Criminal Litigation
FROM THE SECTION OF LITIGATION CRIMINAL LITIGATION COMMITTEE
Fall 2011, Vol. 12, No. 1

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Lessons from the Failed Prosecution of In-House Pharmaceutical Counsel

By Ronald J. Friedman and Michelle Peterson

"The business of the advocate, simply stated, is to win if possible without violating the law." Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1031, 1037 (1975). As recently experienced by a pharmaceutical associate general counsel, the line between fair advocacy and criminality is not a settled matter and can be clouded in the eyes of the beholder. The result of this collision can be disastrous. The U.S. Justice Department's recent failed prosecution of Lauren Stevens, associate general counsel at GlaxoSmithKline (GSK), in *United States v. Lauren Stevens*, Case No. 8:10-cr-00694-RWT (May 2011), is illustrative. The government's prosecution arose due to Stevens's alleged failure to provide complete answers in response to an informal and voluntary request for information during an investigation being conducted by the Food and Drug Administration (FDA). While corporate in-house lawyers across the country were sure to breathe a collective sigh of relief at news of the acquittal of Stevens by District Judge Roger Titus of the United States District Court for the District of Maryland, who pulled the case away from the jury in order to dismiss it, inquisitive minds also wondered how the prosecution got as far as it did and what, if anything, can be learned from Stevens's ordeal.

A Too Slim Response to the FDA's Request

Stevens's story begins on October 9, 2002, when GSK received a letter from the FDA seeking information regarding the possible off-label promotion by GSK of GSK's well-known product, Wellbutrin. Wellbutrin was FDA-approved as an anti-depressant, but it was also believed to have weight loss potential and had that off-label use. Under current law, the affirmative marketing of a drug by a drug manufacturer for any use not approved by the FDA exposes that manufacturer to civil and criminal liability. However, physicians are free to prescribe the drug for an unapproved use so long as that prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. The FDA requested that GSK provide copies of all marketing materials, in any form, used by GSK to promote Wellbutrin, for any and all uses. Lauren Stevens, GSK's associate general counsel, was assigned the primary task of gathering the information and responding to the FDA letter. Stevens enlisted two GSK in-house attorneys, both of whom had previously worked for the FDA, to assist her in responding to the letter. Stevens also consulted with an outside legal team, led by a former FDA associate chief counsel, to advise in responding to the FDA's inquiry.

On October 25, 2002, Stevens participated in a telephone conference with the FDA, concerning the breadth of the FDA's request, wherein she agreed that GSK would make a good-faith effort

to obtain materials from outside doctors under contract with GSK, including physician speakers at GSK-sponsored promotional events. Stevens confirmed GSK's agreement in a letter to the FDA with the caveat that GSK would need to obtain consent of the owners of the additional material before GSK could properly include such materials in its response. Stevens agreed to advise the FDA if GSK was unable to secure such outside approval.

In December 2002, Stevens sent a letter to some 550 speakers who had given promotional talks on behalf of GSK. Several physicians responded with information indicating that they had promoted Wellbutrin for unapproved uses, including weight loss, at GSK-sponsored events.

Stevens sought legal advice from other GSK counsel as well as outside counsel as to whether these additional materials should be turned over to the FDA as part of GSK's response. This request for advice culminated in a legal memorandum setting forth the pros and cons of turning over the materials. On the con side, GSK's legal team determined that voluntarily turning over the materials would provide "incriminating" evidence against GSK. On the pro side, it was recognized that turning over the information would "potentially garner credibility" with the FDA.

Stevens proceeded to respond to the FDA inquiry without disclosing any evidence of such off-label promotion. Upon learning that another GSK employee had turned over some instances of such off-label promotion by physicians, Stevens wrote to the FDA, characterizing these instances as "isolated deficiencies," and stated that "the objective evidence clearly demonstrates" that GSK "has not developed, maintained, or encouraged" such off-label promotional use.

In November 2010, following a lengthy criminal investigation that included a court order disclosing much of GSK's attorney-client communications between Stevens and other counsel with whom she consulted, Stevens was indicted by a federal grand jury on several felony obstruction charges, including obstruction of a proceeding in violation of 18 U.S.C. § 1512, falsification and concealment of documents in violation of 18 U.S.C. § 1519, and making false statements in violation of 18 U.S.C. § 1001.

Dismissal of the Indictment

One month before trial was to commence, Judge Titus displayed his first hints of doubt regarding this prosecution when he threw out the indictment, without prejudice, based on the government's errant response to a grand juror question regarding the applicability of the "advice of counsel" defense. During a colloquy between the prosecutor and the grand jury, a standard feature of grand jury proceedings, one juror asked, "Does it matter that maybe she was—that Lauren Stevens was getting direction from somebody else about how to handle this? Does it matter or is it not relevant?" Judge Titus was troubled by the prosecutor's response, which conveyed that the "advice of counsel" defense may only be raised by the defendant *after* she had been charged and that it was therefore not a proper factor for the grand jury to consider in deciding whether or not there was probable cause to indict.

