LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin®

An ALM Publication

Volume 17, Number 6 • February 2010

Confronting the Forensic Facts

How an Expansion of the Confrontation Clause Creates New Opportunities and Obligations for Challenging Electronic Evidence

By Marjorie J. Peerce and Elizabeth S. Weinstein

Most matters involving white-collar investigations and prosecutions do not result in trials, so evidentiary issues are not frequently discussed in articles on business crime. A new focus on evidentiary issues, however, is warranted in light of a pair of recent Supreme Court cases built upon the Sixth Amendment's Confrontation Clause. *See Crawford v. Washington*, 54 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). These two cases have given criminal defense attorneys potent new weapons to challenge forensic evidence proffered by the government — not only the potential right to confront forensic analysts, but also the potential right to demand broader and earlier discovery so that counsel is able to make full use of the right to confrontation identified by the Supreme Court.

New Law on Forensic Evidence

Melendez-Diaz extended the Sixth Amendment's Confrontation Clause into the realm of forensic evidence. Citing *Crawford*, the Supreme Court held that, because of the Sixth Amendment's Confrontation Clause, a witness's

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DOJ, Heal Thyself

Need for a Compliance Program Against Prosecutorial Misconduct

By Jim Walden and Georgia Winston

Federal prosecutors have rightly demanded that corporations invest time and money in compliance programs to combat corporate crime. The Department of Justice (DOJ) has enforced this imperative with a big stick: If an employee breaks the law while engaged in the company's business, the company's lack of an "effective compliance program" is a ground for imposing the "corporate death penalty," as in the case of Arthur Andersen, or a range of lesser (but still severe) penalties.

But what about compliance in the business of dispensing justice? The uptick in implosions of high-profile criminal cases has been cause for concern among the DOJ's most ardent supporters. Policymakers need to ask whether the DOJ is doing as much to mitigate its own risks of employee misconduct as it requires of the companies it investigates and prosecutes.

DOJ's Standards for Others Are High

Companies that adopt weak compliance programs, or none at all, face similar risks: corporate prosecution. The key consideration, according to the now-famous Holder Memo, is "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." ("Bringing Criminal Charges Against Corporations," DOJ memorandum, June 16, 1999.)

The DOJ's expectations are sometimes punctuated by tough-talking prosecutors. "If you don't have a good compliance program and we find out," one DOJ official warned executives, "we will give you a compliance program. I guarantee it will be something not to your liking." ("Top DOJ Official Says Better Prosecutions Coming," *Compliance Week*, June 8, 2007.) Compliance program failings are often met with extended and expensive "independent monitorships," even in cases where the scope of the wrongdoing was very limited in comparison with

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a target company's overall global business operations.

SHARED PAIN?

Meanwhile, some courts have acted with unprecedented force after finding misconduct by federal prosecutors. A few failed cases have affected our foreign relations and the fate of elections, and resulted in dismissed indictments, public censure, injunctive relief, sanctions, and criminal investigation of the prosecutors themselves. These sanctions have had a ripple effect on other prosecutions.

In the Blackwater case, involving the alleged shooting of 34 Iraqi civilians, the judge found that line-level prosecutors had misused involuntary statements from the defendants to gather other evidence. The judge criticized the prosecutors' "reckless behavior," finding that they had "purposefully flouted the advice of [other prosecutors] when obtaining the substance of the defendants' compelled statements, and in so doing, knowingly endangered the viability of the prosecution." (*U.S. v. Slough*, No. 08-cr-360, 2009 WL 5173785 (D.D.C. Dec. 31, 2009)). The effect of the dismissal had international implications, as the Iraqi government denounced the situation as "unjust," and a U.S. commander expressed concern over a "backlash" against other security companies in Iraq. ("Iraq Says U.S. Blackwater Case Dismissal 'Unacceptable,'" *The New York Times*, Jan. 1, 2010).

