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When Federal Agencies Are the "Same Party" under FRE 804(b)(1)

By Thad A. Davis and Leslie A. Wulff – August 14, 2014

In March, Zachary Warren, a former client manager at Dewey & LeBoeuf experienced firsthand the effects of the increasing frequency of cooperation between government agencies. Warren was indicted in New York state court for alleged fraud leading to the demise of Dewey & LeBoeuf in 2012. He had consented to be interviewed by the Securities and Exchange Commission (SEC) as a witness related to the SEC's civil investigation into the firm's collapse. Only after it was too late did Warren learn that his own testimony was going to be used against him as a partial basis for his ultimate indictment.

Warren's case illustrates the extent to which government agencies of all shapes and sizes are increasingly turning to each other to cooperate in the civil enforcement and criminal prosecution of financial fraud and other suspected wrongdoing. In cases where dual investigations are headed by separate federal agencies—such as the SEC and the U.S. Attorney's Office—questions regarding the cooperation and identity between the agencies are particularly important when it comes to issues of admission of out-of-court statements under the hearsay exception for prior testimony. Indeed, an effective defense may involve turning the tables on the agencies and using exculpatory transcripts of other witnesses the agencies have taken testimony from but are ultimately unavailable to be called at trial by the defense.

The federal courts are divided on this issue. We explore here the circuit split, and suggest the Seventh Circuit approach has much to recommend it.

Hearsay Exception for Prior Testimony

Federal Rule of Evidence 804(b)(1) allows for the admission of hearsay when it is in the form of prior testimony by an unavailable witness. This exception to the default exclusion of hearsay applies as long as the witness is unavailable and the testimony (1) was taken during trial, a hearing, or a lawful deposition; (2) is being used against the same party who previously took the deposition; and (3) that party had an opportunity and similar motive to question the witness as it would under cross-examination. The second prong of this test is the focus of our discussion here.

Government Agencies as the Same Party

Application of Rule 804(b)(1) is particularly interesting in instances where a now-unavailable witness was previously deposed by the SEC, or another federal agency, and provided testimony that could be potentially exculpatory in a pending federal criminal prosecution by the U.S. Attorney's Office. This issue is bound to arise more frequently as cross-border investigations continue and individuals express reluctance to travel to the United States to serve as witnesses. It is becoming more likely that a foreign witness might be deposed by the SEC as part of a civil

investigation and provide testimony that could serve as exculpatory evidence in a subsequent federal criminal prosecution for the same conduct.

The Seventh Circuit's "Functional" Approach

In deciding whether two federal government agencies are the same party for purposes of Rule 804(b)(1), the Seventh Circuit has developed a functional approach that focuses on the structural relationship between the two agencies, such as whether both agencies report into the executive branch; the factual and legal overlap between the civil and criminal proceedings; and the context in which the original deposition was taken—whether it was an exploratory or a conclusory interview. In *United States v. Sklena*, 692 F.3d 725 (7th Cir. 2012), the court found that the U.S. Commodity Futures Trading Commission (CFTC), and the U.S. Attorney's Office were the same party under Rule 804(b)(1). The CFTC had taken the deposition of a coconspirator in an alleged wire- and commodity-fraud case. That coconspirator passed away before the pending criminal case went to trial, but the CFTC deposition provided exculpatory evidence for the surviving coconspirator. The Seventh Circuit overruled the district court's decision to exclude the CFTC deposition from the criminal trial on the grounds that the agencies were similarly situated in the executive branch such that action by one was reasonably related to action by the other. In other words, when the two government agencies looked and smelled like they had the same interest, they probably did and should be considered the "same party" for purposes of Rule 804(b)(1).

The Southern District of New York's "Literal" Approach

In recent cases, the Southern District of New York has struck a more literal approach to interpreting the "same party" clause of Rule 804(b)(1). For example, in *United States v. Martoma*, No. 12-CR-973 (S.D.N.Y. Jan. 8, 2014), the court held that the SEC and the U.S. Attorney's Office were not the same party under Rule 804(b)(1). In part, because, federal prosecutors were not actually present at the SEC deposition and did not have the opportunity to direct the SEC's line of questioning, the court found that the two agencies could not be considered the same party. The court applied a far more literal interpretation of the "same party" language, ignoring the possibility that two government agencies could have so much in common so as to be considered the same party in the absence of evidence that employees of both agencies were acting in direct concert.

