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White Collar Roundup - August 2013

Down to the Wire (Application)

The U.S. Court of Appeals for the Second Circuit in *United States v. Goffer* examined what to do when the government uses a wiretap to investigate crimes that are not enumerated in the Wiretap Act as predicates for obtaining a wiretap. Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. ?? 2510 et seq., lists certain predicate crimes for which wiretap orders may be issued. Wire fraud is listed among them; securities fraud is not. The statute allows evidence of nonpredicate offenses to be used in a subsequent prosecution in the absence of bad faith. *Goffer* stemmed from the investigation into securities fraud in connection with the Galleon Group cases. The government convicted the defendants in part on the strength of wiretap evidence, even though they were charged with securities-fraud offenses, but not wire-fraud offenses. The defendants unsuccessfully sought to exclude the wiretap evidence in the district court. After their convictions, they appealed, arguing the wiretap evidence should have been excluded for two reasons: (1) securities fraud is not a predicate under Title III, and (2) any interceptions of nonpredicates can be admitted only if they were inadvertent. The court of appeals rejected these arguments. In so doing, it noted that the government's wiretap applications were premised on a wire-fraud investigation, but noted that "they expected to uncover evidence of securities fraud (which, they expressly noted, is 'not a predicate offense under 18 U.S.C. ? 2516')." This language, the court reasoned, ensured there was no "'subterfuge'" in obtaining the wiretap authorizations.

Reprieve Resulting from Skilling Is Not a Slam Dunk

In *United States v. Caso*, the D.C. Circuit vacated the conviction of former congressional aide Russell James Caso, Jr., who had pleaded guilty to honest-services wire fraud. In 2005, a consulting firm had solicited Caso's boss in the House of Representatives to take legislative action on two proposals. The firm then hired Caso's wife to work on those proposals and paid her $19,000 over the course of a few months for de minimis services. As a congressional employee, Caso was required to file a form to report his wife's income over $1,000. He did not include her income on the form, even though he swore under the penalties of perjury that the form was accurate. After being charged with wire fraud on an honest-services theory, Caso pleaded guilty. After the U.S. Supreme Court's ruling in *Skilling v. United States*, Caso sought to vacate his conviction. Caso argued he was "actually innocent" of wire fraud, which excused his procedural default on his habeas petition for not raising the issue on direct appeal. But to avoid the procedural default, one must show "actual innocence" on not only the offense of conviction, but also any other more serious offense the government might have forgone in agreeing to the plea bargain. The district court held Caso did not satisfy the conditions of "actual innocence" because he had not shown he was actually innocent of "not only the crime for which he was charged and convicted . . . but also of the separate, uncharged offense of making a 'materially false . . . statement' to the government." Reasoning that the false-statement charge was less serious than the wire-fraud charge, the court of appeals reversed, holding that Caso was not required to prove "actual innocence" with respect to both. The court held that to determine whether the uncharged crime was more serious than the charged crime, courts should look to the potential penalties under the U.S. Sentencing Guidelines as well as the underlying statutes.

Foreign Forfeiture Fun

The D.C. Circuit's opinion in *Luan v. United States* waded into the murky waters of interpreting 28 U.S.C. ? 2467(d)(3). That statute authorizes federal courts to issue orders to restrain property in the United States at the request of foreign

governments to "preserve the availability of property subject to civil or criminal forfeiture under foreign law." The statute also directs that a court can issue the restraining order only if the foreign claimant has the same due process protections as would a domestic claimant were the United States seeking a restraining order under 18 U.S.C. ? 983(j). In *Luan*, a magistrate in Hong Kong had issued an arrest warrant for the claimant and an order restraining the proceeds of his alleged smuggling operation, which amounted to some $23 million. Hong Kong asked the United States to restrain the claimant's U.S. assets. The district court issued the restraining order, and Luan appealed, claiming that the restraining order was improperly issued because it was not "issued in a manner consistent with the procedural due process protections of ? 983(j)(1)(A)." The issue before the court was whether Hong Kong's actions provided the protections required by due process. The court of appeals affirmed the restraining order, holding that whatever the requirements of
? 2467(d)(3) were, the claimant's due process was adequately protected by the filing of the Hong Kong arrest warrant, the restraining order and the adversarial hearing.

Government Forms Don't Amount to Business Records

The Ninth Circuit in *United States v. Morales* held that government immigration forms could not be admitted as business records under Federal Rule of Evidence 803(6), which excepts such out-of-court statements from the normal hearsay bar. Morales had been driving five illegal aliens who were secreted in her truck in Arizona. When she was stopped by the police, the aliens were discovered. Upon their arrest, each was presented with immigration form I-826, on which each admitted to his or her illegal status and requested deportation. Morales was arrested and charged with various offenses relating to the illegal transportation of aliens. At her trial, the government was allowed to introduce into evidence the forms I-826 as business records to establish that each of the passengers was, in fact, an alien. After her conviction, Morales appealed, claiming these forms were improperly admitted because they were not business records. The court of appeals agreed, holding that because the I-826s were government forms, their admissibility is governed by Rule 803(8), not 803(6), and they failed to satisfy that rule. Alas, the conviction was left unmolested because the court found the error was harmless.

Not Guilty, But Hardly Innocent

The Seventh Circuit in *Pulungan v. United States* clarified that a judgment of acquittal is not the same as a finding of innocence. In this case, Doli Syarief Pulungan had been prosecuted for attempting to export defense articles without a license in violation of 22 U.S.C. ? 2778. He spent 23 months in prison both pretrial and after the jury conviction for the offense. On appeal, the Seventh Circuit vacated the judgment, holding there was insufficient evidence to show beyond a reasonable doubt that Pulungan knew a license was required. After his release from incarceration, he sought from the district court a certificate of innocence under 28 U.S.C. ? 2513, which would allow Pulungan to obtain compensation under 28 U.S.C. ? 1495 for the period of his incarceration. The district court gave him the certificate, ruling that the court of appeals opinion showed he was innocent. The United States appealed, and the Seventh Circuit made plain that a finding of insufficient evidence to support a conviction is not a finding of innocence for the purposes of ? 2513. As the court put it, "[a] conclusion that the prosecutor did not prove a charge beyond a reasonable doubt differs from a conclusion that the defendant is innocent in fact." The court also proffered its view of Pulungan's case by concluding, "[h]e is now the plaintiff in civil litigation, so the burdens of production and persuasion are his. If he decides not to testify, that would be a good basis for an adverse inference."