The DOJ ultimately dropped charges against former Alaska Senator Ted Stevens, but only after the damage had been done and Stevens lost his bid for reelection. (*U.S. v. Stevens*, No. 08-cr-231 (D.D.C. Apr. 7, 2009)). And the prosecutorial misconduct in *Stevens* led prosecutors to seek remand in two related cases in which the defendants had already been convicted and begun to serve their sentences. The appeals court ordered those defendants released pending the district court's decision on remand. *U.S. v. Kott*, 333 Fed. App'x 204 (9th Cir. 2009); *U.S. v. Kohring*, 334 Fed. App'x 836 (9th Cir. 2009).

In the Broadcom case, a disgusted, conservative judge concluded that prosecutors had "intimidated and improperly influenced" three critical defense witnesses and had "distorted the truth-finding process and compromised the integrity of the trial." *U.S. v. Ruehle*, No. 08-cr-139 (transcript, Dec. 15, 2009). On that basis, the court dismissed the stock-options backdating indictments against two defendants. The judge even vacated the conviction of another defendant who had already accepted a guilty plea because of the court's "grave concerns over the government's tactics." *U.S. v. Samueli*, No. 08-cr-156 (Dec. 14, 2009). All dismissals were with prejudice against further prosecution.

Misconduct in the Detroit "sleeper cell" terrorism case was even more egregious. The judge dismissed several charges against three defendants, and granted a new trial on remaining charges after a court-ordered review by the DOJ found that the trial team had engaged in a widespread pattern of misconduct. *U.S. v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004). The court's rebuke characterized the prosecution's misconduct as "prevalent and pervasive," making it "abundantly clear [that] the prosecution misled the Court, the jury, and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case." The prosecutor's misconduct stepped so far over the line that he and the State Department employee who had assisted in the prosecution were indicted for conspiracy and obstruction of justice. *U.S. v. Convertino*, No. 06-cr-20173 (E.D. Mich. 2006). They were eventually acquitted.

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Business Crimes Bulletin®

Business Crimes Bulletin® (ISSN 1090-8447) is published by Law Journal Newsletters, a division of ALM.

Business Crimes Bulletin P0000-245
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to :
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

Money Laundering: A Changing Paradigm

By Michael Zeldin and Miriam Ratkovicova

When government officials speak, those regulated by them should listen carefully. Over the past several months there has been a slew of public pronouncements that should put financial institutions on edge. Enhanced enforcement of the Foreign Corrupt Practices Act (FCPA) is now migrating into the financial sector and linking up with anti-money laundering (AML) and Office of Foreign Assets Control (OFAC) compliance requirements.

Item: The Financial Industry Regulatory Authority (FINRA) wrote to securities industry executives last March to "highlight new and existing areas of particular significance to FINRA's examination program for 2009," warning them to reassess their firms' compliance and supervisory programs with special attention to AML and the FCPA. The letter concludes: "We hope that by sharing these areas of potential examination focus and other developments, your Firm will be well armed to assess your compliance operations, internal controls and supervisory systems." http://www.finra.org/web/groups/ industry/@ip/@reg/@guide/documents/industry/p118113.pdf

Item: New York State's Insurance Department last June issued Circular Letter 11 (2009) to all Licenses, setting forth the Superintendent's expectations regarding compliance by licensees with three areas of federal law: the Bank Secrecy Act, the FCPA, and regulations of the Office of Foreign Assets Control. "Although supervision and enforcement of these statutes resides with national regulators," the Superintendent observes warns that "compliance with these laws is consonant with prudent risk management" and that well designed programs to ensure compliance with federal law "should prove effective in detecting violations of New York law … pertaining to money laundering and insurance fraud." The letter warns that the Insurance Department may specifically ask the members of a licensee's senior most governing body or senior management" about policies aimed at compliance with federal law. http://www.ins.state.ny.us/circltr/2009/cl2009_11.htm

Item: Robert Khuzami, the SEC's Director of Enforcement, announced last August that the SEC has established an FCPA Unit to "focus on new and proactive approaches to identifying violations" because "more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations."

