IN HOT PURSUIT
of Federal Criminal Justice

Message from the Chair
By Hartley M.K. West

On behalf of the Board of the Criminal Law Section, I want to express our excitement in reigniting and publishing the Spring 2018 In Hot Pursuit newsletter. It is with great appreciation that we recognize all of the members of our Section who have provided articles and case updates, and for all of those who have assisted with our continued efforts. Want to publish but didn't get your article finished in time? No problem! We are always looking for new material. Please contact our Newsletter Co-Chair, Donna Coltharp: Donna.Coltharp@fd.org.

We are also pleased to report the resurgence of the Criminal Law Section Subcommittees. We are confident that these Subcommittees will enhance the value of your membership by building substantive programming, facilitating networking opportunities in your region and nationwide, and investing in the future leadership of the Section. As our Section continues to blossom and grow, you – our Membership – play a vital role in its success. The Corrections & Sentencing, Rules of Criminal Procedure & Evidence, Science & Technology, and Solo & Small Practitioners Subcommittees are currently accepting new members. If you practice or have a specialized interest in these areas, please contact Laura Conover at laura@yourtucsonlawfirm.com, and she will connect you with the appropriate Subcommittee Chair.

As always, I welcome your feedback and input on how our Criminal Law Section can better serve you. Please email any time at Hartley.West@kobrekim.com. •

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TABLE OF CONTENTS

Special Conditions Of Supervision

By Niles Illich, Ph.D., J.D.

Nearly every federal sentence includes a term of "supervised release." In 2000, Justice Kennedy, writing for a unanimous Court, explained the purpose of this portion of the sentence, noting that "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." See also S. Rep. No. 98-225, p. 124 (1983) (declaring that "the primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release").[1]

The U.S. Code specifically requires district court judges who are contemplating a sentence to consider the need "to provide the defendant with [ ] educational or vocational training, medical care, or other correctional treatment in the most effective manner."[2] To effectuate this end, the statute governing supervised release, 18 U.S.C. § 3583, specifically provides district court judges with wide discretion to impose specific and tailored "special" conditions of supervision on any individual defendant.[3][4]

Although courts are given broad discretion to craft special conditions, those conditions must satisfy both procedural and substantive rules. As for procedure, before imposing special conditions, a district court must hold a hearing and explain on the record why the judge decided to impose the specific condition, and a failure to do so is "procedural" error.[5] However, such "procedural" error will be harmless if the record on appeal supports the condition.[6]

To satisfy substantive requirements, a special condition must be reasonably related to the sentencing factors in 18 U.S.C. § 3583(d) and comport with the purposes for which a special condition can be imposed.[7] A condition that fails under either of these prongs is likely to be a "substantive" error.[8]

Sometimes the distinction between "procedural" and "substantive" errors is not altogether clear. For example, in *United States v. Doyle*,[9] the defendant was convicted of failing to register as a sex offender.[10] The district court imposed various special conditions on his term of supervised release, such as a complete prohibition on the possession of pornography; a prohibition on "direct or indirect conduct with any child," including the defendant's own children; and a total prohibition on the use of a computer without permission from a probation officer.[11] The court failed to explain how the conditions were related to the charges against the defendant. The trial attorney failed to object but, on appeal, the Sixth Circuit concluded that the district court erred by not explaining these conditions—especially as "the crime for which Doyle was convicted did not involve the use of the internet" and did not "involve pornography of any kind," and as there was there no apparent reason to prohibit Doyle from contact with his own children.[12] The Sixth Circuit emphasized, "supervised release conditions must be tailored to the specific case before the court."[13] The failure to do so, however, was procedural error, not substantive error.

Had the court of appeals and held that the conditions were not, in fact, sufficiently tailored, it would have identified a "substantive" error.

Whether the proposed error is "procedural" or "substantive," the defendant must properly object or the issue will be reviewed only for plain error.[14] The proper objection for a "substantive" error is an objection based on either 18 U.S.C. § 3583 or 18 U.S.C. § 3553.[15] The defendant should also make any appropriate constitutional objection. However, neither objection will preserve the alternative argument. For example, an objection on a First Amendment ground against a condition that prohibited the defendant from "dat[ing any] women/men who have children under the age of eighteen" will preserve only the constitutional claim but not the § 3583 or § 3553 objection.[16] Thus, in *United States v. Caravayo*,[17] the defendant's objection that a condition prohibiting him from dating any adult with minor children was reviewed for plain error because, at sentencing, the trial attorney had objected to this as a violation of Caravayo's First Amendment right of association and on appeal had argued that it violated.[18] However, the majority found the condition was plainly erroneous because "unlike the defendants in other cases in which we have upheld similar dating restrictions, Caravayo does not have a history of inappropriate contact with minors or of using relationships with adults to reach children."[19] The court emphasized, "special conditions must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course in a particular district."[20]

Special conditions remain a common component of sentencing and can impose conditions that last for the duration of a defendant's life. For these reasons, attorneys must review these conditions carefully for compliance with § 3583 and § 3553 and object under either or both of these as necessary. Further, district court judges must make certain to explain their justification for imposing specific conditions and must make certain that the condition is tailored to the individual defendant and the offense he committed. •

Niles Illich is a criminal appellate attorney in Dallas, Texas. Niles graduated from the University of Houston Law Center in 2009 after completing a doctorate in Nineteenth Century German History and working briefly for NASA. Upon graduation from law school, Niles clerked for the Honorable Evelyn Keyes of the First Court of Appeals in Houston, Texas. Niles has recently argued a criminal case before the Seventh Circuit but most of his work originates in Texas courts.

Endnotes:

[1]*United States v. Johnson*, 529 U.S. 53, 59 (2000).

[2]18 U.S.C.S. § 3553(a)(2)(D).

[3]*Id.*

[4]*See id.; United States v. Fields*, 777 F.3d 799, 802-03 (5th Cir. 2015).

[5]*United States v. Doyle*, 711 F.3d 729, 731 (6th Cir. 2013).

[6]*See United States v. Perazza-Mercado*, 553 F.3d 65, 76 (1st Cir. 2009); *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014).

[7]Briefly, those purposes include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to (1) reflect the seriousness of the offense, promote response for the law, and provide just punishment; (2) defer future criminal conduct; (3) protect the public; and (4) provide the defendant with needed training, medical car, or other correctional treatment; the kinds of sentences available; the kinds of sentence and sentencing range established for the offense; any pertinent Guidelines policy statement; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. 18 U.S.C. § 3553(a).

[8]*United States v. Carter*, 463 F.3d 526, 528-29 (6th Cir. 2006).

[9]711 F.3d 729.

[10]*Doyle*, 711 F.3d at 731.

[11]*Id.* at 732.

[12]*Id.* at 734-35.

[13]*Id.* at 737.

[14]*United States v. Caravayo,* 809 F.3d 269, 272-73 (5th Cir. 2015).

[15]*Id.*

[16]*Id.*

[17]809 F.3d 269 (5th Cir. 2015).

[18]*Id.*

[19]*Id.* at 275.

[20]*Id.* at 276. Caravayo was not unanimous, and the dissent argued that the child pornography that Caravayo possessed was "gruesome" and "of a depraved and sadistic nature" and that, for this reason, keeping Caravayo from "close daily contact with children" was "reasonably necessary in light of the nature and circumstances of [Caravayo]'s offense."