As explained below, Judge Titus disagreed, holding that good-faith reliance on the "advice of counsel" negates the wrongful intent required to commit each of the charged offenses and therefore is a fully appropriate factor for the grand jury to consider in deciding whether there was probable cause to believe an offense had been committed. Judge Titus concluded that a proper response to the juror's question would have been that if Stevens relied in good faith on the advice of counsel, after fully disclosing to counsel all relevant facts, then she would lack the wrongful intent required to violate the law and could not be indicted for the crimes alleged. Because the grand jury had been materially misled, the court ruled that dismissal was appropriate. However, because it had not been shown that the prosecutor's erroneous explanation was willful or intentional, the dismissal was without prejudice.

The Government Returns

Not to be deterred, the government returned to the grand jury forthwith and obtained a new indictment of Stevens on all of the same charges. Trial commenced in May 2011. Following the presentation of evidence by the government, Judge Titus dealt his final blow to the prosecution by granting Stevens a Rule 29 motion to acquit on all charges. As explained below, Judge Titus's ruling was based primarily on the finding and conclusion that Stevens's actions amounted to zealous advocacy, consistent with the advice of inside and outside counsel, and that no crime had been committed.

Would Your Outside Counsel Do This for You?

Before turning to Judge Titus's order, it is worth highlighting the declaration filed by Stevens's trial counsel during pretrial proceedings summarizing the participation by other counsel, including outside counsel, in preparing the response to the FDA. According to the declaration, outside counsel prepared all of the first drafts of the letters Stevens submitted to the FDA containing the allegedly false statements, and outside counsel reviewed and approved multiple drafts of those letters. Outside counsel and GSK jointly took the position that while there may have been rogue physicians promoting the unapproved use of Wellbutrin, such was not the corporate policy of GSK, and it was not encouraged, promoted, or directed by GSK; therefore, GSK's answers and responses to the FDA were accurate. According to the declaration, it was part of a joint plan and intention by GSK and outside counsel to present the withheld materials to the FDA at a follow-up meeting with the FDA in 2003, but GSK's calls to the FDA to schedule the meeting were never responded to; accordingly, this meeting never took place.

One Judge's Crime Is Another's Bona Fide Legal Representation

Judge Titus began his ruling on the Rule 29 motion by questioning the wisdom of the United States magistrate judge who earlier ruled that a significant amount of GSK's attorney-client privileged documents had to be produced to the government in the underlying investigation on the basis that the documents were discoverable under the crime-fraud exception. The crime-fraud exception abrogates the privilege against disclosure typically accorded communications between attorney and client where, as noted by Judge Titus, "the evidence establishes that the client

intended to perpetrate a crime or fraud and the communications at issue between the attorney and the client were made in furtherance of such crime or fraud." Judge Titus referred to this ruling by the magistrate judge as "an unfortunate one." Judge Titus specifically rejected the notion that Stevens was planning a criminal scheme when she sought the advice of counsel. To the contrary, Judge Titus found that a review of all of the privileged documents produced by GSK showed "a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client." In addition, Judge Titus concluded while Stevens's responses "may not have been perfect" and "may not have satisfied the FDA," they were communicated to the FDA "in the course of her *bona fide* legal representation of a client and in good faith reliance on both external and internal lawyers for GlaxoSmithKline."

Judge Titus ruled that the "safe-harbor" provision of the Sarbanes-Oxley Act set forth in Title 18 United States Code, Section 1515(c) compelled the acquittal of Stevens as to those counts charged under Title 18 United States Code Section 1512 (the "obstruction of proceedings" counts). The "safe-harbor" provision provides that defense counsel may not be punished under section 1512 for the "provision of lawful, *bona fide* legal representation services."

Further, Judge Titus concluded that Stevens was entitled to acquittal on all of the remaining counts as well, because the evidence could only support one conclusion, which was that Stevens acted in good faith and on the advice of counsel to whom she had disclosed all relevant information; therefore, her lack of wrongful intent negated all remaining counts. Accordingly, the court acquitted Stevens on all remaining counts of the indictment.

Given that the Rule 29 judgment of acquittal was granted following the close of the government's case, double jeopardy barred further prosecution of Stevens. Lest the legal public think Judge Titus acted precipitously, or was a "quick draw," Judge Titus pointed out that in all his years on the bench, and after denying numerous Rule 29 motions to date, here the granting of such motion was unavoidable.

In granting the Rule 29 motion, Judge Titus made the following comment:

> [L]awyers do not get a free pass to commit crimes, . . . a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud.

Summing up, Judge Titus told the lawyers arguing the case before him: "Not everybody can win the case. One person has to win or one person has to lose this. In this case, I conclude that justice wins by acquitting this lawyer of the charges brought against her."
Judge Titus clearly took a very dim view of the government's prosecution of Stevens. Having first concluded that the grand jury proceedings were tainted by the prosecutor's erroneous legal explanation, only to be met with a new indictment, Judge Titus took the exceptional step of

ending the government's prosecution, with prejudice, by granting a judgment of acquittal on the basis that the evidence presented, construed in the government's favor, was insufficient to sustain a conviction. Double jeopardy bars any further prosecution.