A New Paradigm

The days when AML compliance meant focusing narrowly on transactional activity related to the volume, velocity, origin and direction of money movements may be ending. A new paradigm for AML compliance is emerging — one that requires a holistic view that includes risks related not only to the FCPA, but also to fraud, tax evasion, and other criminal activity related, for example, to mortgages, etc. While many large U.S. and EU financial institutions have kept FCPA compliance separate from AML, this new imperative might require a convergence of the two in order to provide for improved detection and enhanced investigation while realizing significant, synergy-derived cost savings.

What FCPA risks should an AML compliance officer consider under this new paradigm? Predominantly, there are three types of risk, two addressed by standard AML measures, and the third by an effective FCPA compliance program:

1. The risk of providing services to persons whose funds may derive from public corruption, *e.g.*, Politically Exposed Person (PEP) risk. Of the three risk categories, risk of 'accepting' funds derived from public corruption may be the easiest to detect if your AML protocols are robust. Virtually all financial institutions have, or should have, some mechanism for identifying PEPs and other public officials within their customer screening systems. Improved detection rates may be achieved by transaction monitoring focused on corruption proceeds entering the PEP account.

2. The danger of facilitating corrupt payments to foreign officials by "legitimate" clients of the financial institution, *e.g.*, an oil company. The judicial dockets are filled with cases involving corruption with domestic and foreign public officials. While historically these cases have focused on the corrupt officials, there appears to be a trend toward prosecuting the financial institutions that accepted corruption proceeds for transit or as deposits. This may even entail personal liability, both civil and criminal, for the officers and directors of the financial institution if they knew, should have known, or were willfully blind to the activity in which the government is interested. Once you get a subpoena — a sure sign of government interest — it may be too late to fix the problem.

3. The risk that a financial institution is itself engaging in public corruption by making corrupt payments to gain a business advantage. As financial institutions expand into more diverse geographies, there is a growing likelihood that the institution, in an effort to secure permits, licenses and facilities or to obtain additional revenue from, for example, public sources such as pension or sovereign funds will conduct business with individuals who are "public officials" under the FCPA. Building an effective FCPA compliance program can mean the difference between an event requiring self-disclosure or no event at all. For example, a U.S. SEC-registered brokerage company just reported in its

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Money Laundering

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2009 8-K that "it has recently uncovered actions initiated by an employee based in China in an overseas real estate subsidiary that appear to have violated the FCPA." Public reports indicate that the activities in question are related to company's real estate practice in China, which invests with various state-owned entities. The employee reportedly was a top property dealmaker in China.

A Compliance Checkup

What questions a financial institution asks its internal-controls program and the compliance professionals who manage it often defines the difference between avoiding these risks or not. Here are some questions to ask at the outset of a compliance checkup:

- Does your institutional risk assessment accurately identify high-risk areas for both FCPA and AML/OFAC?
- Have you identified high-risk customers, products, services and geographies for both FCPA and AML/OFAC?
- Have you considered the inter-relationships of risk factors between AML/OFAC and the FCPA?
- Is your risk assessment nimble enough to be responsive to external events and political changes?
- Have you defined corruption and money laundering typologies related to all your products and services (*e.g.*, trade finance, construction loans, etc.)?
- Have you reviewed your own SAR filing history to be certain you are filing FCPA-related SARs?
- Have you adapted and refined the red flags in your transaction monitoring system to address the footprint of your organization and its business portfolio?
- Are your Customer Identification Program (CIP) and Know Your Customer (KYC) protocols adequate to the corruption risks reasonably foreseeable in each location in which you are doing business?
- Have you established a bank-wide definition of who is a PEP? Does it include both domestic and foreign government persons? Do you also identify more generally customers who fit the FCPA definition of "public officials"?
- Are your employees dealing directly or indirectly with government officials both as regulators and as bank customers? Do you have FCPA compliance guidelines and an associated training program that reach those employees?
- Have you assessed and addressed your risk related to agents and intermediaries?
- What data are available for FCPA monitoring?
- What are your expenses, gifts, entertainment, charitable contributions?
- Do you focus on high-risk government touch points and client relationships?
- Are there third parties and third-party payments?
- To what extent can contemporaneous information about corruption risks, events and investigations be integrated into monitoring and surveillance programs?
- Do you use external data (*e.g.*, country corruption indices, quality of government procurement regimes) to complement the use of customer risk ratings or transaction monitoring?
- Where and how is FCPA monitoring being conducted?
- Do you have centralized or decentralized monitoring?
- What degree of convergence of FCPA and AML monitoring is taking place at your institution now? Are you using different analytic engines, case management tools, investigators and investigation protocols? Are FCPA findings informing AML monitoring and vice versa?