Crossing Borders in the Digital Age

By Douglas Whitney

Although it may seem counter-intuitive, the digital revolution has made international travel substantially more perilous for clients and lawyers alike. Thanks to cell phones, we now travel with more private and confidential information than could have been imagined even a decade ago. As the Supreme Court recently observed, "it is no exaggeration to say that many of the more than 90 percent of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[1] And for lawyers and clients, cell phones and laptops also often contain vast amounts of confidential data and communications protected by the attorney-client privilege.

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court confronted this new technological reality in which today's smart phone is "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy" and issued a game-changing opinion in terms of its Fourth Amendment jurisprudence.[2] In *Riley*, Chief Justice Roberts, writing for eight members of the Court, concluded that the smart phone required a fundamental re-examination of longstanding Fourth Amendment doctrines (in that case, the search incident to arrest exception) because "[w]ith all they contain and all they may reveal, [smart phones] hold for many Americans 'the privacies of life,'" which are not "any less worthy of protection" simply because technology "allows an individual to carry such information in his hand."[3]

It remains to be seen, however, what exactly *Riley* means for travelers crossing U.S. borders carrying electronic devices. Pursuant to a somewhat antiquated jurisprudence known as the "border exception" to the Fourth Amendment, which was originally developed to allow the government to protect the "territorial integrity" of the United States by searching incoming individuals and parcels for contraband, the U.S. Customs and Border Patrol (CBP) now routinely searches tens of thousands of these electronic devices each year without a warrant or probable cause.[4] CBP conducts these warrantless searches pursuant to its "plenary authority" to conduct searches and inspections of "persons and merchandise crossing our nation's borders."[5] In other words, by exiting or entering this country, every traveler is effectively agreeing to allow CBP to rummage freely through every piece of private and confidential information contained on any electronic device they are carrying, even if CBP does not have any reasonable suspicion (or any suspicion at all) that the device contains contraband or relates to any illegal activity.

In this digital age, in which information contained on our electronic devices is at once so revealing and fully accessible without regard to location or national borders, is this really the right answer? And, if so (or in the meantime), what do lawyers need to do to discharge their ethical obligations to maintain client confidences and privilege? Courts, privacy advocates, and lawyers are all grappling with these pressing questions.

Until March of this year, no United States Court of Appeals had been asked to reconcile the "border exception" with the Supreme Court's recent decision in *Riley*. In *United States v. Vergara*, the Eleventh Circuit was presented with the apparent conflict between the two. Unfortunately, its reconciliation efforts were less than inspiring. In a relatively cursory opinion, the two-judge majority simply stated that "[b]order searches have long been excepted from warrant and probable cause requirements, and the holding of *Riley* does not change this rule."[6] But in a lengthy and compelling dissent, Judge Jill Pryor argued that technological advances and the Court's decision in *Riley* required reevaluation of the border search exception because "cell phones are fundamentally different from any object traditionally subject to government search at the border."[7] Accordingly, Judge Pryor would have held that, absent other potentially applicable warrant exceptions such as exigent circumstances, a warrant and probable cause should be required to search an electronic device at the border.

Surely the Eleventh Circuit's decision in *Vergara* will not be the last word on this issue. There are a number of other Fourth Amendment challenges pending before district courts, and the ACLU and the Electronic Frontier Foundation also filed a lawsuit in September challenging the CBP's authority to conduct warrantless and suspicionless searches of electronic devices.[8] It is likely that the issue will be taken up by other courts of appeals soon, and eventually by the Supreme Court in the next several terms as it continues to grapple with the ramifications of the digital age in various Fourth Amendment contexts.

In the meantime, in January, CBP issued revised (but still quite disconcerting) guidelines for searches of electronic devices along the border. The new CBP guidelines restrict agents' ability to conduct "advanced searches" on electronic devices – i.e., those that require use of an external device. Now, such searches may not be conducted unless CBP has reasonable suspicion of unlawful conduct or a national security concern.[9] But CBP remains free to conduct "basic" or non-advanced searches for any or no reason at all. The current guidelines also direct searching officers "encountering information they identify as, or that is asserted to be, protected by the attorney-client privilege or attorney work product doctrine" to coordinate with CBP counsel and employ a "Filter Team composed of legal and operational representatives" to examine such data, but it is not clear how and when this provision may be enforced.[10]

While this revised guidance does provide clarity regarding CBP's procedures, it falls far short of adequately protecting the privacy of incoming and outgoing travelers. For, as Chief Justice Roberts observed in *Riley*, transparency may be nice, but "the Founders did not fight a revolution to gain the right to government agency protocols."[11]

As it now stands, CBP maintains virtually unfettered discretion to search electronic devices, which is particularly concerning for lawyers, who have an ethical duty to protect their client's confidential and privileged information. In a formal opinion issued in 2017, the Association of the Bar of the City of New York took this issue on, concluding that the "reasonable steps" a lawyer must take to preserve client confidences depend on the nature of the confidences, the potential harm to the client, the attorney's need to have access to the information while traveling, and the efforts taken by the attorney to protect the information before and during any encounter with CBP. While suggesting that lawyers consider removing confidential and privileged information from the devices they are traveling with, or travel only with burner devices that contain no such information, the opinion stopped short of concluding that such steps need be employed in every case.[12]

But, in this digital age, is it really possible – or should it be necessary – to travel without access to confidential and privileged information on electronic devices? Hopefully, courts will soon rein in the authority of CBP in this regard. In the meantime, however, clients and lawyers must be cognizant of the possibility that their electronic devices can be freely rummaged through by CBP any time they cross the border. •

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Endnotes:

[1]*Riley v. California*, 134 S. Ct. 2473, 2490 (2014).

[2]*Riley*, 134 S. Ct. at 2484.

[3]*Id.* at 2494-95 (quoting *Boyd v. United States*, 116 U. S. 616, 630 (1886)).

[4]While it is true that, on a percentage basis, searches of electronic device searches remain very rare, CBP searched 60% more electronic devices in 2017 than in 2016, and it is certainly reasonable to expect this trend to continue. See CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics (January 5, 2018), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and.

[5]CBP DIRECTIVE NO. 3340-049A (Jan. 4, 2018), at 5.1.4 (https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf).

[6]2018 U.S. App. Lexis 6413 (11th Cir. Mar. 18, 2018).

[7]*Id.* at *14.

[8]*Alasaad v. Nielsen*, 17-cv-11730-DJC (D. Mass.).

[9]CBP DIRECTIVE NO. 3340-049A, at 5.1.4.

[10]*Id.* at 5.2.1.2.

[11]*Riley*, 134 S. Ct. at 2494-95

[12]Association of the City Bar of New York Committee on Professional Ethics Formal Opinion 2017-5, http://s3.amazonaws.com/documents.nycbar.org/files/2017-5_Border_Search_Opinion_PROETHICS_7.24.17.pdf.

Determining Data Extraterritoriality: United States v. Microsoft Corp. and the CLOUD Act

By Sanford C. Coats and Ryan K. Wilson

The United States Supreme Court recently heard oral argument in a case that questioned whether an email provider located in the United States must produce emails stored on its servers located overseas when served with a warrant. The dispute began when the federal government served a warrant on Microsoft, requiring it to turn over information for an email account that the government suspected was being used for drug trafficking. Microsoft partially complied by providing the account information and data stored on servers located in the United States. But Microsoft refused to provide the content of the emails because that data was stored on servers located in Ireland.