Lessons Learned

In a situation like this, there are no winners. Certainly, the government does not benefit when a judge dismisses its case. It is a costly embarrassment. And one can hardly characterize an individual who has been twice indicted, made to endure the arduous and angst-filled toll of a federal criminal trial, and who is victorious whether by the judge's or jury's hand, as a winner in any meaningful sense.

So what is the lesson? If there is a lesson to be learned, it is that we care greatly about our adversarial system of justice, and in the same sense that we are more interested in letting the guilty go free to protect the innocent, we are more interested in coming down hard on the side of allowing a lawyer wide berth in exercising his or her loyalties and responsibilities on behalf of a client, lest the lawyer become the shill and proxy of the government. And when the lawyer becomes the shill of the government, guess what? We all lose. Because we have lost a very important part of our system, and its protections are for us all. When lawyers are intimidated or afraid to act zealously to protect the interests of their clients for fear that they may be charged criminally for their actions, we all lose.

The situation in which Stevens found herself was not an easy one. GSK had received a voluntary request for information, rather than a subpoena, and all counsel—inside and outside—truly wondered whether the additional information should be produced, given GSK's argument that these were unapproved practices of physicians and given that counsel owed an obligation to advocate and protect the interests of her client. As is the case with many areas of law, there is room for disagreement. However, rather than regard this as a good-faith and principled disagreement among legal practitioners as to whether the better practice was for GSK to produce the disputed material, the government chose to forgo a more tempered response and, instead, opted to "swing for the fences" by charging the associate general counsel with several felony counts of obstruction of justice and related offenses. When it did, all were ill-served.

The GSK case stands as a tribute to the principle and a reminder to us all that the role of counsel to act zealously for the protection of his or her client must be protected and should be sacrosanct. And if it means that, on occasion, an in-house lawyer may receive even bad advice, and a government's investigation may thereby be hindered or even thwarted, this may be a negative in the context of the particular investigation, but to prosecute the lawyer for honoring his or her obligations to a client, even mistakenly, is not the way to resolve the dilemma.

The case also stands as a reminder for counsel not to be reluctant to seek to pierce and unmask the secrecy traditionally afforded grand jury proceedings, where there is a basis to believe that material improprieties may have occurred, such as legal misstatements by government counsel.

Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) expressly provides for such relief upon a showing that grounds may exist to dismiss an indictment based on matters that occurred before the grand jury. Our system of justice is hardly advanced when improper statements of law are made and public citizens, whose sworn duty it is to enforce the law and to decide who shall be indicted, receive faulty information from those entrusted with the sworn duty to provide accurate explanations of law. And whether done willfully or unwittingly by a prosecutor, the result is the same—an individual is improperly indicted. And one ought not be surprised that there may be additional such occurrences that will go undetected, absent the continued scrutiny and appropriate challenge made by diligent defense counsel.

Today, the role of corporate counsel is ever more complex due to the increasing pressures and incentives to cooperate with the government, which cooperation must forever be reconciled with the lawyer's obligations to protect the interests and confidences of his or her client. This incongruence was illuminated in the months leading up to Stevens's trial in a speech by Assistant Attorney General Lanny Breuer of the Criminal Division of the Department of Justice to a gathering of corporate counsel.Assistant Attorney General Lanny A. Breuer, Dep't of Justice, Criminal Division, Address at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011).

Referring to the then pending Lauren Stevens indictment, Assistant Attorney General Breuer stated, "[T]he way I see it, your only incentive should be to ensure that your organization is conducting business responsibly, in every corner of the globe in which it operates." *Id.* This proclamation was coupled with the directive that corporate counsel go forth to detect, deter, and prevent crime within the organization and to lead it down the path of responsibility and compliance. Although laudable, and intermittently achievable, these results are often difficult to achieve and may cause the attorney to come into direct conflict with his or her other sworn responsibilities to his or her client, to his or her mission, and to our adversarial system of justice.

It remains the difficult job of corporate in-house counsel and outside counsel to seek to reconcile these interests. But one thing is for sure: Such counsel should not have to worry about criminal prosecution in the event their good-faith decisions are second-guessed. And that is the message well sent by the court's decision in *Stevens*.

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Reconsidering the Extraterritorial Reach of the Mail and Wire Fraud Statutes

By Norman Moscowitz

Assume the following scenario: A group located in England that orders goods from a company, also located in England, plans and executes a "bust-out" scheme. However, at some point during the execution of the scheme, to enhance its credibility or for lulling purposes, the schemers have a confederate in the United States send an email or mailing to the victim company.