Conclusion

The FCPA and AML compliance environment is unforgiving. U.S. law enforcement views compliance in these areas a national-security imperative. Regulators across the globe are developing strict examination procedures, and failures have lead to stiff fines and, in the case of the FCPA, criminal convictions of senior personnel. Frederic Bourke and the investment management company Omega Advisors were prosecuted in New York for bribery of senior government officials in Azerbaijan to ensure that those official would privatize the state oil company; in the UK, the Financial Services Authority fined Aon Ltd. £5.25 million for failure to maintain adequate systems to counter the risks of bribery and corruption. These prosecutions likely portend the future in this fast evolving area. In the words of Bob Dylan: "He not busy being born is busy dying."

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The Tip of the Iceberg

These high-profile cases are just the tip of the iceberg. A startling number of courts have found investigative misconduct, disclosure violations, witness interference, and trial misconduct. Courts in the First, Third, Seventh, Eighth, and Ninth Circuits recently reversed convictions because prosecutors made improper statements to jurors during trial. Courts in the Ninth and D.C. Circuits granted new trials and dismissed indictments because prosecutors failed to disclose key evidence to the defense. In the Eleventh Circuit, a judge went to the unusual length of entering injunctive relief after finding that prosecutors had violated their discovery obligations and launched a retaliatory investigation

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of defense counsel during trial. The judge also publicly reprimanded and imposed sanctions against the prosecutors for "acting with gross negligence," and "vexatiously and in bad faith," and ordered the United States to reimburse the defendant over $600,000 in attorneys' fees and costs. *U.S. v. Shaygan*, No. 08-cr-20112, 2009 WL 980289 (S.D. Fla. Apr. 9, 2009). And, in a First-Circuit case, the district judge attached to his decision a three-page annex of alleged misconduct by federal prosecutors in the district. *U.S. v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009).

'Compliance' Risks in the U.S. Attorney's Office

In response to critical comments based on these cases, DOJ officials often reply that the overwhelming number of their prosecutors are conscientious, and that the proportion of cases with reported misconduct is low. The truth of this defense makes it no less ironic: This is precisely what private companies often claim after misconduct is revealed, but the federal government requires heightened compliance programs nonetheless. For example, a medical device company recently entered a three-year deferred-prosecution agreement and five-year corporate-integrity agreement despite the company's claim that the misconduct at issue involved only "a small fraction" of its business. (NeuroMetrix Inc. News Release, Feb. 9, 2009.)

It should not be left to judges to remedy these issues piecemeal. Anything less than a comprehensive and robust program to prevent misconduct and train well-intentioned prosecutors to prevent error will inevitably lead to wrongful convictions — an extreme consequence that should not be tolerated in a civilized society. Prosecutorial misconduct also carries with it the risk of violating federal and state criminal and civil laws, as well as contempt of judicial proceedings. And it risks undermining public faith in the DOJ.

DOJ's New Policies: A Cure Or a Band-aid?

Within the DOJ, both the Office of Professional Responsibility (OPR) and the Office of the Inspector General (OIG) have the power and the duty to investigate the causes of, and recommend cures for, systematic prosecutorial error or misconduct. Yet neither has instituted any comprehensive investigations of the recent pattern, based on nationwide judicial findings, of prosecutorial misconduct or any comprehensive compliance and monitoring programs to address these systemic problems.