The Superiority of the Functional Approach

We believe that in the face of modern realities, the Seventh Circuit's functional approach presents the more realistic avenue for interpreting Rule 804(b)(1). In the wake of the recent economic meltdown, federal agencies are increasingly exercising their power to bring parties to justice through both civil and criminal enforcement. Even when those agencies are not talking on the phone or emailing every day and coordinating their strategy on a detailed level, such agencies may still be acting as the same party when they are advancing the same goals and interests and aligned in the federal bureaucracy in such a way that their interests can be considered functionally similar.

Conclusion

Given the aggressive criminalization of many previously civil matters, particularly in the securities realm, extreme caution is in order when appearing before or meeting with any government agency. On the flip side, defense counsel must be aware of the ability to admit and use other testimony given to federal agencies. This may form the basis for an effective defense, depending on the path of the law in this area.

Keywords: criminal litigation, government agencies as the same party, hearsay exception for prior testimony, FRE 804(b)(1), functional approach, literal approach, *United States v. Sklena*, *United States v. Martoma*

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Recent Cases Limit Government's Ability to Search Phones, Computers

By Aaron M. Danzig – August 14, 2014

The Founding Fathers were extremely concerned about the ability of the government to enter a person's home with a broad, general warrant or no warrant at all and search papers, correspondence, pictures, calendars, etc., for evidence of criminal activity. "The Framers abhorred this practice, believing that 'papers are often the dearest property a man can have' and that permitting the Government to 'sweep away all papers whatsoever,' without any legal justification, 'would destroy all the comforts of society.' *Entick v. Carrington*, 95 Eng. Rep. 807, 817–18 (C.P. 1765)." *United States v. Ganias*, 2014 U.S. App. LEXIS 11222, at *20–21 (2d Cir. June 17, 2014). "Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Riley v. California*, 573 U.S. ___, 2014 LEXIS 4497, at *50 (June 25, 2014). But the framers of the Constitution are unlikely to have ever imagined that all of the documents in a person's home—indeed, all records of one's life and business—could be stored on a single device small enough to fit in a suit pocket. Such is the issue in two recent cases that have applied Fourth Amendment search-and-seizure concepts to modern technology. These cases held that the government overstepped its authority in searching a cell phone incident to arrest without a warrant and in retaining indefinitely a mirror image of a computer hard drive even if initially seized pursuant to a valid warrant.

***Riley v. California*—The government needs a warrant to search your cell phone.**

In a unanimous opinion, the U.S. Supreme Court held in *Riley v. California* that, absent exigent circumstances, a warrant is needed to search a person's cell phone, even if that cell phone was seized incident to a lawful arrest. In *Riley*, the defendant was stopped for driving with expired registration tags, and the car was impounded. During an inventory search of the car, police found two handguns under the car's hood and arrested Riley for possession of concealed handguns. In searching Riley incident to the arrest, police seized a cell phone from his pocket. At the police station, police searched the contents of the cell phone. They found evidence of Riley's connection to gang activity, including a photograph of Riley in front of a car that was suspected to have been involved in a shooting a few weeks earlier. Ultimately, Riley was charged in connection with that shooting, evidence from his cell phone was used at trial, and he was convicted.

The Supreme Court analyzed the case in light of various "search incident to arrest" cases that generally allow police to search a person being arrested and his or her surrounding area because of the potential risk that the arrested person may have a hidden weapon to harm officers or may be able to destroy evidence. However, the Court noted that "digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Riley*, 573 U.S. ___, 2014 LEXIS 4497, at *23. Additionally, while there is a risk that information on a cell phone may be vulnerable to evidence destruction—via remote wiping or data encryption—the Court held that there are means to address those concerns such as removing

the phone's battery or placing the phone in a "Faraday bag," which is a bag made of aluminum foil that isolates the phone from radio waves.

Importantly, the Supreme Court was struck by the massive volume of information that can be placed on a cell phone, technology that has become more than just mobile telephones; they are cameras, video players, rolodexes, calendars, audio recordings, libraries, diaries, albums, televisions, maps, and newspapers. Additionally, the information stored on a phone could reveal more in combination than in a single isolated record. For example, the phone may contain an address, note, prescription, bank statement, and photograph that are all interrelated. As another example, the Court noted that a person may carry in his or her pocket a written note as a reminder to call Mr. Jones, but a person would not carry a record of all of his or her past communications with Mr. Jones, as may be contained on a cell phone. Also, cell phones contain Internet browsing history and may contain a range of applications that could further reveal the private life of a person.