The case turned on the applicability of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, a 31-year old statute that requires service providers to turn over electronic records if the government obtains a warrant. Based on the presumption that U.S. law generally does not apply outside of the country, Microsoft contended that the SCA did not extend to records stored in Ireland. The government, however, argued that complying with the warrant did not require an extraterritorial application of the SCA, because Microsoft could have accessed the data stored in Ireland from computer terminals located on U.S. soil. The Second Circuit ruled in favor of Microsoft, determining that the SCA did not contemplate the citizenship of an account holder or an email provider, but rather operated based on the location of the data.

Unsurprisingly, the Second Circuit's ruling caused great concern for law-enforcement agencies. Others have pointed out, however, that the SCA is not the only means by which the government may reach data stored overseas. For example, the United States has entered into several mutual legal assistance treaties (MLATs) with other countries, which are designed to assist with evidence-gathering across borders. But, like the SCA, these treaties are often imperfect tools and typically result in long delays before data is produced.

The inadequacy of these avenues prompted a bipartisan group of U.S. Senators to introduce the CLOUD Act (Clarifying Lawful Overseas Use of Data), which would allow the government to issue warrants for data stored overseas subject to the objections of email providers and the countries where the data is stored. Interestingly, the CLOUD Act (H.R. 4943) incorporates aspects of MLATs by providing incentives to foreign governments to enter into executive agreements with the U.S. for the administration of warrants. Under these agreements, countries could gain access to data stored in each other's countries on a reciprocal basis, which could substantially improve the ability to investigate and prosecute criminal activity. The CLOUD Act only allows the Executive Branch to enter these types of agreements with countries that offer certain legal protections, including fair trial rights and prohibitions against arbitrary arrests and detention. Even if the Executive Branch determines that a given country does offer such legal protections, Congress has 180 days to determine whether to accept or reject the executive agreement. Importantly, the CLOUD Act ensures that those served with a warrant (such as Microsoft) retain the common-law right to challenge the warrant in court.

Against this backdrop of pending legislation, the oral argument heard by the Supreme Court on February 27 seemed to reveal a split between the justices as to whether the SCA applies to the data stored overseas. Chief Justice Roberts appeared concerned that if the SCA could not reach data stored overseas, then email providers may attract customers by promising to store their emails abroad to avoid the reach of the federal government. Justice Alito shared that concern and cautioned that under Microsoft's reasoning, even if the government had probable cause to obtain information for a crime that occurred in the United States, that information and data would be off limits if stored outside the country.

Other justices appeared more open to Microsoft's argument. Justice Ginsburg noted that for Microsoft to turn over the emails in question, it would have to take some action in Ireland. Justice Gorsuch echoed that sentiment, pointing out that at least part of the process of disclosing the emails would have to occur outside the United States. Justice Sotomayor referenced the recent legislative efforts to modernize the law and seemed to suggest that Congress was better situated to handle the issue than the Supreme Court. Justice Breyer appeared to occupy a middle ground, suggesting a practical approach that would allow the government to first obtain a warrant for data stored overseas, but would also provide companies like Microsoft an opportunity to challenge the warrant in court before being required to disclose the data. This practical approach may have been targeted at Justice Kennedy, who characterized the choice before the Court as "binary."

But all of this speculation is now moot: just three weeks after the oral argument in Microsoft, Congress passed the CLOUD Act, which was tucked into the 2,232-page omnibus spending bill. Following the bill's passage, the government filed a brief stating that it had already obtained a warrant under the new law and thus the Court should dismiss the case for mootness. Microsoft agreed with the government, noting there is no longer a live case or controversy. The passage of the CLOUD Act marks a significant victory for law-enforcement agencies, and even Microsoft has admitted that the new law "is an important step forward." But Microsoft and other providers continue to stress the importance of balancing effective law enforcement with robust privacy rights. Whether the CLOUD

CLOUD ACT continued on page 10

Tawdry Tales of Un-Official Action: Implications of Federal Corruption Prosecutions following *McDonnell*

By Brian McEvoy and William Ezzell

Last year, the landscape of federal anti-corruption laws changed dramatically, following the Supreme Court's unanimous decision in *McDonnell v. United States*. In recent months, courts have been grappling with the scope and implications of *McDonnell*: When it comes to money and politics, where should courts draw the line between politics as usual and criminal behavior? Perhaps no court in the country has been busier considering this issue than the United States Court of Appeals for the Second Circuit, which has published two appellate rulings in light of *McDonnell* (with another expected this year). To understand the potential implications, one must first begin with former Virginia Governor Bob McDonnell.

Certain aspects of Bob McDonnell's tenure as the Governor of Virginia epitomize the type of sensationalized behavior? that often appears on 60 Minutes. From 2009 to 2012, Governor McDonnell and his wife accepted $177,000 from a local businessman in personal loans and gifts that included golf bags and clubs, luxury family vacations, the use of a Ferrari, $20,000 of designer clothes, and a Rolex watch. In 2014, the government indicted McDonnell and his wife for allegedly accepting bribes from Jonnie Williams, CEO of Star Scientific, a Virginia-based company that had developed a nutritional supplement made from a compound found in tobacco. Williams sought McDonnell's assistance in procuring Virginia's public universities to perform research studies on the supplement.

McDonnell was indicted for honest services fraud and violations of the Hobbs Act, codified at 18 U.S.C. §§ 1346, 1951, respectively. Because McDonnell was a state official, federal prosecutors did not charge him with violations of 18 U.S.C. § 201–the federal bribery statute. Nevertheless, the parties agreed to define honest services fraud in tandem with that statute.[1] Specifically, the federal bribery law forbids "a public official or person selected to be a public official, directly or indirectly, corruptly," to "demand, seek, receive, accept, or agree" to "receive or accept anything of value" in return for being "influenced in the performance of any ***official act.***" 18 U.S.C. § 201 (emphasis added). The law defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

In the case against McDonnell, the government had to prove that the former governor committed or agreed to commit an "official act" in exchange for the loans and gifts.[2] *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016). At trial, the district court accepted the government's proposed instruction that the term "official act" consisted of "acts that a public official customarily performs, including acts in furtherance of longer-term goals or in a series of steps to exercise influence or achieve an end." *Id.* at 2366 (internal citations omitted). The district court rejected McDonnell's proposed definition, which would have excluded customary duties such as "arranging a meeting," or "hosting a reception."McDonnell appealed and, after the United States Court of Appeals for the Fourth Circuit affirmed the conviction, sought review by the Supreme Court,arguing that the jury instructions had permitted conviction based on conduct that did not constitute "official acts."

The Supreme Court reversed. In relevant part, the Court concluded that McDonnell's setting up a meeting, hosting an event, or calling an official to talk about the research study did not qualify as a decision or action on the pending question of whether to initiate the dietary-supplements study – so long as he did "not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id.* at 2371.

The Court raised numerous concerns about the provision if it were not so limited. The Court stressed that "official act" as defined by the government failed to provide sufficient definiteness that ordinary people could understand what is acceptable and what is prohibited. *Id.* at 2372-73. It stated that, "in the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." *Id.* at 2372. Concluding that it did would, in the Court's view, create significant constitutional concerns by "cast[ing] a pall on relationships between officials and constituents. *Id.* at 2372.