In January 2010, the DOJ issued new discovery guidelines to help ensure that prosecutors comply with their obligations under *Brady*, *Giglio*, and the Jencks Act. (Guidance for Prosecutors Regarding Criminal Discovery, DOJ memorandum, Jan. 4, 2010). These guidelines give instructions on where to look for potentially discoverable information, direct prosecutors to memorialize and disclose any variances in witness statements, and encourage prosecutors to review potentially discoverable material themselves.

Although these guidelines are a step in the right direction, they do nothing to address other potential abuses, including the types of witness interference and improper statements to the jury that have been repeated subjects of judicial ire. Nor do they address other risks of misconduct during the investigatory stage, which can have significant effects at trial. And they do nothing to ensure that prosecutors comply with the guidance that is in effect. They are, largely, toothless guidelines.

Recommendations

The DOJ, OPR, and OIG can and should take stronger steps to minimize prosecutorial misconduct by instituting some of the same strict compliance measures required of businesses. A meaningful, nationwide compliance program would have many components and contours, but three pillars are essential.

First and foremost, the DOJ needs to provide more meaningful training to prosecutors. Many prosecutors receive the bulk of their training at an "academy" during their first weeks on the job, and thereafter training programs vary greatly among the many U.S. Attorneys' Offices and DOJ components. This is inadequate. Education in prosecutorial ethics through a nationwide Webcasting system should be standardized, periodic, mandatory, and subject to certifications.

Second, pretrial disclosure requirements should be more methodically outlined for prosecutors, with mandatory checklists and certifications maintained in each case file. Periodic audits should be required, and the overall results of such audits should be periodically reviewed by the OIG, which can refine and enhance the process as lapses are discovered.

Third, allegations or judicial findings should be subject to centralized reporting, investigation, and periodic review to identify particularly troubled components or types of misconduct. Indeed, the OIG should conduct regular reviews to identify the most common other types of misconduct, allowing the DOJ to amplify its training programs on each type of potential violation. Such guidance and training should address investigative abuses (including improper influence of witnesses), trial misconduct (including inappropriate comments to the jury), and pretrial leaks of confidential or inflammatory information. The DOJ should coordinate with ethics officers to identify patterns of misconduct on an ongoing basis, so that any problems can be reported and addressed on a real-time basis. It should set up a hotline to the OPR so that DOJ employees may anonymously report any instances of misconduct. And the DOJ and OPR should establish and enforce clear disciplinary standards for any prosecutor who does not comply with the rules.

If the DOJ begins to take its own advice about the importance of strict compliance, it will go a long way toward curing some of its current ills.

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out-of-court statements are inadmissible at trial unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity to cross-examine the witness. In *Melendez-Diaz*, the Supreme Court applied *Crawford* to police lab technicians, holding that the Confrontation Clause gives defendants the right, in certain circumstances, to confront those who conducted a forensic analysis offered against the defendant at trial.

Melendez-Diaz has drawn the ire of prosecutors, who claim the decision creates unworkable inefficiencies in the justice system, and there is currently debate over how the ruling should be applied in lower courts. The Supreme Court recently declined to provide additional guidance in a recent confrontation clause case. *See Briscoe v. Virginia*, 559 U.S. ___ (2010). In *Briscoe*, the Supreme Court of Virginia found that a statute that allowed the defendant to call to the stand the lab technician who conducted an analysis, but allowed the prosecution to introduce the report without calling the technician in its case-in-chief, did not violate a defendant's constitutional rights. The Supreme Court vacated the decision and remanded the case for consideration not inconsistent with its decision in *Melendez-Diaz*.