Based on that communication, a federal prosecutor in the United States could indict the English participants in the scheme under the mail and wire fraud statutes substantively or, at a minimum, for conspiracy and, on the current state of the law, expect the indictment to survive a motion to dismiss. The reach of those statutes to certain kinds of frauds (i.e., fiduciary and honest services) has been cut back. (*See Skilling v. United States*, 130 S. Ct. 2896 (2010). *See also Cleveland v. United States*, 531 U.S. 12 (2000) (holding that a state-issued license is not property for purposes of the mail fraud statute.)) However, the courts have not set any comparable limitation on their use to prosecute frauds that are, at their essence, extraterritorial. To the contrary, these statutes have been given broad extraterritorial application, and motions to dismiss that have raised the issue have not been successful.

The recent Supreme Court decision in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010), may, however, suggest an opening for revisiting that issue. In *Morrison*, a securities fraud action, the Court reaffirmed the primacy of the statutory presumption against extraterritoriality. Unless congressional intent to make a statute extraterritorial is clear, it is presumed that the statute does not have extraterritorial reach. As the Securities Exchange Act is silent as to its extraterritorial reach, the Court held that it should be construed to have none. In further reliance on the presumption, the Court struck down the conduct and effects tests, which have been developed chiefly by the Second Circuit for determining when exceptions should be made for arguably extraterritorial cases, a holding that should have consequences for the application of other "silent" statutes. Indeed, the Second Circuit has, in response to *Morrison*, abandoned its conduct and effects tests for Racketeer Influenced and Corrupt Organizations (RICO) Act cases. *See Norex Petroleum Ltd. v. Access Indus.*, 631 F.3d 29 (2d Cir. 2010).

The *Morrison* holding should similarly make a difference in the construction of the mail and wire fraud statutes. Until now, courts have generally approached the issue of a statute's territorial reach as a question relating to its jurisdiction. However, *Morrison* defines the issue of extraterritoriality as a "merits" issue rather than a "jurisdictional" one. Thus, under *Morrison*, with reference to mail fraud, while a use of the domestic mails would confer jurisdiction on a federal court to hear a case involving an otherwise foreign scheme, that doesn't answer whether the statute should be construed to apply to the prosecution of such schemes. Similarly, while the

wire fraud statute's reference to foreign commerce, for jurisdictional purposes, has previously been held to be a sufficiently clear indication of congressional intent to give it extraterritorial reach, that should no longer be the case. Indeed, *Morrison* specifically rejected the argument that a statute's reference to foreign commerce shows such intent. In other words, under *Morrison*, a criminal statute's expansive jurisdictional provisions no longer necessarily provide a basis for its extraterritorial application.

While American criminal jurisdiction is ordinarily territorial, there is no issue as to whether Congress can give its laws extraterritorial application. It can. Rather, the issue is whether, in enacting a particular statute, Congress has intended to do so. The courts have always upheld the reach of the mail and wire fraud statutes to the prosecution of foreign frauds against defense arguments that they should not be applied extraterritorially. However, these rulings have usually avoided determining whether the statutes are extraterritorial by holding that what matters is whether the statutes' domestic jurisdictional requirements have been met. The statutes have been construed to penalize the domestic use of the instrumentalities of commerce in the commission of frauds, wherever they may be executed, not the frauds themselves. The "gist of the offense" is not the devising of the fraudulent scheme, it is the use of the mails to execute it. *Hartzell v. United States*, 72 F.2d 569, 576 (8th Cir. 1934). Similarly, as to wire fraud, see, for example, *United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982), "jurisdiction under § 1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme." As the Sixth Circuit stated in *United States v. Wood*, 364 F.3d 704, 711 (6th Cir. 2004), "'the mail and wire fraud statutes do not penalize the victimization of specific persons; rather, they are *directed at the instrumentalities of fraud*.' . . . 'The place where the scheme is conceived or put in motion is immaterial, it is the place of mailing or delivery by mail.'" (emphasis in original).

At least one pre-*Morrison* case, *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001), did give consideration to the presumption. However, it determined that the wire fraud statute is intended to reach frauds primarily carried out abroad. It found a "clear" indication of such congressional intent in a 1956 amendment that "include[d] the words 'foreign commerce' so as to reach fraud schemes furthered by foreign wires as well as by interstate wires." *Id.* at 189.

In *United States v. Christopher West*, Case No. 08 CR 669 (N.D. Ill. June 23, 2010), the court construed the mail fraud statute to be extraterritorial on a different rationale, pursuant to *United States v. Bowman*, 260 U.S. 94 (1922). In *Bowman*, the Court had approved the extraterritorial application of a criminal statute prohibiting a conspiracy to defraud a corporation in which the United States is a shareholder, even though the statute was silent as to its extraterritorial application. (The scheme took place on the high seas on board a ship owned by the corporation.) While the Court affirmed the continuing applicability of the presumption against extraterritoriality, it held that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction or fraud wherever perpetrated . . ." *Id.* at 98. *West*'s reliance on *Bowman* is not

persuasive because it was premised on the fact that the victim of the fraudulent scheme (committed at Bagram Air Force Base, Afghanistan) was the United States, and "an extraterritorial location would be a probable place for its commission." *West*, No. 08 CR 669 at 8. However, *Bowman* does not hold that a statute's extraterritorial reach is to be construed "as applied." The determination is instead to be made based on whether the purpose of the statute is the protection of the interests of the United States. The mail and wire fraud statutes, of course, are also intended to protect nongovernmental victims.