The Court noted, "[I]n 1926, Learned Hand observed that it is 'a totally different thing to search a man's pockets and use against him what they may contain, from ransacking his house for everything which may incriminate him.' *United States v. Kirschenblatt*, 16 F.2d 202, 203 (CA2)." *Riley v. California*, 573 U.S. ___, 2014 LEXIS 4497, at *39 (June 25, 2014). Here, in acknowledging the reality of modern digital life, the ubiquity of cell phones, and the vast data that they contain, the Court reversed the California Court of Appeal's affirmation of the conviction and ruled that cell phones cannot be searched without a warrant, absent exigent circumstances.

***United States v. Ganias*—The government cannot retain indefinitely every file on your computer even if a mirror image of the computer was lawfully seized.**

In *Ganias*, the Second Circuit expressed similar concerns as the Supreme Court in *Riley* about the challenge of applying Fourth Amendment protections and jurisprudence to modern computer files and the ability of computers to store massive volumes of data. And, like the Supreme Court, the Second Circuit also limited law enforcement's ability to retain and search electronically stored data, albeit in a slightly different context. In *Ganias*, the court held that the Fourth Amendment does not permit officials executing a warrant for the seizure of particular data on a computer file to seize and indefinitely retain every file on that computer for use in future criminal investigations.

The defendant, Stavros Ganias, performed accounting work for two companies that were under investigation related to allegations of improper billing and theft of items by one of the companies that had a contract to provide security and maintenance at a vacant Army facility. As part of the investigation, law enforcement obtained a warrant to search Ganias's offices, including his computers, for information related to the two companies. As is common, the agents did not physically seize Ganias's computers; instead, they made identical mirror images of the computers, which included copying each and every file on the computers. Almost two years later, the agents expanded their investigation to include possible tax violations by Ganias

himself. Two-and-a-half years after the agents obtained the mirror images as part of their investigation of the companies, they obtained a new warrant to search the same mirror images. This time, the search was for evidence related to possible tax violations by Ganias. Ganias was later indicted for tax evasion, and the evidence from his computers was admitted over objection at trial, where he was convicted.

In its opinion, the court noted that, "[l]ike 18th Century 'papers,' computer files may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle, and they should be similarly guarded against unwarranted Government intrusion. If anything, even greater protection is warranted." *Ganias*, ___ F.3d ___, 2014 U.S. App. LEXIS 11222, at *22. The court noted that computers can store massive amounts of data that could take months to review and would be impractical and, with the ability to create mirror images, unnecessary for agents to occupy a person's home or office to review. While the government can make such mirror images pursuant to a warrant, the court held that the government's retention of copies of Ganias's personal-computer records for 2.5 years "deprived him of exclusive control over these files for an unreasonable amount of time." *Id.* at *29. Further, "[t]his was a meaningful interference with Ganias's possessory rights in those files and constituted a seizure within the meaning of the Fourth Amendment." *Id.* at *29–30. The fact that the government later obtained a new search warrant to search the files related to its investigation of Ganias did not cure the defect in wrongfully keeping the retained files. Therefore, the circuit court reversed the lower court's denial of the defendant's motion to suppress and vacated the conviction.

Implications of Rulings

The holdings in these cases are straightforward. Absent exigent circumstances, police officers may no longer search the contents of cell phones that are seized pursuant to an arrest. Instead, a search warrant is required. Computers that are copied pursuant to a valid warrant may not be retained indefinitely.

These holdings do place some limits on law enforcement. However, in applying the Fourth Amendment to the digital age, the courts found that these searches violated the prohibitions on unreasonable searches and seizures. More broadly, these cases signify that courts are acknowledging that all documents, pictures, and other information that could be kept in one's house (subject to search only upon a warrant) can now be kept on a device in one's pocket, and constitutional protections against an unreasonable or warrantless searches of a man's castle extend to devices that can store all of that information in a small place.

Keywords: criminal litigation, Fourth Amendment, search and seizure, *Riley v. California*, *United States v. Ganias*, smartphone, cell phone, PDA, retention of mirror image, hard drive

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U.S. v. Houser: Bellwether for Civil FCA Theories in Criminal Prosecutions?