In *Melendez-Diaz*, the Supreme Court cited a recent report published by the National Academy of Sciences, which found the current legal system woefully short of ensuring the reliability of forensic evidence because of a number of factors: lenient admissibility standards, deferential appellate review, limitations on the right of confrontation, and judges and lawyers who lack the necessary scientific expertise to evaluate forensic evidence. *Strengthening Forensic Science in the United States: A Path Forward, Before the S. Comm. on the Judiciary*, 110th Cong. 3-1 (2009) (statement of Harry T. Edwards, J., 2nd Cir., and Prof., N.Y.U.), http://judiciary.senate.gov/pdf/09-03-18EdwardsTestimony.pdf (hereinafter "National Academy Report"). By expanding the right of confrontation to require the testimony of forensic analysts under certain circumstances, the Supreme Court's decision in *Melendez-Diaz* addresses one of the concerns identified in the National Academy Report.

Application to Business Crimes

Ballistics, arson residue, tool marks and the like do not regularly appear in business crime cases, so how is the new jurisprudence applicable to white-collar litigation? In the electronic age, there are many types of evidence against white-collar defendants that will be affected by *Melendez-Diaz*. For example, determining whether a computer-generated document was altered, whether metadata is accurate, or whether an image in a photograph has been Photoshopped, are all evidentiary analyses performed by forensic analysts and thus subject to the analysts' varying techniques, equipment, training, integrity and discipline. With the right to confront forensic computer analysts, a white-collar defense attorney may be able to rebut effectively the foundation of the evidence proffered by the government.

Defense counsel can probe into issues such as whether forensic analysts took appropriate steps to insure that they did not delete data, add to data, overwrite data such as the last date of access, the author, etc., or copy data into different media. Defense counsel may also be able to attack the potential bias of a forensic analyst's assessment of computer evidence by cross-examining the analyst on her awareness of the particulars of the government's case against the defendant, or how her preconceived ideas of the defendant's wrongdoing may have influenced her conclusions. Through confrontation, the defense may also be able to uncover potential spoliation of evidence which would have otherwise gone undetected. Additionally, when the government offers testimony by just one of the forensic analysts who conducted the test, *Melendez-Diaz* may support a defense request to examine others in order to probe exactly what steps were taken in preparing and analyzing the evidence.

While we are not aware of *Melendez-Diaz* yet being applied to more than a handful of business-crime cases, we need only remember back to the early days of RICO (when it was thought RICO would apply only to organized crime) or the early days of the Sentencing Guidelines (when the white-collar bar paid too little attention as precedent was being set in drug cases) to realize that changes in forensic evidence standards will become relevant to all types of criminal law. The sooner white-collar defense attorneys proactively use the rights afforded us by *Melendez-Diaz*, the better positioned we will be to help shape lower courts' application of confrontation rights in a way that advances the interests of our clients.

When to Invoke the *Melendez-Diaz* Right to Confrontation

There is no doubt that *Crawford* and *Melendez-Diaz* give the defense certain rights. Defense counsel should think long and hard before stipulating to forensic evidence in the government's case rather than confronting the forensic analyst. Still, zealous defense attorneys should invoke the right to confrontation selectively and strategically — only when they have a reason to question the validity of the analytic methods used. A weak cross-examination of the prosecution's forensic analyst might only serve to buttress the prosecution's case and emphasize the damaging evidence.

This means that defense counsel may need to devote significant pretrial time and effort to learning about the specific analysis of forensic or electronic evidence proffered by the government to ascertain whether confrontation will be advantageous. Obtaining access to the evidence at issue, however, may be easier said than done.

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IN THE COURTS

Eleventh Circuit: Probation-Only Sentence For HealthSouth Executive Unreasonable

The Eleventh Circuit Court of Appeals, in an opinion by Judge Joel F. Dubina, found that the District Court's sentence of Kenneth K. Livesay was unreasonable in light of the factors outlined in 18 U.S.C. § 3553(a).

This was not the Eleventh Circuit's first review of the defendant's sentence. The court had already remanded the case for further explanation, then reversed the District Court's sentence as unreasonable, then vacated the sentence (after the U.S. Supreme Court remand). After its most recent sentencing hearing, the District Court found that the defendant's offense level was 28, his criminal history category was I, and his Guidelines sentencing range was 78 to 97 months' imprisonment. The government had moved for a downward departure — under § 5K1.1 in light of the defendant's substantial cooperation in the prosecution of others — and recommended a 20-month sentence. The District Court again (for the third time but now with a different judge) imposed a sentence of 60 months of probation and the government (for the third time) appealed.