The holding was not a total loss for the government–the Court held that it had satisfied the first element, by identifying a "question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may by law be brought before a public official." *Id.* at 2370–71. The Court noted that the issue of whether a state-created commission would allocate money for a briber's desired project qualified as a question or matter pursuant to Section 201. Further, while setting up a meeting does not alone qualify as an "official act," such actions could serve as evidence of an agreement to take an official act. *Id.* at 2371.

Nonetheless, the McDonnell Court significantly narrowed the definition of official act within the meaning of the federal bribery statute, 18 U.S.C. § 201(a)(3), as incorporated in other federal laws that prohibit *quid pro quo* corruption. *See id.* at 2374 (noting decision resulted in "more limited" interpretation). Unsurprisingly, soon after the Court's decision in *McDonnell*, defendants in federal bribery cases appealed.

Immediate Implications in the Post-McDonnell World: United States v. Boyland, United States v. Silver, and United States v. Skelos

In *United States v. Boyland*, the government indicted a former New York state representative for honest services fraud. 862 F.3d 279, 282 (2d Cir. 2017). The government accused Boyland of accepting money in exchange for securing permits for a carnival, facilitating a real estate development in his district to particular investors, which included representations that he would ensure grant monies, assurances that one investor's company would win construction bids, and resolve any zoning or permit-related problems–in exchange for $250,000 for his role in the project. *Id.* A jury convicted Boyland for violations of the federal bribery statute, honest services fraud, the Hobbs Act, and federal funds bribery (18 U.S.C. § 666).

Following *McDonnell*, Boyland appealed. The government conceded that the instructions regarding honest services fraud failed to comport with the holding in *McDonnell. Id.* However, the government argued that the instructions regarding the Hobbs Act charge were proper because the instructions tied to the Hobbs Act counts directed the jury to convict if Boyland knew that any money "was offered in exchange for a specific exercise of Boyland's *official powers." Id.* at 290 (emphasis added). The Second Circuit disagreed and held that, while the instructions did not explicitly incorporate "official act," the instructions nevertheless suffered from identical flaws "in that they did not sufficiently inform the jury as to the nature of the power that the government was required to prove the defendant exercised or promised to *exercise." Id.* at 291.[3] Finally, the Court concluded that the *McDonnell* standard did not apply to allegations related to the federal funds bribery charge, because 18 U.S.C. § 666 is more expansive in scope.[4]

Ultimately, the Court affirmed the entire conviction because, despite the erroneous instructions, Boyland did not suffer any prejudice (i.e., the instructions were "harmless."). *Id.* at 291-92. "In sum, all of Boyland's dealings . . . involved concrete matters, that, in order to proceed, needed to be brought before public officials or agencies that would have to make formal and focused administrative decisions. In connection with each matter, Boyland agreed to ensure that favorable governmental decisions would be made, whether for licensing, work contract, zoning or funding." *Id.* The Court found no reasonable possibility that the flaws affected the outcome of the case.

Three days after the decision in *Boyland*, in *United States v. Silver*, the Second Circuit both found error and prejudice , vacating and remanding the bribery convictions of Sheldon Silver, the former Speaker of the New York State Assembly. *United States v. Silver*, No. 16-1615-CR, 2017 WL 2978386 (2d Cir. July 13, 2017). There, the government indicted Silver on charges of honest services fraud, Hobbs Act extortion, and money laundering. The government alleged that Silver abused his public position by engaging in two *quid pro quo* schemes in which he performed official acts in exchange for bribes and kickbacks in the form of referral fees from third-party law firms. Silver performed favors for a doctor in exchange for the doctor's referral of mesothelioma patients to Silver's law firm and performed favors for two real estate developers who had hired, at Silver's request, a law firm that was paying referral fees to Silver.[5] A jury convicted Silver on all counts, and he received a 12-year sentence.

As in *Boyland*, the Second Circuit held that the jury instructions were flawed pursuant to *McDonnell*. The government argued that, even if the instructions were in error, any errors were harmless (i.e., only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error). *Id.* at *13. However, the court concluded that, "while the government presented evidence of acts that remain 'official' under *McDonnell*, the jury may have convicted Silver for conduct that was not unlawful and a properly instructed jury might have a reached a different conclusion." *Id.* The court noted that, in addition to "the clear factual differences," *Boyland* applied a plain-error, rather than a harmless-error, standard of review because the defendant had not objected to the jury instructions. The Court further highlighted that the proper official act definition, when applied, meant that only one of the three acts proved by the government could have been deemed "official." *Id.* Thus, a jury may have convicted Silver by relying on acts outside the statute of limitations that are no longer "official."[6]

In the months following the holdings in *Boyland* and *Silver*, the Second Circuit continued to grapple with the implications and scope of *McDonnell*. In 2016, a jury in the Southern District of New York convicted Adam and Dean Skelos for conspiracy to commit honest services wire fraud, aiding and abetting solicitation of bribes pursuant to 18 U.S.C. § 666, and aiding and abetting extortion under color of official right (18 U.S.C. § 1951, 1952). The Skeloses appealed and, following the holdings in *Silver* and *Boyland*, the Second Circuit ordered the parties to submit letter briefs regarding the significance and potential impacts. The Skeloses argued that *McDonnell's* definition of "official action" must apply in § 666 cases, in part because at trial and on appeal, the government maintained the same definition of "official action" for § 666 violations as defined in the Hobbs Act and § 201 counts. The government argued that the Court's holding, in Boyland, that McDonnell did not apply to § 666 charges foreclosed the Skelos's arguments related to Section 666, and that there was no harmless error.

The Second Circuit concluded that the jury instructions issued at the Skelos's trial were invalid. *United States v. Skelos,* 707 F. App'x 733, 737 (2d Cir. 2017). The Court rejected the instructions pursuant to the same rationale in *Silver* and further held:

> No different conclusion is warranted by viewing the defective instruction in context. The additional instructions to which the government points—including those relating to Hobbs Act extortion and federal program bribery—do not mitigate the breadth of the official act instruction. Rather, even in context,

> that instruction invites conviction on acts outside Dean Skelos's official duties as defined by McDonnell.

Skelos, 707 F. App'x at 737. Despite the ruling, the government soon announced its intention to retry the Skeloses. However, on March 2, 2018, the Skeloses moved to dismiss the case entirely, arguing that the grand jury instructions were similarly erroneous regarding what the law requires and that parts of the indictment failed to state an offense pursuant to *McDonnell*.

"Ample Room" for Prosecutors Going Forward?