By Jerry Friedberg and Amanda Touchton – August 14, 2014

In *United States v. Houser*, 2014 WL 2767200 (June 19, 2014), the Eleventh Circuit upheld the defendant's conviction and 20-year sentence for Medicare fraud and tax evasion. The case is noteworthy for the federal government's willingness to devote its resources to prosecuting persons who operate nursing homes that force the residents to live in grossly substandard conditions. The case is equally noteworthy for the severity with which the district court was willing to punish the owner, who received a sentence similar to that imposed on high-level drug dealers. The egregious facts of *Houser* undoubtedly explain both the prosecution and the sentence. Looking beyond these two issues, however, the ruling suggests a potentially far-reaching development: the incorporation of expansive theories of liability derived from civil False Claims Act (FCA) cases into the criminal context.

Courts have interpreted the civil FCA broadly, consistent with its remedial purposes. Two theories of civil liability under the FCA have no direct parallel in common law: (a) worthless services, and (b) implied false certification. A worthless-services claim "asserts that the knowing request of federal reimbursement for a procedure with no medical value violates the Act." *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 702 (2d Cir. 2001); *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) (worthless-services theory based on "seeking and receiving payment for medically worthless tests"). An implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment, even though a certification of compliance is not required as part of the process of submitting the claim. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). Prosecutors in some jurisdictions are starting to apply these theories of liability to criminal cases, even though criminal statutes are traditionally interpreted narrowly and implicate due-process concerns not present in traditional FCA civil actions.

The Facts of *Houser*

The *Houser* opinion arose out of one such prosecution. Defendant Houser owned and operated nursing homes that primarily served Medicare or Medicaid patients. He had an extensive history of failing to pay services providers and operating the homes at a substandard rate. As a result of his failure to pay for basic amenities, conditions at the homes that he operated were, according to witnesses, "barbaric" and "uncivilized." For example, one facility had a leaky roof that was so porous that it caused the patients' rooms to flood; another had no heat during the winter and no air conditioning during the summer. Patients and staff reported unsanitary, insect-infested conditions, unclean bathrooms, limited laundry, and no trash services. Patients were not provided with their prescribed medication, were denied dialysis and other critical treatments or tests, did not receive required rehabilitative and physical therapy, and were not properly fed. Despite Houser's best efforts to cover up the conditions, including firing whistleblowers and making temporary improvements on the eve of government inspections, the state licensing agency closed

the facilities. To make matters worse, Houser cheated on his taxes. He failed to pay payroll taxes, despite withholding from his employees, and filed his income tax returns late or not at all.

Houser and his wife were charged with a conspiracy to commit health-care fraud in violation of 18 U.S.C. § 1349, as well as several tax offenses. The indictment alleged that Houser submitted claims that were "false or fraudulent claims" because they sought payment for services that were "worthless." The indictment specifically relied on a Medicare regulation that required nursing homes to maintain the quality of life of each resident, including providing "services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a plan of care." 42 U.S.C. § 1396r(b)(2)(A); 42 C.F.R. § 483.25.

Houser waived jury, went to trial, and was convicted on all counts. In a lengthy opinion, the trial judge concluded that Houser committed fraud by submitting claims for services that were "either not rendered or were so inadequate or deficient as to constitute worthless services." 2014 WL 2767200, at *9.

What *Houser* Did Not Address

On appeal, Houser argued that the incorporation of a "worthless services" theory from civil FCA cases into the Medicare fraud statute would render the statute "unconstitutionally vague." The Eleventh Circuit rejected this argument on the facts of the case before it. However, the circuit failed to provide any guidance as to when the provision of substandard services could support a criminal conviction under the "worthless services" theory, stating, "We do not believe that Mr. Houser's conviction requires us to draw the proverbial line in the sand for purposes of determining when clearly substandard services become 'worthless.'" Instead, the circuit affirmed the conviction on the ground that the district court had found that some patients went "entirely without necessary services such as physical therapy, medication, dialysis and wound care." The circuit found that, because some services had not been provided at all, it was not necessary to reach the issue of whether due process precludes a conviction for substandard, "worthless services."

