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White Collar Roundup - April 2013

No Reversal for *Skilling* Mistake

In *United States v. Nouri*, the U.S. Court of Appeals for the Second Circuit upheld the defendants' honest-services fraud convictions even though the district court failed to instruct the jury that it had to find proof of a quid pro quo as required by *Skilling v. United States*. While the Second Circuit agreed the instructions were erroneous, it refused to reverse the conviction on plain-error review because it found the evidence of guilt was overwhelming. The court "ha[d] no doubt that, had the jury been properly instructed, it would have found the defendants guilty of honest-services wire fraud based on their scheme of concealed bribery." The court based its reasoning in part on the fact that the jury also found the defendants guilty of commercial bribery under the Travel Act, belying any claim of insufficient evidence of a quid pro quo. The court "s[aw] no reasonable likelihood that the jury would have reached a different verdict on the honest-services fraud charges against defendants had the jury been instructed, in accordance with *Skilling*, that the offense of honest-services fraud could be based only on a finding beyond a reasonable doubt of a bribery or kickback scheme."

I Want My Lawyer

The Tenth Circuit held in *United States v. Gordon* that a defendant must show prejudice to prevail on a Sixth Amendment claim that the government's restraint of his assets prevents him from retaining his counsel of choice in his defense. The U.S. Supreme Court held in *United States v. Gonzalez-Lopez* that denial of the Sixth Amendment right to paid counsel of one's own choosing is a "structural error" and not susceptible to harmless-error review. In *Gordon*, the defendant claimed the government's act of restraining his assets, which the government alleged were forfeitable, prevented him from employing counsel of his choice in his criminal trial. The court conceded arguendo that the government's use of pretrial restraints was prohibited but declined to vacate the conviction, because it found that, even without the restrained assets, he had sufficient funds to pay for counsel of his choosing. Similar issues about the restraint of assets affecting counsel of choice are pending before the Supreme Court in *Kaley v. United States* (No. 12-464) and the Second Circuit in *United States v. Bonventre* (No. 12-3574-cv).

Computer Strip Searches at the Border

The Ninth Circuit, sitting en banc in *United States v. Cotterman*, held that reasonable suspicion is required for law enforcement officials at the border to forensically search laptops, tablets, smartphones or other digital media. The court held that traditional border search principles did not apply in this context because the amount of information one can carry on such devices is not "circumscribed by the size of the traveler's luggage or automobile," but, rather, laptops and other such electronic devices are "capable of storing warehouses full of information." The court called the search at issue "a computer strip search" and noted laptops can contain "sensitive and confidential information" that can remain on hard drives "far beyond the perceived point of erasure," making it "impractical, if not impossible, for individuals to make meaningful decisions regarding what digital content to expose to the scrutiny that accompanies international travel." Because a forensic search of an electronic device carries the potential to reveal "the most intimate details of one's life," the court held, a showing of reasonable suspicion is required. The court noted in closing that this standard "leaves ample room for agents to draw on their expertise and experience to pick up on subtle cues that criminal activity may be afoot."

Court Says Probation Won't Deter

The Eleventh Circuit in *United States v. Kuhlman* held that a sentence of probation was substantively unreasonable for a five-year, multimillion-dollar scheme of falsely billing insurance companies for services that were not rendered to the defendant's patients. The United States Sentencing Guidelines called for a range of imprisonment between 57 and 71 months, but the district court sentenced the defendant to probation based significantly on his full payment of restitution prior to sentencing and the community service he completed during a six-month continuance of the sentencing. The Eleventh Circuit rejected the sentence as unreasonable because it failed to "adequately deter other similarly inclined health care providers," which the court found especially important given the government's lack of resources to prosecute health care fraud cases. The court also referenced its long line of cases holding that economic and fraud-based crimes "are prime candidates for general deterrence" but did not go so far as to hold that probation can never be suitable for a white collar crime.

Making It Easy to Find Probable Cause

Chief Judge William M. Skretny of the U.S. District Court for the Western District of New York dismissed an indictment against defendant William Huntress and others for the government's improper conduct in the grand jury. The government called as a witness the general counsel of Mr. Huntress' company, who refused to answer on the grounds of the attorney-client privilege. The government then sought a court order that the privilege did not apply, because there was probable cause to believe the defendants had violated the Clean Water Act (CWA) and the advice Huntress sought from his attorney was covered by the crime-fraud exception to the privilege. The court granted the order, and the government recalled the general counsel to the grand jury. The grand jury's duty was, of course, to determine whether there was probable cause that the defendants had violated the CWA. The government made the grand jury's job easier by having the general counsel (get ready) read the court's holding that the crime-fraud exception applied because there was probable cause to believe the defendants had violated the CWA. Unsurprisingly, the grand jury returned a true bill, and the court later granted the defendants' motion to dismiss it. For more, click here.

Phase Shifters

The First Circuit in *United States v. Wu* rejected the defendants' "broad-based attack on the federal government's arms export control system" and affirmed the majority of the defendants' convictions on export-control offenses related to their electronic parts dealership. But the court vacated the defendants' convictions that related to the export of "phase shifters." The First Circuit held that as to these convictions, the district court erroneously instructed the jury that it had to accept the State Department's after-the-fact determinations that the phase shifters were controlled by the U.S. Munitions List. By removing from the jury the question of whether the phase shifters fell under the munitions list, the instructions violated the defendants' right to a jury finding on each essential element of the crime.