So, if, as in *Kim*, the wire fraud statute can be construed to have extraterritorial application, even when the presumption against extraterritoriality is considered, how does *Morrison* affect the issue? First, it reframes it procedurally. Until *Morrison*, the issue of extraterritoriality had been viewed as jurisdictional. *Morrison* "corrects" that "threshold" error. It defines the issue of extraterritoriality instead as a "merits" question. As it states, "[T]o ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question. Subject matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.'" *Morrison*, 130 S. Ct. at 2877. Thus, the fact that the use of the mails and interstate and foreign wire facilities confers jurisdiction to hear cases under sections 1341 and 1343 doesn't mean that those statutes are to be construed to have extraterritorial reach. Moreover, *Morrison* specifically rejects the argument that a statutory reference to foreign commerce shows that a statute is intended to have extraterritorial application. Section 10(b) of the Securities Exchange Act, under review in *Morrison*, prohibits any manipulative or deceptive conduct under the regulations of the SEC, that is, Rule 10b-5, "by the use of any means or instrumentalities of interstate commerce or the mails . . ." However, *Morrison* states that there is "nothing" in that language "to suggest it applies abroad." *Id.* at 2881. In response to the government's argument that the reference to foreign commerce in the statute's definition of interstate commerce shows such intent, the opinion makes clear that "[t]he general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Id.* at 2882.

The implications, then, of *Morrison* for construction of the mail and wire fraud statutes should be clear: They cannot be construed to have extraterritorial reach based on the expansive scope of their jurisdictional provisions. As they are otherwise silent as to their reach, and there is nothing about their scope and purpose that renders locality irrelevant, they should be construed to be domestic statutes.

The argument against the extraterritoriality of the mail and wire fraud statutes, in reliance on *Morrison*, has so far been made unsuccessfully in two cases, *United States v. Coffman*, 2011 U.S. Dist. LEXIS 14600 (E.D. Ky. 2011), and *United States v. Mandell*, 2011 U.S. Dist. LEXIS 27064 (S.D.N.Y. 2011). However, neither provides a fair test of the argument; in both, there was substantial domestic conduct. Indeed, in *Mandell*, the district court noted that the "fact that defendants engaged in some conduct abroad does not mean that conduct here in the United States is not covered by the mail and wire fraud statutes." *Mandell*, 2011 U.S. Dist. LEXIS 27064, at *15. Even so, both courts relied on the Supreme Court's earlier decision in *Pasquantino v.*

United States, 544 U.S. 349 (2005), in rejecting the defendants' arguments that the statutes don't reach foreign frauds.

That reliance, however, may be misplaced. In *Pasquantino*, the defendants were convicted of a wire fraud scheme in which they smuggled liquor into Canada, defrauding the Canadian government of excise tax revenues. While, factually, the case involved a fraud on a foreign victim, the Canadian government, the primary issue was not whether the wire fraud statute should be construed extraterritorially. It was whether the prosecution violated the common law revenue rule, which bars U.S. courts from enforcing the tax laws of foreign countries. The majority opinion determined that it did not. The issue of the statute's extraterritoriality was raised by Justice Ginsburg's dissent, which maintained that this prosecution was an impermissible extension of the statute's reach, in violation of the presumption against extraterritoriality. As the dissent stated, "[c]onstruing §1343 to encompass violations of foreign revenue laws . . . ignores the absence of anything signaling Congress' intent to give the statute such an extraordinary extraterritorial effect." *Pasquantino*, 544 U.S. at 377 (Ginsburg, J., dissenting). However, the majority opinion gave short shrift to the argument, dismissing it as a "novelty" and denying that its decision gave the wire fraud statute extraterritorial reach. The majority stated that the case presented a domestic application of the statute, pointing to the execution of the scheme by the "use of U.S. interstate wires." At the same time, the majority suggested in passing that the statute has extraterritorial application. Because the wire fraud statute can be employed to punish frauds "executed in interstate or foreign commerce," it "surely [is] not a statute in which Congress had only 'domestic concerns in mind.'" *Id.* at 372.

Given that the majority opinion found the execution of the scheme in *Pasquantino* to be domestic, its suggestion that Congress intended extraterritoriality by its statutory reference to foreign commerce is at best dictum. More important, it is inconsistent with *Morrison*'s later statement that "'we have repeatedly held that even statutes that . . . expressly refer to '*foreign* commerce' [in their definitions of commerce] do not apply abroad. . . . The general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Id.* at 2882 (emphasis in original). Moreover, the implication that use of interstate facilities would alone be sufficient to render an otherwise extraterritorial scheme domestic also appears to be contradicted by *Morrison*'s separation of a statute's jurisdiction from the issue of its territorial reach and by its discounting of the significance of jurisdictional contacts in determining whether an essentially extraterritorial case should be deemed to be domestic. As *Morrison* states,"[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.*at 2884.