The *Houser* court therefore avoided the question of whether substandard services that were actually provided could support a criminal conviction. However, at least one other court has expressly permitted a prosecution based on a substandard-services theory to go forward. In *United States v. Wachter*, 2006 WL 2460790 (E.D. Mo. Aug. 23, 2006), the district court for the Eastern District of Missouri rejected a motion to dismiss a health-care fraud indictment, holding that defendants could be charged with submitting false statements that services had been rendered, when the services provided were so "inadequate, deficient, and substandard" as to be worthless. The *Wachter* court further held that the term "worthless service" was not unconstitutionally vague.

Although in *Houser* the Eleventh Circuit did not expressly adopt the holding of *Wachter*, the crux of the case below was worthless services, and the Eleventh Circuit did not renounce the

prosecution's use of this theory in fashioning a criminal health-care-fraud prosecution. The prosecution charged Houser with submitting claims for services "that were worthless in that they were not provided or rendered, were deficient, inadequate, substandard, and . . . failed to meet professionally recognized standards of health care." The district court convicted Houser based in part on this theory, and the Eleventh Circuit affirmed Houser's conviction.

Moreover, the Eleventh Circuit affirmed Houser's conviction based on the failure to perform services that were never separately billed. Nursing facilities are paid on a per diem basis for each Medicare patient, regardless of what particular service is provided on that day. Although Houser failed to provide required services, he did not certify and apparently was not required to certify that any particular service was provided on the day for which the claim for per diem reimbursement was submitted. Nevertheless, the Eleventh Circuit affirmed the conviction based on Houser's failure to provide necessary services. (The court also noted that, on his Medicare enrollment form, Houser certified that he would comply with the Medicare rules and regulations, and those Medicare rules and regulations specify the services that must be offered by nursing homes. However, the court did not rely on Houser's express certification when it analyzed whether Houser's failure to provide required services was sufficient to sustain the conviction.)

The Impact of *Houser*

The *Houser* opinion does not expressly address the extent to which criminal liability can be premised on an implied false certification. However, *Houser* appears to have opened the door for prosecutions based on this theory by holding that a defendant who fails to provide required services can be convicted for submitting invoices for payment even if the defendant never billed for those specific services.

More generally, *Houser* suggests that future cases will test the extent to which theories of liability that have been accepted in civil FCA cases, such as the worthless-services theory and the implied-certification theory, may also form the basis of criminal prosecutions. Future prosecutions are likely to require the resolution of those issues that the *Houser* court declined to expressly address.

Keywords: criminal litigation, health-care fraud, False Claims Act, worthless services, implied false certification

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The U.S. Sentencing Commission's War on Drugs

By Vadim A. Glozman – August 14, 2014

Editor's Note: We are pleased to present two excellent articles below regarding the recent amendments to the Federal Sentencing Guidelines by the U.S. Sentencing Commission. Our first article, by Vadim A. Glozman, discusses how the amendments are consistent with Department of Justice policy under Attorney General Eric Holder, and examines the potential impact on the sentencing courts. Dillon Malar's article focuses on the consequences of the guidelines being applied retroactively, and touches on the logistics of how this will be accomplished. We hope you enjoy both of these excellent articles on this important subject.

Earlier in 2014, the U.S. Sentencing Commission voted unanimously to amend base offense levels associated with the Drug Quantity Table in guideline section 2D1.1. Essentially, the amendment reduces the base offense levels for all drug types by two, while remaining consistent with the mandated five- and ten-year statutory minimums. The amendments would make parallel changes to the section 2D1.11 quantity tables, which apply to offenses involving chemical precursors of controlled substances.

The commission estimates that the amendment would decrease sentences for nearly 70 percent of federal drug-trafficking defendants by an average of 11 months, or 17 percent. This "modest reduction" in drug penalties is an attempt by the commission to reduce the federal prison population by what they expect to be more than 6,500 inmates in five years, with hopes of a considerably greater long-term impact.

Uniformity with Attorney General Holder's Agenda

Last August, Attorney General Eric Holder introduced his "Smart on Crime" initiative, changing the Justice Department's policy on charging drug offenders by reserving mandatory minimum sentences for high-level and violent drug traffickers. Holder urged prosecutors to continue charging the most serious offense consistent with the defendant's conduct, as long as the charges reflect an individualized assessment and fair representation of the defendant's conduct.

In his memorandum, Holder provided a framework under which prosecutors should decline to charge a defendant with a drug quantity that would trigger a mandatory minimum sentence. Effectively, defendants with nonviolent relevant conduct, minimal roles within criminal organizations, no significant ties to large-scale drug-trafficking organizations, and no significant criminal history become eligible for relief under Holder's initiative.