The Eleventh Circuit applied the factors laid out in 18 U.S.C. § 3553(a)(2) to find that a sentence of no jail time did not adequately "reflect the seriousness of the offense, promote respect for the law, or provide a just punishment." More importantly, the court determined that one of the main considerations in the Sentencing Guidelines was the deterrence of white-collar criminals. It found that probation-only sentences were unlikely to deter white-collar criminals who could analyze the financial benefits against the risks and easily determine that financial fraud might be worth the risk of no time in prison.

The court also looked to several prior decisions in which it reversed sentences of minimal jail time for HealthSouth executives involved in the same fraud as defendant. In short, the court explained: "We also hold that *any* sentence of probation would be unreasonable given the magnitude and seriousness of Livesay's criminal conduct" (emphasis in original). The court vacated the sentence and remanded to the District Court for re-sentencing.

Sixth Circuit Affirms Use of Evidence Exclusion

In *United States v. Hardy*, No. 08-5421 (6th Cir. Nov. 20, 2009), the Sixth Circuit affirmed a district court's exclusion of documents as a sanction for delayed disclosure to the prosecution by defense counsel due to counsel's doubts about their origin and admissibility.

The defendant-appellant, Donna Hardy, was convicted on 12 counts of bank fraud, 18 U.S.C. § 1344, and five counts of tax evasion, 18 U.S.C. § 7201, by a jury empanelled by the United States District Court for the Western District of Tennessee. The convictions related to her alleged

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Obtaining Access to Evidence

Suppose you have a case involving the issue of whether a specific e-mail was opened by a particular individual, or at what time the e-mail was opened. For both issues, the metadata for the e-mail is vitally important. It is crucial for the defense to obtain access to the original metadata in order for it to be examined by the defense expert. Because the material is in the government's possession, the examination must either take place on government premises in the presence of a government agent, or the material must be duplicated precisely on a hard drive. Gaining direct and timely access to the relevant material may be a great challenge, particularly because in many instances a defense attorney lacks the time, financial resources, and scientific expertise to assess the material adequately. In addition, in white-collar cases, while the government may have had the evidence for months or years before it brings charges, the defense is not entitled to gain access to the evidence until after charges have been filed. Even then, the significance of the evidence may not be apparent until the government's production of "3500 material," which generally takes place shortly before trial or before a witness testifies, at which point it is often far too late for the defense to do an effective forensic analysis of the evidence. *See* 18 U.S.C. § 3500(b). Although *Crawford* and *Melendez-Diaz* allow a defendant to use his constitutional right to confront the evidence against him, the criminal discovery rules may prove a greatly limiting factor on the effectiveness of this new legal regime.

Conclusion

Now that the Supreme Court has recognized that confrontation of the prosecution's forensic analysts in this context is a constitutionally protected right of defendants, the next step may be to convince courts to make procedural accommodations to allow time so that the game of "gotcha" can yield to the Sixth Amendment. The government may need to be encouraged to provide 3500 material and expert reports earlier, along with more complete access to forensic and electronic material and the analytical methodology utilized. One possible solution would be to require any government review of evidence to be in the presence of the defense expert, so that both parties are on an equal playing field. If courts refuse to make appropriate accommodations, counsel may need to advocate for the modification of procedural rules. We should also be prepared to argue that the government's failure to provide sufficient access to forensic evidence is a Sixth Amendment violation.

Although at first blush it would appear that *Melendez-Diaz* does not demand much attention by the white-collar practitioner or the in-house lawyer, the decision is hugely relevant to our practices. It will only become more so as time passes.