If the mail and wire fraud statutes are no longer to be construed to have extraterritorial application, how then should the determination be made as to what constitutes domestic criminal activity that is within their reach? The answer should be relatively easy with regard to schemes at the two ends of the spectrum. Ponzi schemes such as Madoff's or the Rothstein scheme in South Florida, planned and primarily executed in the United States, are clearly domestic. On the other

end of the spectrum, the bust-out described in the opening paragraph and the scheme in *United States v. Kim* appear to be impermissibly extraterritorial. (In *Kim*, the defendant, a New York resident, was indicted for wire fraud for approving payment of inflated travel vouchers submitted to the United Nations as part of its peacekeeping mission in Bosnia-Herzegovina, while he was stationed in Bosnia-Herzegovina. The payments were made by wire from a New York bank.) However, what about the schemes, such as in *Coffman* and *Mandell*, that are transnational? How is the determination to be made at what point a scheme that is both domestic and foreign in participants and execution should be considered to be extraterritorial?

The Court's approach in *Morrison* to such line drawing was to determine the "focus" of congressional concern, separate and apart from the location "where the deception originated." It held that section 10(b)'s focus is on transactions in securities listed on domestic exchanges and domestic transactions in other securities. Similarly, in *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010), a RICO case in which, following *Morrison*, the district court dismissed the complaint as alleging an extraterritorial scheme, RICO's focus was construed to be on domestic enterprises "as the recipient of, or cover for, a pattern of criminal activity." (The author represents one of the defendants in this case, which is now on appeal.) However, defining a "focus" for mail and wire fraud purposes is not as neatly done. While there may be a formal entity that is used in the execution of the fraud, such as a brokerage or law firm, there may not be such an entity, or there may be both foreign and domestic entities.

Another substantial issue is the application of the statutes to fraudulent schemes located outside the United States and directed against victims in the United States, for example, the hypothetical English bust-out ordering its products from a U.S.- based supplier. Victim venue, that is, the filing of charges in the district where the victim is located, has long been a staple of mail and wire fraud prosecutions. More fundamentally, it would be difficult to argue that the anti-fraud statutes were not intended to protect domestic victims against targeting by foreign schemes, even though that position appears contrary to *Morrison*'s categorical rejection of domestic effects exceptions for extraterritorial schemes. *Morrison*, 130 S. Ct. at 2878–81.

A possible approach would be, as has been suggested with regard to RICO, to develop a "predominance test," which would look at whether the United States is the center of the alleged criminal activity, both as to the location of the execution of the scheme, use of the mails and wires aside, and the defendants and victims. (With regard to RICO, see Jonathan C. Cross, "RICO's Post-'Morrison' Reach: Will Other Courts Adopt the 2nd Circuit's Approach?," *Law.com* (Nov. 12, 2010).) This is, effectively, the Second Circuit's approach in *Norex*, which defined the issue as whether a federal court can hear a RICO claim that "primarily involves foreign actors and foreign acts." *Norex*, 622 F.3d at 149.

In sum, the effort to provide guidelines for distinguishing the domestic from the extraterritorial under the mail and wire fraud statutes may prove to be less straightforward than under the securities laws and RICO. However, given the range of prosecutions brought under these

statutes, the issue will continue to arise with some frequency. Defense lawyers are now armed with better arguments, following *Morrison*, for challenging the prosecution of cases that are extraterritorial.

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The Shifting Grounds of the Constitutional Right to Confrontation

By Emily R. Schulman and Melissa Turitz

The Confrontation Clause of the Sixth Amendment, made binding on the states by the Fourteenth Amendment, guarantees that in all criminal prosecutions, the accused shall have the right to "be confronted with the witnesses against him." This procedural guarantee—of the right to face one's accusers—generally requires that a defendant has the opportunity to cross-examine witnesses. Questions about the limits of the Confrontation Clause's protection arise, however, when witnesses are unavailable for cross-examination.

In such cases, prior to 2004, the Confrontation Clause provided little additional protection to the protection already provided by the rules of evidence. In criminal litigation, as enunciated in the U.S. Supreme Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), "reliability" was the touchstone of Confrontation Clause evaluations. Statements for which defendants did not have an opportunity for cross-examination would nonetheless be admissible if they met one of the hearsay rules' exceptions or otherwise bore indicia of trustworthiness or reliability.

Almost a quarter of a century later, in 2004, and again in 2006, the Supreme Court revisited the Confrontation Clause and, rejecting reliability, began developing a new bright-line inquiry focusing solely on whether the statements were testimonial or non-testimonial. These decisions—*Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006) (decided jointly with *Hammon v. Indiana*, 547 U.S. 813 (2006))—suggested a judicial revival of the Confrontation Clause. Justice Scalia, writing for the Court in both opinions, emphasized that the Confrontation Clause stood as an independent guarantee separate from the rules of evidence and promised greater predictability with the Court's new approach.