In concluding the unanimous opinion of *McDonnell*, Chief Justice Roberts explained the "more limited interpretation of the term 'official act' leaves ample room for prosecuting corruption, while comporting with the text of the statute and precedent of this Court." *McDonnell*, 136 S.Ct. at 2375. Indeed, the Court explicitly noted that the district court could have found evidence sufficient to convict McDonnell of agreeing to commit an "official act." *Id.* Nevertheless, the government opted to dismiss the case. The irony, of course, is that the Court acknowledged that Governor McDonnell's "tawdry tale of Ferraris, Rolexes, and ball gowns" was "distasteful," or even "worse than that." *Id.* Yet, *McDonnell* will likely lead to a narrower, more precise prosecutorial and judicial approach to all anticorruption statutes. Former Deputy Attorney General Jim Cole commented that the case "gives much greater room for public officials to commit improper acts, to commit bribery in subtle ways, and it gives them that room to do it without worrying about getting prosecuted." *McDonnell* will likely drive United States Attorneys to be more careful in case selection.[7] But as Hank Asbill, McDonnell's lead defense attorney, explained to 60 Minutes, "You wanna take the money outta politics, then take it outta politics. Would anyone look at the gifts and loans in this case and say it's a good idea? No. I wasn't happy about having to defend it, but there was no crime." •

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Endnotes:

[1]The parties further stipulated that obtaining a "thing of value ... knowing that the thing of value was given in return for official action" was an element of Hobbs Act extortion, and that they would use the definition of "official act" found in the federal bribery statute to define "official action" under the Hobbs Act. *United States v. McDonnell*, 792 F.3d 478, 505 (4th Cir. 2015) (internal quotation marks omitted).

[2]This proof would cover two elements: the government had to identify a "question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may by law be brought before a public official." *McDonnell*, 136 S. Ct. 2355 at 2369. The government then had to prove that the official "made a decision or took an action on that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id.*

[3]This was in part because "the jury could have believed . . . that merely contacting another government agency sufficed to constitute a misuse of his 'official powers.'" *Id.* at 291.

[4]"Section 666 prohibits individuals from 'soliciting . . . anything of value from any person *intending to be influenced or rewarded in connection with any* business, transaction, or series of transactions of an organization, government, or agency.' 18 U.S.C. § 666(a)(1)(B)" Boyland, 862 F.3d at 291 (emphasis in original).

[5]The schemes produced roughly $4 million in referral fees for Silver, which was laundered by investing the proceeds into various private investment vehicles.

[6]The Court concluded, "We recognize that many would view the facts adduced at Silver's trial with distaste. The question presented to us, however, is not how a jury would *likely* view the evidence presented by the Government. Rather, it is whether it is clear, beyond a reasonable doubt, that a rational jury, properly instructed, would have found Silver guilty. Given the teachings of the Supreme Court in *McDonnell*, and the particular circumstances of this case, we simply cannot reach that conclusion. Accordingly, we are required to vacate the honest services fraud and extortion counts against Silver, as well as the money laundering count." *Silver*, No. 16-1615-CR, 2017 WL 2978386, at *17.

[7]*McDonnell* positions the Department of Justice to reframe prosecutions based on theories of access and influence as cases in which officials used their offices to pressure subordinates, offer advice, or take initial steps somewhat attenuated from the ultimate official action. Chief Justice Roberts highlighted three scenarios in which a jury could find criminal activity: (1) the taking of "a decision or action on a qualifying step" toward an official action; (2) using an "official position to exert pressure on another official to perform an "official act,"; and (3) giving "advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Id.* at 2370.

Dissecting the Government's Case in the Sen. Menendez Bribery Trial

By Jonathan D. Cogan and Samuel A. Stern

In the wake of the government's failed corruption prosecution of Senator Robert Menendez and his co-defendant, Dr. Salomon Melgen, many commentators declared that the Supreme Court's 2016 decision in *McDonnell* hampered the prosecution's case and led to the defense's victory. This is an inaccurate assessment. While *McDonnell* does limit the government's ability to prosecute corruption in some instances, it had no impact in the Menendez trial. Instead, the government's failure to obtain a conviction stemmed from the defense's repeated attacks on the prosecution's central contention in the case, which was that Sen. Menendez and Dr. Melgen had engaged in *quid pro quo* (i.e., "this for that") corruption.

In *McDonnell*, the Supreme Court overturned the conviction of former Virginia Governor Robert McDonnell, finding that the acts Governor McDonnell took as part of the alleged bribery scheme did not constitute the types of "official acts" needed to violate federal bribery laws. That holding led to the reversal of several recent, high profile corruption convictions.

In the Menendez trial, however, the determinative issue was not whether the acts the Senator took constituted "official acts" but instead whether the defendants engaged in *quid pro quo* corruption. The government pointed to instances in which Dr. Melgen, a wealthy eye doctor, had given things of value to the Senator and instances in which Sen. Menendez took actions that helped Dr. Melgen. Based on this evidence, the government argued that a *quid pro quo* must have existed.

Throughout the trial, the defense repeatedly attacked the key inference the government was asking the jury to draw — which was that the *"quids"* (i.e., the things Dr. Melgen did for Sen. Menendez) were exchanged for *"quos"* (i.e., the things Sen. Menendez did that helped Dr. Melgen). For example, the defense put on substantial evidence that the two defendants had a long and close friendship and that the things Sen. Menendez did that helped Dr. Melgen were routine acts similar to acts taken on behalf of many others and were consistent with his broader policy positions.

The defense also attacked the government's credibility by identifying and exposing exaggerations and inconsistencies in its case. For example, the government contended that Sen. Menendez accepted bribes because he wanted a life of luxury he could not afford. In an effort to support this contention, it introduced into evidence glossy photos of fancy amenities available in the Dominican community where Dr. Melgen's home was located, arguing that the amenities were part of the bribes because Sen. Menendez frequently vacationed in the Dominican Republic and stayed at Dr. Melgen's home. The defense, in turn, demonstrated that Sen. Menendez did not use those amenities, that the trips were for the purpose of spending personal time together in Dr. Melgen's home, and that Dr. Melgen's home itself was not opulent.

As another example, the government contended that a $300,000 political contribution given by Dr. Melgen in October 2012 was a bribe, and that Sen. Menendez ultimately did not take action in exchange for that payment only because the media began reporting on the relationship between the two the next month. This claim, however, contradicted another claim the government simultaneously made: that just two months later, in January 2013 (while the intense media scrutiny continued), Sen. Menendez took another alleged official act as part of the bribery scheme. Seizing on this contradiction, the defense called into question the inferences the government was asking the jury to draw.

Ultimately, the trial ended in a hung jury. According to press interviews of jurors after the trial, the vast majority of jurors favored outright acquittal. But none of those interviews indicated that jurors believed the case hinged on the precedent set in *McDonnell*. Instead, when the contradictions and flaws in the government's case were brought to light, the jury simply rejected the notion that the defendants' conduct was the product of a bribery scheme. •

Jonathan D. Cogan and Samuel A. Stern of Kobre & Kim, alongside Kirk Ogrosky and Murad Hussain of Arnold & Porter, served as defense counsel to Dr. Salomon Melgen in United States of America v. Robert Menendez and Salomon Melgen. Mr. Cogan and Mr. Stern practice from the New York and Miami offices, respectively, of Kobre & Kim, a global disputes and investigations firm. They serve as trial counsel in high-profile government enforcement defense matters.

CLOUD ACT continued from page 6

Act achieves that balance remains to be seen. •

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Helping Incarcerated Individuals With Constitutional and Tort Claims

By Ian Wallach

Introduction

The purpose of this guide is to provide a realistic assessment of available remedies -- in tort or in civil rights -- to inmates harmed while incarcerated; and to teach lawyers and inmates how to bring constitutional claims and tort claims to remedy such injuries.