Since then, Holder has testified before the commission, endorsing the proposed amendments to the Federal Sentencing Guidelines that would reduce the average sentence for low-level offenders. In his testimony, Holder proclaimed that his "Smart on Crime" initiative has already allowed the department to make critical improvements by conserving precious resources, improving outcomes, and disrupting the "destructive cycle of poverty, incarceration, and crime

that traps too many Americans and weakens entire communities." Holder confidently assured the commission that the proposed amendments to the Federal Sentencing Guidelines will undoubtedly further advance and institutionalize his initiative of ensuring that people convicted of certain low-level, non-violent drug crimes will face appropriate sentences and help control federal prison populations.

Possibility of Retroactivity

The implementation of the proposed amendments to the "draconian" drug guidelines begs the question as to their retroactivity. For previously convicted defendants to realize the benefit of the amendment, the commission must first vote to make the amendment retroactive and modify section 1B1.10(c) of the guidelines to include the amendment.

In deciding whether the proposed amendments should be retroactive, the commission must consider the purpose of the amendment, the magnitude of the change in the guideline range, and the difficulty in applying the amendment retroactively. Although very few guideline amendments are made retroactive, it would seem as if the commission's ultimate goal of reducing the prison-overcrowding problem would be directly benefited by retroactivity of the amendment.

The commission's Office of Research and Data estimates that 51,141 offenders sentenced before October 31, 2014, would be eligible to receive a reduction in their current sentence should the amendments be made retroactive. In the unlikely event that courts were to grant the full reduction possible in each sentence, there would be an average reduction of 18.4 percent, resulting in the immediate release of approximately 4,600 inmates.

Potential Impact on Sentencing Courts and Litigation

Should the amendments be made retroactive, 18 U.S.C. § 3582(c) provides defense attorneys with a procedural vehicle to ask sentencing courts to apply the new guideline amendments to their client's case and reduce the client's sentence. Specifically, section 3582(c)(2) allows courts to modify a defendant's sentence in cases where the defendant was sentenced to a term of imprisonment based on a sentencing range that was subsequently lowered by the commission.

Notwithstanding the government's agreement or opposition, it is entirely within the court's discretion to grant the reduction. In his testimony to the commission, Holder acknowledged that adopting the proposed amendment to the Federal Sentencing Guidelines would be an important step in allowing judges to make commonsense determinations.

In 2005, the now-seminal decision in *United States v. Booker* first gave sentencing courts the ability to exercise much greater discretion in crafting a sentence that is sufficient but not greater than necessary by effectively making the Federal Sentencing Guidelines advisory rather than mandatory. As such, if the commission alters the guidelines—as would happen in November 2014 when the amendments can come into effect—courts should be given the chance to reconsider both the guidelines and the resulting sentence.

When fashioning a post-amendment sentence subject to section 3582(c) relief, the sentencing court must again consider the factors set forth in section 3553(a) and make a determination that is consistent with the applicable policy statements issued by the commission. (The commission's guideline section 1B1.10 application notes instruct sentencing courts to consider public safety and post-sentencing conduct when imposing a reduced sentence.) What's more, in determining the amended guideline range for eligible defendants, the court must do so as if the amendments to the guidelines had been in effect at the time the defendant was sentenced, while leaving all other guideline-applicable decisions unaffected.

There is not much to suggest the courts will be reluctant in granting reductions. The U.S. Supreme Court previously asserted in *Freeman v. United States* that there is no reason to deny section 3582(c)(2) relief to defendants who "linger in prison" because of sentences that would have not been imposed "but for a since-rejected, excessive range." The commission has made a determination that drug-quantity guidelines were excessive, in part because the guidelines already include enhancements for violence, firearms, and a "whole host of other factors." Accordingly, there is no sense to preclude defendants who were subject to those enhancements from obtaining a benefit from the amendments.

Keywords: criminal litigation, U.S. Sentencing Commission, Federal Sentencing Guidelines, drug penalties, Eric Holder, retroactive

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A Look at Retroactive Reduction of Drug-Trafficking Sentences

By Dillon Malar – August 14, 2014

Editor's Note: We are pleased to present two excellent articles below regarding the recent amendments to the Federal Sentencing Guidelines by the U.S. Sentencing Commission. Our first article, by Vadim A. Glozman, discusses how the amendments are consistent with Department of Justice policy under Attorney General Eric Holder, and examines the potential impact on the sentencing courts. Dillon Malar's article focuses on the consequences of the guidelines being applied retroactively, and touches on the logistics of how this will be accomplished. We hope you enjoy both of these excellent articles on this important subject.