In contrast to the Court's promises in 2004 and 2006, the recent Supreme Court decision in *Michigan v. Bryant*, No. 09-150, 131 S. Ct. 1143 (Feb. 28, 2011), appears to stand as a setback to judicial efforts to provide greater predictability and differentiate the Confrontation Clause from the rules of evidence. With its renewed references to reliability, *Bryant* reopens the question of whether reliability is relevant to constitutional evaluations of testimony under the Confrontation

Clause. And with the *Bryant* Court's employment of a multifactorial evaluation, Confrontation Clause jurisprudence again becomes significantly more malleable and outcome oriented.

The consequences of *Bryant* for criminal defendants are considerable. Under *Bryant*, if faced with unavailable witnesses, defendants will be left arguing over what are considered non-testimonial statements, especially in the context of "ongoing emergencies." Multiple factors—including the formality of the interrogation during which a statement is made, the use of a weapon, the private nature of the dispute, the existence of an ongoing emergency, and the actions and statements of both the witness and interrogator—must be examined. Defendants will face the possibility that any witness statements made to first responders, including police officers, medical responders, or 911 operators—until such time that the defendant is apprehended, or at least his or her motive, identity, and location are learned—could be considered non-testimonial. Moreover, defendants will need to assume knowledge of both the witness's perspective and motives in making his or her statements and the first responders' motives and perspective in taking such a statement. In any given case, the defendant may need to argue that either the primary purpose of the witness, in making the statement, or the first responder, in taking the statement, is paramount to the evaluation regarding what is testimonial.

Confrontation Clause Jurisprudence Pre-*Bryant*

Prior to 1980, the Supreme Court had ruled on Confrontation Clause issues but had not sought to proclaim a general doctrine for Confrontation Clause evaluations. *See Ohio v. Roberts*, 448 U.S. 56, 64 (1980) ("[T]he process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.") (internal quotations omitted). In 1980, as noted above, the Supreme Court announced that "reliability" was the touchstone of Confrontation Clause evaluations. Since that time, the Supreme Court has experienced a sea change in approach, as it first rejected reliability and then attempted to provide further guidance for the courts for when statements should be considered testimonial and when they should be considered non-testimonial and subject only to the varying rules of evidence.

Indicia of Reliability

In *Ohio v. Roberts*, 448 U.S. 56 (1980), a defendant was convicted of forgery and receiving stolen property, among other things, partially on the basis of statements made during a preliminary hearing by a defense witness who subsequently became unavailable for trial. *Id.* at 58–60. At the preliminary hearing, the defense counsel questioned the witness at length but did not request to have her declared hostile or to place her on cross-examination; the prosecution never questioned the witness. *Id.* at 58. At trial, and on appeal, the defendant objected to the admission of a transcript of the witness's preliminary hearing statements as a violation of his rights under the Confrontation Clause. *Id.* at 59–60. After the Supreme Court of Ohio held that the transcripts were inadmissible because the witness had not been cross-examined at the

preliminary hearing, although the defendant had an opportunity to do so, the U.S. Supreme Court granted certiorari. *Id.* at 61.

The Supreme Court attempted to clarify the relationship between the Confrontation Clause and the evidentiary rules regarding hearsay. *Id.* at 62. It emphasized the importance of "face-to-face confrontation at trial" to test a witness's accuracy but recognized that competing interests existed for sometimes dispensing with the requirement of cross-examination. *Id.* at 63–64. The root of the test defined in *Roberts* was whether the proposed evidence bore some "indicia of reliability." *Id.* at 66. In that manner, the Court found that the rules of hearsay and the Confrontation Clause were closely bound and that for the purposes of Confrontation Clause exceptions, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception [or] particularized guarantees of trustworthiness." *Id.* at 66.

Testimonial Versus Non-Testimonial Statements

Twenty-four years later, in *Crawford v. Washington*, 541 U.S. 36 (2004), Justice Scalia's majority opinion rejected *Roberts* and its use of "reliability" for Confrontation Clause evaluations. *See Id.* at 60–65. In *Crawford*, a defendant accused of assault and attempted murder contested the trial court's admission of his wife's witness statements, which were made during a recorded police interview shortly after the attack. *Id.* at 40–41. The wife did not testify at trial and, thus, was unavailable for cross-examination. *See id.* After the Washington Supreme Court unanimously concluded that the wife's statements were admissible because they bore "guarantees of trustworthiness," the Supreme Court granted certiorari to consider whether the statements violated the Confrontation Clause. *Id.* at 41–42.

The *Crawford* opinion explained that conditioning the admissibility of hearsay evidence only on whether it falls within a "firmly rooted hearsay exception" or bears other guarantees of trustworthiness did not adequately address the concerns behind the Confrontation Clause. *See id.* at 60. In the Court's 2004 opinion, it was not sufficient for a statement to be merely reliable; the Confrontation Clause required that the reliability be tested, if a statement was *testimonial*, by cross-examination. *Id.* Thus, *Crawford* imposed "an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine." *Id.* Although it did not provide a "precise articulation" or "comprehensive definition" of "testimonial," *Crawford* was clear that out-of-court statements could be testimonial, depending on whether they were "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 52, 61 (internal quotations omitted) (including ex parte in-court testimony, such as affidavits, custodial examinations, or prior testimony that the defendant could not cross-examine; extrajudicial statements, such as depositions or confessions; or statements made where an objective witness could reasonably believe that he or she could be used at trial or for prosecutorial purposes). The Court also announced that the term unquestionably covered at least two types of statements: (1) prior testimony at a preliminary hearing, grand jury session, or former trial and (2) police interrogations. *Id.* at 68.