In short, due to the judicial creation and expansion of "qualified immunity", and because the pre-filing requirements of the Prison Litigation Reform Act ("PLRA") are far too complex and give too much discretion to facilities to "reject" claims rather than denying them (potentially leaving the inmate with no available remedy), this author believes that there are **no longer viable claims for Eighth amendment violations for inmates to bring under *Bivens* or Section 1983, and that soon the same will be true for Fourth Amendment violations.** Practitioners should therefore look to state and federal tort claims acts to address conduct historically addressed by Section 1983 and Bivens.

This is part one of a series concerning what to do in light of our nation's troubling diminished access to courts experienced by inmates. Part one asks the reader to take the unfortunate step of acknowledging that traditional Section 1983 and Bivens actions are now rarely effective (as that will be covered subsequently), but provides a guideline on how to bring tort claims to remedy harms traditionally addressed as constitutional claims.

How To Bring a Claim Under The Federal Tort Claims Act (Or State Equivalent

The Federal Tort Claims Act -- What Is It And What Remedies Are Available?

The FTCA allows the United States to be sued for tort claims (subject to certain exceptions), as though the United States was a private person, in accordance with the laws where the act or omission occurred.

FTCA claims are less attractive to attorneys than claims brought under Section 1983. The FTCA does not contain an attorneys' fee provision. There are fee caps -- attorneys' fees are limited to 25 percent in FTCA actions that are litigated in court, and 20 percent for claims settled before litigation commences. Charging more is a federal misdemeanor that can result in both a fine and imprisonment. There is no right to a trial by jury for claims brought under the FTCA.

But inmate-abuse claims -- traditionally addressed in civil rights actions -- are also actionable in tort. And some states have even recognized a special relationship imposed upon a jailor to protect an inmate from known harms. Because the doctrine of qualified immunity is inapplicable to tort claims, and because the pre-filing requirements of the FTCA are simple and manageable, the FTCA may the best place for an inmate to seek a remedy.

How To Bring a Claim Under The FTCA

Drafting your fee agreement

Ensure that your fee agreement limits your recovery under your claim against the United States to 25% in FTCA actions that are litigated in court, and 20% for claims settled with the agency prior to litigation. If there are other defendants (either individuals against whom claims under Section 1983 are asserted, or private parties who are the subject of separate claims) then your fee agreement should separately state what your percentage of any recovery will be from those parties.

The FTCA's Administrative Remedy Requirements (*a.k.a. Pre-Filing Requirements*)

The good news is that the pre-filing requirements for the FTCA are extremely easy to handle. The federal government has streamlined the process to file an administrative claim. First, identify the agency you are suing and locate its headquarters. Second, complete the two page "Standard Form 95". Make sure to put the amount that you will eventually seek at trial as your claim for tort damages because the federal action will be limited to what you put in your administrative claim (absent a change of circumstances).

The injured party has up to two years to submit a claim to the agency responsible for the injury. To be safe, however, try to be a few months early. An FTCA claim is barred unless it is "presented in writing to the appropriate Federal Agency within two years after such claim." But there is no definition of what "presented" means – so the BOP could assert that it did not receive a claim for weeks after it was mailed.

The statute expressly states that a claim submitted after the passage of the two-year deadline is "forever barred." However a court can still have jurisdiction to hear the claim under the doctrine of "equitable tolling" upon a showing of "extraordinary circumstances," which usually involve some governmental conduct that contributed to the filing delay. But be very careful when considering to take on a case after the passage of the 2-year deadline.

Drafting Your FTCA Complaint

1. Avoiding The Prevalent Exceptions (The Independent Contractor Exception And The Discretionary Function Exception)

Careful drafting is necessary to avoid the application of the FTCA's exceptions. The independent contractor exception precludes claims against the United States based on injuries resulting from the negligence of the government's contractors, barring claims premised on vicarious liability. Make sure that you identify negligence on the part of a federal employee.

The discretionary function exception precludes judicial "second-guessing" of discretionary decisions. The present test for the application of this exception is referred to as the

Gaubert/Berkovitz test. First, a court is to determine whether a particular act is governed by a statute, policy, or regulation (if so, the exception does not apply). Second, the court must determine whether the challenged governmental actions are "susceptible to policy analysis" and involve a decision grounded in social, economic, and political policy. This can be confusing. But the general rule is that matters of scientific and professional judgment -- particularly judgments concerning safety -- are rarely considered to be susceptible to social, economic, or political policy. Since most tort claims that could be brought by inmates relate to safety, such claims should not be barred.

States have their own versions of the FTCA. And a state inmate seeking to bring a state tort claim against a jailor is likely to face differing and complex administrative remedy requirements and archaic exceptions that may or may not be asserted by the state government agency. For example, the pre-filing requirements of the California Tort Claims Act are so complex that inmates are rarely able to get through the entire process. And the act has antiquated immunities relating to the spread of disease, which the Government can rely on to try to bar any claim related to public safety. California's Government Code even has a section barring a public agency from being liable any "injury to any prisoner" (although this section is constitutionally questionable and we have not seen this argument raised recently).

Lastly, as with any other complaint, make sure to list the proper jurisdictional basis United States or Government as a defendant) and statutory authority ("This action arises from, and this Court has jurisdiction over this action by virtue of the Federal Tort Claims Act, 28 U. S. Code §§ 1346(b), 2671, et seq."). If it's an FTCA case, make sure you identify a specific federal employee (if known) who committed a negligent or wrongful act, that somehow relates to safety (if possible). If it's a state tort case, please write about it, so others can follow in your footsteps. Good luck! •

Ian Wallach practices Criminal Defense and Civil Rights in California and New York. He is a former deputy public defender with the County of Los Angeles, and subsequently, in private practice, argued the Edison v. USA case before the 9th Circuit guaranteeing inmates the right to bring tort claims against the USA for claims arising out of their confinement. He was the first lawyer to successfully prosecute a claim against the USA arising out of avoidable valley fever infections acquired during incarceration. He is a member of the Board of Directors of NACDL, and has published articles on how inmates can bring tort claims as an alternative remedy, in light of the expansion of the doctrine of Qualified Immunity and its impact on inmate's civil rights claims. Mr. Wallach successfully defended a client accused of extorting Stevie Wonder, and was also counsel to the plaintiffs in the Dontre Hamilton matter which ended in a historical settlement and systemic change within the Milwaukee Police Department.

Endnotes:

[1]The Supreme Court's most recent discussion of Qualified Immunity was in *White v. Pauly*, 137 S. Ct. 548 (2017), where the Court held that there was no settled Fourth Amendment principle requiring the officer to ensure that the other officers' ongoing use of force was reasonable. *White*, 137 S. Ct. at 551. Two decisions from the 9th Circuit demonstrate the disturbing breadth and application of the Qualified Immunity Doctrine. See *Chappell v. Mandeville*, 706 F.3d 1052 (2013) (barring a claim where an inmate was subjected to six days of novel torturous conduct); *Jackson v. Brown, et al.*, 1:13-cv-01055-LJO-SAB (E.D. Cal.) (Order Granting Summary Judgment, Sept. 28, 2016) (barring a claim where 40 inmates of African descent were killed and hundreds infected by a known toxin).

[2]The discussion of constitutional claims that can be brought by *state* inmates wishing to sue state or local employees applies to claims under Section 1983. The discussion of constitutional claims that can be brought by *federal* inmates wishing to sue federal employees, applies to claims under *Bivens*.

[3]*Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005).

[4]28 U.S.C. § 2678.

[5]28 U.S.C. § 2402.

