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White Collar Roundup - August 2014

Third Circuit Curtails Review for Procedural Error at Sentencing

In *United States v. Flores-Mejia*, the en banc U.S. Court of Appeals for the Third Circuit implemented a new requirement to preserve a sentencing error for appeal. Now, if "a party has an objection based upon a procedural error in sentencing but, after that error has become evident, has not stated that objection on the record" during the sentencing hearing, then the Third Circuit will review it only for plain error. Previously, as long as a sentencing argument was raised in the district court?- even in a sentencing memorandum filed before the sentencing hearing?- but was rejected by the district court at the hearing, on appeal it was reviewed for "reasonableness." Not anymore. After *Flores-Mejia*, anyone being sentenced who fails to note their objection to a procedural error at the sentencing hearing will have to clear the higher hurdle of plain-error review on appeal. Notably, this new rule applies to procedural errors only, i.e., "a court's failure to give meaningful review to a defendant's substantive arguments," but not to substantive errors, i.e., the length of the sentence imposed. In announcing this rule, the Third Circuit joins the First, Fifth, Sixth, Eighth, Ninth, Tenth and D.C. Circuits, but perpetuates the split with the Fourth Circuit.

FedEx Indicted for Distribution of Pharmaceuticals From Illicit Internet Pharmacies

The U.S. Attorney's Office in the Northern District of California has obtained a 15-count indictment against FedEx Corp. and various subsidiaries, alleging that FedEx knew its services were being used by illegal Internet pharmacies to deliver pharmaceuticals that were being sold without a prescription. FedEx was charged with violating the Controlled Substances Act and the Food, Drug, and Cosmetic Act. To substantiate FedEx's alleged knowledge that its services were used to distribute these illicit pharmaceuticals, the indictment claims FedEx drivers in Kentucky, Tennessee, and Virginia reported safety concerns to senior management because they were being stopped on the road by desperate customers demanding their packages of pills. Drivers also reported that often the delivery address was to a parking lot, school, or vacant home where several carloads of people waited for the packages from these "pharmacies." This type of thing apparently doesn't happen when people are expecting medicine from Walgreens or CVS. The indictment also alleges that FedEx's gross gain from the alleged misconduct was at least $820 million.

Common-Interest Privilege Confirmed in the Garden State

The Supreme Court of New Jersey unanimously endorsed broad protections for the common-interest privilege in *O'Boyle v. Borough of Longport*. There, Martin O'Boyle, a citizen in New Jersey with active interest in his town's affairs, sued a former planning and zoning board member and two town residents. Their lawyer suggested to the town's attorney that they work together to defend against O'Boyle's current and anticipated claims. The town attorney agreed. Their lawyer also prepared a joint strategy memorandum and compendium of documents and provided them to the town's attorney. O'Boyle later sought that memorandum, but the defendants claimed it was protected by the common-interest privilege. On appeal, the Supreme Court endorsed the rule that had been set down by the New Jersey Appellate Division: "The common interest exception to waiver of confidential attorney-client communications or work product due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties." The court also clarified that "[t]he disclosure may occur prior

to the commencement of litigation" and "the common interest need not be identical; a common purpose will suffice."

Prosecutors Looking for Evidence in Detainees' E-mails to Lawyers

The U.S. Attorney's Office for the Eastern District of New York is collecting and reading e-mails to attorneys from defendants housed at the Metropolitan Detention Center (MDC). In a letter to the Federal Defenders of New York, the government made plain that it would review all e-mails sent from MDC inmates, even if the e-mails were between the inmates and their lawyers. The government claims that those e-mails are not protected by the attorney-client privilege and are, therefore, fair game. The defense bar has cried foul as reported here and here. The *New York Times* Editorial Board doesn't like it either, as expressed here. District judges in Brooklyn have differing views as well. Judge Dora Irizarry told prosecutors they may not read such e-mails, but Judge Allyne Ross said they may.

Courts Split Over Searching Web-Based E-mail Accounts

A magistrate judge in the Southern District of New York approved a search warrant for a Gmail account, contradicting rulings from the U.S. District Courts for the District of Columbia and the District of Kansas, which did not approve similar warrants for web-based e-mail accounts. In refusing to issue the warrant presented to it, the District of Columbia ruling explained its concern that "the government...gets *all* e-mails?- regardless of their relevance to its investigation?- and keeps them indefinitely." The District of Kansas court denied the warrants requested because they did not meet the Fourth Amendment's particularity requirement. The Southern District ruling brushed these concerns aside, noting that courts have traditionally issued warrants to seize a large quantity of documents "in order for the police to perceive the relevance of the documents to crime" even though some documents are innocuous. The court also rejected the "particularity" concerns raised by the Kansas court, ruling that the warrants were sufficiently particular to identify the items within the scope of the warrant.

Should All E-mail Be Encrypted?

As more and more questions arise over the ability to obtain web-based e-mails, encryption technology might become more prevalent. For an interesting article on how to easily encrypt web-based e-mails, click here.