In April 2014, the U.S. Sentencing Commission made perhaps the most significant amendment to the Federal Sentencing Guidelines since they went into effect in 1987. The USSC voted unanimously to reduce the base offense levels associated with drug quantity for all drug types by two levels. According to the commission, the changes will affect nearly 70 percent of federal drug-trafficking defendants, who account for nearly half of all federal criminal prosecutions. The changes will reduce the average sentence by 17.7 percent, from 62 months to 55 months. Unless Congress takes the unlikely step of blocking the amendment, the reduction will go into effect on November 1, 2014. In practice, the guidelines are already in effect as the Department of Justice has instructed its attorneys not to oppose application of the new guidelines.

On July 18, 2014, the USSC went a step further when it voted unanimously to apply the amended guidelines retroactively. This is likely to be an even more consequential step from the perspective of all those involved in the business of federal sentencings, including defense attorneys, courts, the Office of Probation and Pretrial Services, and the Bureau of Prisons. While prospective application entails little more than a subtle change in a formula, retroactive application to offenders currently incarcerated will create an enormous amount of work that would never have existed without retroactivity. The USSC estimates that 46,290 offenders will be eligible to have their cases reviewed by a judge to determine whether their sentences should be reduced. Eligible prisoners will spend a collective 79,740 fewer years in prison, and their average sentence will be reduced from 125 months to 102 months, thereby saving taxpayers billions of dollars. While the long-term savings from the reductions will be enormous, processing the reductions is going to put further strain on an already seriously overburdened federal criminal-justice system.

What Exactly Did the USSC Decide?

The USSC voted that courts can begin entertaining motions in November 2014 but that no prisoners benefiting from reductions will be released until November 2015. According to the USSC chair, Judge Patti B. Saris, the year-long delay "will help to protect public safety by enabling appropriate consideration of individual petitions by judges, ensuring effective supervision of offenders upon release, and allowing for effective reentry plans." This limitation

is responsive to concerns voiced by the federal judiciary, the Office of Probation and Pretrial Services, and the Bureau of Prisons that November 1, 2014, was much too soon to implement adequate measures for dealing with the flood of reduction motions that would result.

The USSC did not heed the Department of Justice's request that retroactivity be limited to offenders who had little or no criminal history and whose sentences did not include enhancements for things such as use of a weapon, violence, or obstruction of justice. Instead, the USSC prioritized its duty to minimize overcrowding in the federal prison system over concerns for public safety voiced by the Department of Justice and law-enforcement groups, pointing to studies that showed that offenders released early under previous retroactive reductions posed no greater risk than those who served out their full sentence. Ultimately, the USSC decided to implement the fullest retroactivity possible with only minor modifications to deal with the practical issues that will inevitably arise from having to process the reductions.

How Will the Reductions Be Conducted?

The need for the creation of an efficient system to deal with 60,000 sentence-reduction motions that the Department of Justice estimates will be made becomes clear when one considers the entire federal court system handled about 80,000 sentencings during the whole of the 2013 fiscal year. While the number of prisoners eligible for reductions is unprecedented, amendments to the guidelines have been applied retroactively in the past.

The application of retroactive reductions for crack-cocaine offenses, approved in 2007, is instructive of how the new amendments will work in practice. First, despite what many media outlets have reported, the 2014 guidelines amendment will likely not necessitate full resentencing hearings requiring the presence of the offender. In *Dillon v. United States*, 560 U.S. 817, 828 (2010), the U.S. Supreme Court held that neither Federal Rule of Criminal Procedure 43 nor 18 U.S.C. § 3582(c) required the offender's presence at a reduction hearing. This means that the vast majority of reduction motions will be handled by judges on the papers with the aid of a report authored by the Office of Probation. Second, the Supreme Court ruled in *Dillon* that offenders could not re-raise previously litigated issues and could not seek further reductions on other grounds. This meant that offenders sentenced before *United States v. Booker*, 543 U.S. 220 (2005), could not argue for a below-guideline range that they were ineligible for when they were sentenced.