[6]*Giraldo v. Cal. Dep't of Corrs. & Rehab.,* 85 Cal. Rptr. 3d 371, 382–88 (Ct. App. 2008); *Edison v. United States*, 822 F.3d 510, 510 (9th Cir. 2016).

[7]A Standard Form 95 can be downloaded at www.wallachlegal.com/resources or at https://www.justice.gov/sites/default/files/civil/legacy/2011/11/01/SF-95.pdf).

[8]28 U.S.C. § 2675(b)

[9]28 U.S.C. § 2401(b)

[10]28 U.S.C. § 2401

[11]*Id.*

[12]*United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015).

[13]*See id.* at 1629-30.

[14]28 U.S.C. § 2671

[15]28 U.S.C.S. § 2680(a)

[16]*Gaubert/Berkovitz refers to United States. v. Gaubert*, 499 U.S. 315, 322-25 (1991), and *Berkovitz v. United States.,* 486 U.S. 531, 536-37 (1988).

[17]*O'Toole v. United States*, 295 F.3d 1029, 1032-33 (9th Cir. 2002)

[18]*Whisnant v. United States*, 400 F. 3d 1177, 1181 (9th Cir. 2005)

[19]Cal. Gov't Code § 810

[20]Cal. Gov't Code § 855.4

[21]Cal. Gov't Code § 844.6

In computing a criminal history score be certain your client "actually served" time on their prior sentence of imprisonment

By Dennis Hester

Federal criminal practitioners know that the Sentencing Guidelines assign criminal history points based on the length of a client's "prior sentence of imprisonment."[1] Three points are added for a sentence exceeding one year and one month,[2] two points are added for a sentence between 60-days and one year and one month,[3] and one point is added for all other sentences.[4]

Criminal history points, "are based on the sentence pronounced, not the length of time actually served,"[5] so the client does not have to serve an entire sentence to receive the applicable criminal history points.[6] For example, a defendant sentenced to a year and a half in prison, but who is released after only one month would still qualify for three criminal history points because, although the time served is much less, the sentence itself is greater than one year and one month.[7] The caveat is that, to apply more than one criminal history point, the sentence must be 60 days or greater, and *some* sentence of imprisonment must be "actually served."[8]

The meaning of imprisonment "actually served" has been a subject of contention. Time in home detention, for example, is not sufficient.[9] The same is true for time served awaiting parole revocation proceedings—provided that parole is ultimately not revoked.[10] But courts have permissibly used time served in pre-trial custody as a sentence "actually served," even if the defendant is ultimately sentenced solely to the term of pretrial custody.[11]

What if a defendant is sentenced to a term of imprisonment and given full credit for time served on an entirely separate offense? That was the issue in *United States v. Carlile*, a case recently decided in the Fifth Circuit.[12] There, Carlile's criminal history score included two points for a 365-day sentence for a DWI—i.e., a sentence of more than 60 months but less than one year and one month. In March of 2012, Carlile was charged with both the DWI and criminal mischief under Texas law. In March of 2013, Carlile was sentenced to 21-months incarceration for the criminal mischief offense. Meanwhile, the DWI charge remained pending throughout his term of incarceration. Then, in October of 2014, when Carlile was freshly released from his 21-month prison sentence, he was sentenced to 365 days for the DWI. But in pronouncing the sentence of 365 days, it was ordered, "with credit given for 365 days already served" for the criminal mischief offense. Or as the Fifth Circuit explained, the state court decided that Carlile's sentence for DWI was "satisfied based on the time that he spent in prison for a criminal-mischief offense," and no further imprisonment was ordered.[13]

Carlile did not object to the two criminal history points in the district court but, on appeal, he claimed that the district court erred because he did not "actually serve" time in prison for the DWI. The Fifth Circuit agreed, though it did not find plain error. The court explained: "[b]ecause the state court elected to give him credit for time served from his other sentence, Carlile did not spend any time in custody for his DWI offense," so he should have received one criminal history point, not two, for the DWI sentence.[14]

In *Carlile*, the Fifth Circuit joined the Eleventh and Sixth Circuit holding that, where a defendant is given full credit for time served on an entirely separate sentence, he does not "actually serve" time in prison for the sentence at issue.[15] As the Sixth Circuit explained: "Cold reality informs us that a defendant who receives full credit for time served on an entirely separate conviction does not in fact 'actually serve' any time for the offense in question."[16]

Meanwhile, the Seventh Circuit stands alone as the only circuit that permits addition of criminal history points in this situation.[17] In 2000, before other circuits weighed in on the issue, the Seventh Circuit allowed the addition of three criminal history points where the defendant was sentenced to 250 days but given full credit for time served on an entirely separate sentence.[18]

While this issue does not percolate often in the appellate courts, it is potentially frequently overlooked by practitioners. Attorneys representing clients receiving criminal history points should check, and double check, that the client "actually served" a sentence of imprisonment before he is given more than one criminal history point for the sentence. •

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Endnotes:

[1]U.S.S.G. § 4A1.1(a)-(c).

[2]U.S.S.G. § 4A1.1(a)

[3]U.S.S.G. § 4A1.1(b)

[4]U.S.S.G. § 4A1.1(c)

[5]U.S.S.G. § 4A1.2, cmt. n. 2.

[6]*Id.; see also, United States v. Conca*, 635 F.3d 55, 65 (2d Cir. 2011).

[7]*See e.g., United States v. Brown*, 54 F.3d 234, 239-40 (5th Cir. 1995) (applying three criminal history points where defendant was sentenced to two years in prison but government could only establish he "actually served" 53 days).

[8]U.S.S.G. § 4A1.2, cmt. n. 2.

[9]*United States v. Jones*, 107 F.3d 1147, 1165 (6th Cir. 1997).

[10]*United States v. Stewart*, 49 F.3d 121, 125 (4th Cir. 1995).

[11]*United States v. Fernandez*, 743 F.3d 453, 456 (5th Cir. 2014); *United States v. Cruz-Alcala*, 338 F.3d 1194, 1200

CRIMINAL HISTORY continued on page 15

Mitigating Loss Amounts and Restitution Judgments in Fraud Cases

By Lisa Wood

In fraud cases, loss amount is treated as a proxy for the seriousness of the offense, and is the primary driver of the sentencing guideline range, having the potential to increase a sentence by decades. The United States Sentencing Guidelines provide for an increase in offense level based on either the actual or intended pecuniary loss resulting from an offense. But even in a case where the government or the court determines that intended loss, i.e., the amount of money the defendant put at risk, should be used to calculate offense level, it is important for practitioners to calculate the actual loss caused by an offense. While it may not affect the guideline range, actual loss is also generally used to determine a defendant's restitution obligation under the Mandatory Victims Restitution Act (MVRA). Importantly, in calculating this number, losses caused by forces other than a defendant's criminal conduct must be excluded.

Two causation requirements lie at the heart of all actual-loss calculations. The first, and broader, of the two is factual, or "but for," causation: But for the fraud or other criminal act, would the loss have occurred? In fraud cases, "but for" causation often takes the form of a victim's reliance on a defendant's false statements. The second requirement is legal causation. This requires proof that the illegal act or acts proximately caused the loss. The relevant inquiry here is foreseeability; that is, whether the loss was reasonably foreseeable to the defendant.

