreeing to influence members of the town's school board to refrain from putting the district's insurance contract up for competitive bidding. The insurance broker had won the bid for the existing contract. Unfortunately, Bencivengo had no real authority to influence the board. At trial, he moved for a judgment of acquittal, arguing that because he had no authority over the board, his conduct did not violate the Hobbs Act. The trial court denied the motion, the jury convicted Bencivengo, and he appealed. The Third Circuit held "that where a public official has, and agrees to wield, influence over a governmental decision in exchange for financial gain, or where the official's position could permit such influence, and the victim of an extortion scheme reasonably *believes* that the public official wields such influence, that is sufficient to sustain a conviction under the Hobbs Act, regardless of whether the official holds any *de jure* or *de facto* power over the decision."

Obstructing Justice Enhancement Is Broad

In *United States v. Taylor*, the Ninth Circuit affirmed the application of the obstruction-of-justice enhancement in U.S. Sentencing Guidelines ? 3C1.1 when the defendant "willfully provides materially false testimony at a bond revocation hearing." Defendant Terazze Taylor was on pre-trial release pending trial for defrauding the Veteran's Administration (VA). While on release, Taylor was arrested for assaulting his ex-girlfriend. Though not charged for the assault, he was arrested for violating the conditions of his release, which included the standard bond condition that he not commit any federal, state or local crime. At the bond-revocation hearing, Taylor testified he did not commit the assault, but the magistrate judge concluded that his testimony was contradicted by other evidence. Taylor later pleaded guilty to the VA fraud. At sentencing, the district court applied the two-level enhancement for obstruction under ? 3C1.1. Taylor objected, claiming that his alleged false statements at the bond hearing were not related to the "instant offenses of conviction" as that section requires. The district court rejected his argument and imposed the enhancement. Taylor appealed. The Ninth Circuit concluded that Taylor's reading was "restrictive" and that a bond-revocation hearing is "part of the prosecution of a federal offense." Thus, the enhancement was properly applied.

A Conflict Over the Rules Regarding Conflict Minerals

A divided panel of the D.C. Circuit in *National Association of Manufacturers v. SEC* held that the Securities and Exchange Commission's rules regarding conflict-mineral reporting violate the First Amendment. As has been reported, the Democratic Republic of the Congo is replete with both minerals (such as gold, tantalum, tin, and tungsten) and violence (such as rape and murder). Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to issue regulations requiring firms using "conflict minerals" to investigate and disclose the origin of the minerals. Issuers to whom the regulation applies are required, in short, to disclose in a report filed with the SEC and on its website that the products they manufacture are "DRC conflict free." The plaintiff challenged the final rule as violating the Administrative Procedures Act (APA), the Exchange Act, and the First Amendment. It lost in the district court and appealed. The D.C. Circuit agreed as to the APA and Exchange Act. But the court noted that "[b]y compelling an issuer to confess blood on its hands, the statute interferes with th[e] exercise of the freedom of speech under the First Amendment," and held the rule to be invalid.

Hostility From the Bench During Insider-Trading Appeal

The Second Circuit is considering the standard for tipee liability in an insider-trading prosecution. As reported here, at the trial in *United States v. Newman*, the judge refused to instruct the jury that the defendants could not be convicted unless they knew the tippers had received a benefit when they violated their fiduciary duties not to leak inside information. The defendants were convicted and appealed. At oral argument, the Second Circuit pressed the government about its theory that such an instruction was unnecessary. Judge Barrington D. Parker suggested that a "bright line" might be necessary to protect fund managers from prosecution in case information they receive happens to have been leaked from an insider. The court took the case under advisement, but we're curious to see how it rules.

GPS and Cell-Phone Tracking Is Interstate Commerce

The Tenth Circuit in *United States v. Morgan* held that a trial judge can instruct the jury that the use of GPS and cell-phone tracking satisfies the interstate-commerce element of the federal kidnapping statute. In the case, Morgan and others planned a kidnapping and robbery. To effectuate the scheme, they placed a GPS tracking device on the victim's car and followed his location on the Internet using Google Maps, which allowed them to track him in their car. They also used cell phones to communicate about the victim's whereabouts. Posing as police, they stopped the car, kidnapped the victim, and attempted to extort a ransom. At trial, the district court instructed the jury that the use of the GPS and a cell phone were instrumentalities of interstate commerce as a matter of law. After conviction, the defendants appealed. The Tenth Circuit held it was not plain error for the trial court to give the instruction and affirmed the sentences. The court noted that "[t]o hold otherwise would allow one jury, for example, to find that the Internet is an instrumentality of interstate commerce, and another jury to find in a substantially similar case that the Internet is not an instrumentality of interstate commerce."