Aside from these rules, the USSC will likely grant district courts wide latitude to decide how they want to carry out the reductions, as was done with the 2007 crack-cocaine reductions. Districts with thousands of eligible offenders, such as those along the border with Mexico, will likely need different procedures to handle the reduction motions than districts with fewer than a hundred, such as Vermont and Delaware. In districts such as Western and Southern Texas, it is likely that the courts and the Office of Probation and Pretrial Services may need to assign staff full-time to deal with the reductions that will put further strain on an already overburdened system. It seems unlikely that Congress will approve any additional expenditure to process the reductions in the near term even if retroactivity will ultimately save billions in the long term.

Where Does the USSC Go Next?

Now that it has approved two major reductions in the Federal Sentencing Guidelines since 2007, the question becomes what will the USSC do next? The USSC seems increasingly concerned with the 32 percent over-capacity of the federal prison system. This focus is consistent with the growing consensus that current levels of incarceration are both economically and morally unsupportable. While the 2014 amendments are a step in the right direction, the USSC lacks the power to undertake the systemic reforms necessary to really confront over-incarceration, which only Congress can undertake. Until then, it seems likely that the USSC will continue to incrementally relax the Federal Sentencing Guidelines and slowly chip away at the problem.

Keywords: criminal litigation, United States Sentencing Commission, Federal Sentencing Guidelines, drug penalties, retroactive, sentence reductions

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NEWS & DEVELOPMENTS

July 22, 2014

BNPP Pleads Guilty to Large-Scale U.S. Economic Sanctions Violations

On June 30, the government announced that BNP Paribas S.A. (BNPP), a global financial institution, will plead guilty to state and federal charges of illegally processing financial transactions for countries including Sudan, Iran, and Cuba. BNPP was charged in federal court with knowingly and willfully conspiring to violate the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) from 2004 through 2012. BNPP also was charged in New York state court with falsifying business records and criminal conspiracy. Under a global plea agreement, BNPP accepted responsibility for its criminal conduct and agreed to pay nearly $9 billion in penalties. Approximately $2.24 billion of the settlement will go to the state of New York.

According to the Justice Department, BNPP aided Sudan, Iran, and Cuba by willfully moving more than $8.8 billion throughout the U.S. financial system. $4.3 billion of these transactions were on behalf of sanctioned entities. BNPP used third-party financial entities to conceal both the sanctioned entities, as well as BNPP's own role as the facilitator. About $6.4 billion was moved through the United States on behalf of the Sudanese-sanctioned entities from 2006 to 2007; another $4 billion for a financial institution owned by the government of Sudan; $1.747 billion for the Cuban-sanctioned entities from 2004 to 2010; and more than $650 million involved Iranian-sanctioned entities until 2012. According to government attorneys, BNPP's conduct was known at the highest levels of the organization, and continued even after officers received a legal opinion that the company's actions were unlawful.

Because satellite banks were established to disguise the sanctioned entities' roles and BNPP's role as the facilitator, the illegal transactions went undetected for years. In addition to monetary penalties, BNPP agreed to restrictions on U.S. dollar transactions, including at its New York unit and Paris headquarters.

—*Zachary Greene, Eileen Rumfelt, and Laura DiBiase, Miller & Martin PLLC*

July 22, 2014

Rajaratnam Brother Acquitted of Insider Trading Conspiracy Charges

On July 8, a 12-member jury acquitted Rengan Rajaratnam, brother of Raj Rajaratnam, of criminal conspiracy to commit insider trading. Rengan was the former manager at Galleon Group LLC, a hedge-fund-management firm founded by Raj, who was previously convicted and sentenced to 11 years in prison. Prosecutors alleged that Rengan engaged in an insider criminal

trading conspiracy with his brother during which Rengan and Raj traded tips about multi-billion-dollar transactions involving companies such as Clearwire Corp. and Advanced Micro Devices Inc. Three of the seven initially indicted charges proceeded to jury trial on June 18, 2014, in the Southern District of New York. After Raj's former sources at the involved companies testified that they never told Rengan that Raj was exchanging tips for money, Judge Naomi Reice Buchwald dismissed two securities-fraud counts against Rengan. The jury acquitted him on the remaining criminal-conspiracy count.

Rengan's acquittal ends Manhattan U.S. Attorney Preet Bharara's perfect record with regard to insider-trading cases brought during his tenure.

—*Zachary Greene, Eileen Rumfelt, and Laura DiBiase, Miller & Martin PLLC*

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