Factual Causation

In certain cases, a victim's conduct may undermine a claim of factual causation. Consider the behavior of "victim" banks during the mortgage crisis. Banks had little incentive to vet the information furnished on loan applications because, in most cases, they did not intend to keep the loans on their books. Rather, the toxic mortgages were sold and securitized. In light of the banks' failure to scrutinize applications, many have questioned the legitimacy of the banks' alleged reliance on false statements contained in them. Accordingly, when those loan applications are the subject of a federal fraud case, factual causation may also called into question.

A case from the United States Court of Appeals for the Seventh Circuit, United States v. Litos, involved a typical mortgage fraud scheme: the defendants transferred down payment funds to straw buyers and arranged for them to enter in mortgages with various banks, including Bank of America (BoA). The defendants walked away with the mortgage proceeds, minus the amount of the down payments, and let the loans go into default. In assessing restitution under the MVRA, the district court credited a BoA representative's affidavit stating that, had the bank known the true source of the straw buyers' down payments, it would not have issued the loans.

The Seventh Circuit Court of Appeals, however, found that this affidavit carried little weight in light of BoA's lending practices. "Had the bank done any investigating at all," the court wrote, "rather than accept at face value the obviously questionable claims that the mortgagors were solvent, it would have discovered that none of them could make the required down payments let alone pay back the mortgages."

The court vacated the restitution award entered in favor of BoA, finding that the bank's "reckless" behavior broke the chain of causation. While the court acknowledged that other circuits had declined to do the same in similar cases, it reasoned that Litos was different because there was evidence that BoA's approval of the "palpably phony" loans exceeded "mere negligence." BoA was "deliberately indifferent to the risk of losing its own money."

Although the court in Litos suggested the district court impose a fine in lieu of restitution on remand, this result would still be advantageous to the defendants. Unlike restitution under the MVRA, the imposition of a fine, and its amount, is discretionary. There may be good reason to impose a fine significantly lower than what a restitution award would have entailed if the defendant is insolvent or otherwise unable to pay a hefty sum.

Litos's reasoning applies only to factual causation and thus will not apply in cases involving "intended" loss under the guidelines. Intended loss requires no actual harm or victim. That being said, in cases where it is plain that a victim contributed to its own loss, there may be a compelling argument that its recklessness mitigates the seriousness of the offense, and that a variation from the guideline range is therefore warranted under 18 U.S.C. § 3553(a)(2)(A).

Legal Causation

Once factual causation has been established, the analysis moves to legal causation. Arguments that an intervening event, such as market fluctuation, caused or worsened loss amounts fall under this component of the causation analysis.

Initially, merely positing that an intervening event, such as a stock drop, affected loss amount is insufficient to reduce a restitution judgment or knock a few levels off a defendant's offense level. Courts have rejected defense arguments that outside forces necessarily exacerbated loss amount because the offense occurred during a recession. Accordingly, practitioners must be prepared to "show their work" and separate losses caused by the financial crisis from the overall loss amount.

One way to do this is through a comparative analysis. For example, when the appropriate measure of loss is the decline in a company's share price, the share prices of similar companies should also be examined. If these comparable share prices also dropped during the relevant time period,

then it can be inferred that criminal conduct is not entirely to blame for a decline in the value of the first company's stock. An even simpler analysis can be undertaken in cases involving brokerage accounts. If the measure of loss is the decline in value of a brokerage account, historical price data can be used to determine whether, and to what extent, the investments would have increased or decreased in value independent of the criminal activity. Any net decrease should be subtracted from the restitution figure.

The counter argument to this approach is that market volatility is itself foreseeable, and is therefore insufficient to break the chain of causation. Courts tend to agree with this view in cases where a defendant's fraud has caused a victim to enter the market in the first place. In such cases, courts have reasoned that, by fraudulently inducing a victim to purchase something that he would otherwise not have, "the defendant assumes responsibility for [the victims'] losses, including those resulting from market forces."

However, defendants are not responsible for losses stemming from a victim's failure to mitigate damages. A victim left with securities or collateral must make a good faith effort to sell the item or items at fair market value. Restitution will not compensate for losses due to nominal sales or donations. Moreover, significant delay in selling the items may "evince the victim's choice to hold [the securities or collateral] as an investment rather than reducing it to cash." In such a situation, "it would be wrong for the court to make the defendant bear that loss." Because it appears that the exercise of choice may function as an intervening event in certain cases, practitioners should not only scrutinize the actions of victims in relation to their investments, but also the actions of trustees and receivers, who are entrusted to manage assets and exercise independent judgment about how to proceed. •

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Endnotes:

[1]*United States v. Stein*, 846 F.3d 1135, 1152 (11th Cir. 2017); see U.S.S.G. §2B1.1(b)(1) (loss table).

[2]U.S.S.G. §2B1.1 cmt. n. 3(A).

[3]18 U.S.C. § 3663A.

[4]*United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *see also United States v. Marlatt,* 24 F.3d 1005, 1007 (7th Cir. 1994).

[5]*Stein*, 856 F.3d at 1153; *see also Rutkoske*, 506 F.3d at 179.

[6]*Stein*, 846 F.3d at 1154-55; *see also United States v. Martin,* 803 F.3d 581, 594 (11th Cir. 2015); U.S.S.G. §2B1.1 cmt. n. 3(A)(i) ("Actual loss means the reasonably foreseeable pecuniary harm that resulted from the offense.").

[7]*United States v. Litos*, 847 F.3d 906, 907 (7th Cir. 2017).

[8]*Id.*

[9]*Id.* at 907-08.

[10]*Id.* at 908.

[11]*Id.* at 909-10.

[12]*United States v. Betts-Gaston*, 860 F.3d 525, 539 (7th Cir. 2017); *United States v. Tartareanu*, 884 F.3d 741, 744-45 (7th Cir. 2018).

[13]*Stein*, 846 F.3d at 1154-55.

[14]*United States v. Durham,* 766 F.3d 672, 687 (7th Cir. 2014).

[15]*United States v. Gushlak*, 2011 WL 3159170 at *6 (E.D.N.Y. July 26, 2011).

[16]*Id.*

[17]*See, e.g., United States v. Lohmeier*, No. 12 CR 1005 (N.D. Ill.), Docket Nos. 123 & 123-1 (sentencing position paper and chart analyzing historical price data in mutual funds held by defendants' trust company).

[18]*United States v. Lundstrom*, --- F.3d ----, 2018 WL 475122 at *16 (8th Cir. Jan. 19, 2018), *citing Robers v. United States*, 134 S.Ct. 1854 (2014).

[19]*Robers*, 134 S. Ct. at 1859.

[20]*Id.* at 1860 (Sotomayor, concurring).

[21]*Id.*

CRIMINAL HISTORY continued from page 13

(10th Cir. 2003) (collecting cases).

[12]*United States v. Carlile*, 2018 U.S. App. LEXIS 6243, 2018 WL 1281918 (5th Cir. Mar. 13, 2018) (publish).

[13]*Id.* at *6.

[14]*Id.*

[15]*United States v. Buter*, 229 F.3d 1077 (11th Cir. 2000); *United States v. Hall*, 531 F.3d 414, 419 (6th Cir. 2008).

[16]*Hall*, 531 F.3d at 419.

[17]*United States v. Staples*, 202 F.3d 992, 997 (7th Cir. 2000).

[18]*Id.*

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