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White Collar Roundup - August 2017

A Busy Month at the Second Circuit

The U.S. Court of Appeals for the Second Circuit was quite busy in July. It issued three WCR-worthy opinions.

- First, in *United States v. HSBC Bank USA, N.A.*, the court held that a monitor report issued by an independent monitor retained pursuant to a deferred-prosecution agreement (DPA) with the government cannot be publicly disclosed because it is not relevant to any issues pending before the district court. Organizations and the government often enter into DPAs to resolve investigations into organizational malfeasance. With a DPA often comes an agreement for the organization to hire and pay for an independent monitor. In *HSBC*, during the pendency of the DPA, an individual filed a motion with the district court to unseal one of the monitor's reports to aid him in pursuing his complaint against HSBC with the Consumer Financial Protection Bureau. The district court granted the motion and ordered the parties to submit a redacted version of the report for public disclosure. The parties jointly appealed, and the Second Circuit reversed, holding that "the Monitor's Report is not a judicial document because it is not now relevant to the performance of the judicial function." As a result, it should not be ordered released.
- Second, in *United States v. Silver*, the court vacated the conviction of former New York Assembly Speaker Sheldon Silver, who had been convicted on federal corruption charges. After his conviction, the U.S. Supreme Court issued its decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which clarified the meaning of an "official act" in the honest-services fraud and extortion statutes. In *Silver*, the Second Circuit held that the trial court's "instructions on honest services fraud and extortion do not comport with *McDonnell* and are therefore in error." It further held, "this error was not harmless because it is not clear beyond a reasonable doubt that a rational jury would have reached the same conclusion if properly instructed, as is required by law for the verdict to stand." As a result, it vacated the convictions on all counts and remanded for further proceedings. And as reported here, Silver asked the Second Circuit to stay the mandate so he can seek certiorari from the U.S. Supreme Court regarding the money-laundering counts on which the Second Circuit rejected his arguments.
- Third, in *United States v. Allen*, the Second Circuit considered the appeals by defendants Anthony Allen and Anthony Conti, who were convicted at trial for fraud relating to alleged manipulation of LIBOR rates. The defendants were investigated by both UK and U.S. authorities. In the UK, they were compelled to testify on threat of imprisonment, which resulted in each providing inculpatory evidence. Because of the Fifth Amendment, that evidence could not be used in the U.S. prosecution. Despite that prohibition, the U.S. government shared Allen's and Conti's testimony with both agents and cooperators, who relied on it to some extent during their testimony in both the grand jury and at trial. Under *Kastigar v. United States*, 409 U.S. 441 (1972), if a witness is exposed to a defendant's compelled testimony, the government must prove "at a minimum, that the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the government." Here, the Second Circuit held that the government failed the *Kastigar* test in obtaining the indictment and at the trial. Therefore, it reversed the convictions and dismissed the indictments.

Government Slapped for Misstating Evidence in Its Closing Arguments

The D.C. Circuit vacated the conviction of a family of tax preparers in *United States v. Davis*. Sherri Davis owned a tax-preparation business that the Internal Revenue Service determined was filing returns with false charitable and business deductions. The government prosecuted Davis and her son, Andre Davis, for involvement in the scheme. At trial, Sherri's niece testified about the scheme. Both Sherri and Andre were convicted at trial and appealed, claiming that the government engaged in prosecutorial misconduct during its closing arguments and that the district court made various evidentiary errors. "Upon consideration of the weakness of the evidence offered against Andre and its centrality to the issue of his *mens rea*,"

the D.C. Circuit concluded "that the prosecutor's blatant misstatements of key evidence during closing arguments, in the absence of any steps to mitigate the resulting prejudice, require reversal of Andre's convictions." The court noted that an examination of the government's closing arguments "reveals multiple misstatements of [its] evidence and, given the gaps in the government's evidentiary case, their prejudicial effect is readily apparent." It also concluded "that the evidence against Andre was insufficient and consequently he is not subject to retrial." As to Sherri, it found no similar prejudice and affirmed her convictions but remanded for resentencing.

Customs and Border Protection Searching Electronics at the Border

Back in February, Senator Ron Wyden (D-Ore.) sent a letter to John F. Kelly, the then-Secretary of the Department of Homeland Security. The letter raised questions about media reports that U.S. Customs and Border Protection (CBP) agents were pressuring American citizens to provide the agents "access to their smartphone PIN numbers or otherwise provide access to locked mobile devices." Senator Wyden then sent a letter to CBP's acting commissioner, Kevin McAleenan. Commissioner McAleenan responded by explaining the legal authority the CBP asserts for such searches. He explained that "because *any* traveler may be carrying an electronic device that contains evidence relating to offenses such as terrorism, illegal smuggling, or child pornography, CBP's authority to search such a device at the border does not depend on the citizenship of the traveler." He emphasized that CBP agents would not prevent a citizen from entering the United States, but they might seize the electronic device for further examination if appropriate. He also stated that "CBP does not access information found only on remote servers through an electronic device presented for examination, regardless of whether those servers are located abroad or domestically. Instead, border searches of electronic devices apply to information that is physically resident on the device during a CBP inspection." So, it appears travelers need not be concerned about CBP seeking to access information stored remotely, but would do well to anticipate periodic searches of the electronic devices of people entering the United States.

A Novel, and Fruitless, Sentencing Argument

The Seventh Circuit in *United States v. King* declined defendant Carnell King's invitation to direct district judges to consider whether the parsimony principle of 18 U.S.C. §3553(a) renders the guidelines inapplicable because they call for a penalty that is too harsh under the circumstances. The parsimony principle directs district courts to impose sentences that are "sufficient, but not greater than necessary" to effectuate the purposes of sentencing. In the case, King pleaded guilty and did not dispute that the district court properly calculated the advisory guidelines range. In fact, after doing so, the district court reasoned that the guidelines range overstated King's culpability and imposed a below-guidelines sentence. Given these circumstances, the Seventh Circuit noted "it is hard to see why King is appealing." King's argument was, in essence, that the sentencing court should have considered whether the guidelines violated the parsimony principle *before* considering the guidelines range and the other provisions of §3553(a). The court rejected his argument. It emphasized that "a defendant is always free to argue that the Guidelines, taken as a whole or when particular provisions are examined, recommend an unduly harsh sentence in his case." The place to do that, it reasoned, was when arguing that the court should vary from any guidelines calculation. But the "parsimony principle does not require the district judge to consider the same argument twice, once in a novel adjustment to the guideline calculation itself and again under §3553(a)."

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