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BUSINESS CRIMES HOTLINE

OHIO

TransCapital Corporation COO Pleads Guilty in Tax Shelter Conspiracy

For his role in a three-member tax shelter conspiracy, Michael Parker, the chief operating officer of Virginia-based investment company TransCapital Corporation, pled guilty to a single count of conspiracy to defraud the United States. Parker entered his plea on Dec. 1, 2009 in a hearing before Judge Sandra S. Beckwith of the U.S. District Court for the Southern District of Ohio in Cincinnati.

According to the DOJ, Parker admitted to conspiring with Daryl Haynor and Jon Flask, the former a tax partner with accounting firm KPMG LLC and the latter a TransCapital attorney. Parker admitted his alleged role in the trio's promotion and implementation of a tax shelter that disguised and concealed finance transactions of KPMG clients from 1998-2006 and led to $240 million in claimed corporate income tax deductions on returns filed with the IRS. Additionally, Parker acknowledged conspiring to mislead IRS agents and attorneys during audits of several of the companies that had claimed deductions. To do so, Parker made false statements to the IRS and concealed aspects of the transactions from the trio's corporate clients.

As a result of his single-count plea, Parker faces a maximum five-year prison sentence and $250,000 fine, while Haynor and Flask both face possible eight-year prison sentences along with a corresponding fine up to $500,000.

NEW YORK

Charges Dismissed Against Statoil

On Nov. 18, 2009, U.S. District Judge Richard C. Howell dismissed with prejudice a three-year-old criminal information against Norway-based oil company Statoil. Judge Howell's ruling came in response to the government's motion to dismiss, which, in turn, was filed upon the company's successful completion of a deferred prosecution agreement for violations of both the anti-bribery and accounting provisions of the FCPA. The criminal information, originally filed on Oct. 13, 2006, alleged that Statoil, a New York Stock Exchange issuer, developed a consulting contract with an offshore intermediary company for the purpose of inducing an Iranian official to assist Statoil in its efforts to secure contracts for the development of natural gas and oil fields in Iran.

The terms of Statoil's deferred-prosecution agreement required the company to admit to making corrupt payments; pay $10.5 million in penalties for its actions; submit to a three-year comprehensive review of its FCPA internal controls and processes by an independent compliance consultant appointed by the government; and implement the consultant's compliance recommendations.

Commenting on the dismissal, U.S. Attorney for the Southern District of New York Preet Bharara said: "This case shows that deferred prosecution agreements against corporations can work as an important middle ground between declining prosecution and obtaining the conviction of a corporation," adding that the "deferred prosecution in this case helped restore the integrity of Statoil's operations and preserve its financial viability while at the same time ensuring that it improved what was obviously a failed compliance and anti-corruption program."

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In the Courts and Business Crimes Hotline were written by **Matthew Alexander**, an associate at Kirkland & Ellis LLP, Washington, DC.

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embezzlement of over $250,000 from her employer, Milan Box Corporation. Hardy, who had controlled the company's accounting and treasury functions without check-issuing authority, defended the charges by claiming that she had loaned the company money during lean years and that the funds paid to her were repayment for the earlier loans.

The documents excluded by the district court were copies of check stubs that Hardy claimed proved the existence of the loans. Hardy had provided them to her counsel a week prior to her trial. Her counsel did not provide the documents to the prosecution at that time, instead serving a subpoena *duces tecum* on the company for the original stubs on the weekend prior to the trial.

On appeal, Hardy argued that the district court had violated her compulsory process rights as provided in the Sixth Amendment, which states that "in all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

The Sixth Circuit rejected this argument, finding that Hardy and her counsel "willfully and purposefully chose not to disclose the documents to the government." The Sixth Circuit noted that the district court had discretion to exclude evidence when a party failed to comply with Fed. R. Crim. P. 16, which provides that defendants who request and receive disclosure of the government's documents must provide reciprocal discovery — not limited to the discovery period, upon request, for items: 1) "within the defendant's possession custody, or control;" and 2) that the defendant intends to use in his/her "case-in-chief." Fed. R. Crim. P. 16(b),(c), and (d)(2)(C).

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