Moreover, in *Crawford*,Justice Scalia faulted the *Roberts* reliability test because the "framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.* at 63. *Crawford* stated that there were "countless factors bearing on whether a statement is reliable." *Id.* at 63. ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each one.") Accordingly, in the Supreme Court's view, reliability was a dangerous way to decide Confrontation Clause exceptions, because the test could result in contradictory findings, depending on the court and the weight ascribed to the various factors.

Ongoing Emergencies and the Primary Purpose Test

Two years after *Crawford*, Justice Scalia, again delivering the opinion for the Court, applied the testimonial doctrine announced in *Crawford* to two domestic violence matters in which the defendants objected to the admission of evidence as violative of the Confrontation Clause. In one, *Davis v. Washington*, 547 U.S. 813 (2006), a declarant/victim provided information to a 911 emergency operator, regarding a domestic dispute. During the call, the 911 operator asked what was going on, where the victim was, whether the attacker had a weapon, and the identity of the attacker. The victim answered these questions, and then informed the operator that her attacker was running away. *Id.* at 817. In the other matter, *Hammon v. Indiana*, 547 U.S. 813 (2006), the police, responding to a domestic disturbance report, found the declarant/victim outside her house. *Id.* at 819. The victim appeared frightened but informed the police officers that nothing was the matter In further questioning by the police, the victim told the police about the domestic dispute, while other officers restrained her husband in a separate room. *Id.* at 820. After the interrogation, the police had the victim complete and sign a battery affidavit describing the altercation. *Id.*

The Supreme Court opinion in *Davis* confirmed that the Confrontation Clause only applies to "testimonial" evidence; thus, the touchstone of the Confrontation Clause evaluations must be whether a statement is "testimonial." *See id.* at 821–22. The Court held as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

Applying its holding to the facts in *Davis*, the Supreme Court found that the declarant's initial statements to the 911 operator were not testimonial, because (1) the declarant spoke about events "*as they were actually happening*"; (2) the declarant's 911 call was a call for help in regard to a real physical threat, and "any reasonable listener would recognize that [the declarant] was facing an ongoing emergency"; (3) the substance of the questions and answers were necessary to

"*resolve* the present emergency"; and (4) the 911 call was frantic and made in an "environment that was not tranquil or even . . . safe." *Id.* at 827 (emphasis in original).

In contrast, viewing the facts in *Hammon*, the Supreme Court found that the statements made to the police officers and in the signed affidavit were testimonial because the interrogation "was part of an investigation into possibly criminal past conduct." *Id.* at 829–30. The Court observed that in *Hammon*, (1) there was no emergency in progress when the police arrived, and the declarant had initially told police that she was not in danger; (2) the declarant was actively separated from the defendant, who was forcibly restrained from participating in the interrogation; (3) the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (4) the statements were made after the events had occurred. *See id.* at 830.

In differentiating the two situations, the Court emphasized that in *Davis*, the declarant was alone, unprotected, in immediate danger, and in the process of seeking assistance, while in *Hammon*, there was no such contemporary danger to the declarant, nor were there any contemporary requests for assistance. *Id.* at 831.

In *Davis*, the Court also provided guidance that statements could evolve from non-testimonial to testimonial. *See id.* at 829. For example, in *Davis*, after the victim informed the 911 operator that her attacker was running away, the operator continued to ask, and was provided with additional information, about the attacker and the context of the assault. *Id.* at 818. In that context, after the operator had gained the information necessary to address the ongoing emergency and after the threat to the declarant had apparently ended, the statements made in response to the "battery of questions" posed by the operator could be considered testimonial. *See id.* at 828–29.

Michigan v. Bryant

In *Michigan v. Bryant*, the Supreme Court extended the Confrontation Clause jurisprudence and applied its testimonial inquiry to a situation that involved the interrogation by the police of a gunshot victim lying in a parking lot, not domestic violence. Justice Sotomayor delivered the opinion for the Court, with dissenting opinions from Justice Scalia and Justice Ginsburg, and a concurrence from Justice Thomas.

The question in *Bryant* was whether statements made in the parking lot to several police officers by the gunshot victim, Anthony Covington, were admissible at the trial of Richard Bryant. Covington died shortly after his interrogation, and Bryant was prosecuted for his murder. *Bryant*, No. 09-150, slip op. at 1. After the trial, which included testimony from the police officers regarding Covington's statements that identified and described Bryant as the shooter and identified the location of the shooting, the jury convicted Bryant of second degree murder. *Id.* Bryant appealed, claiming that the admission of Covington's statements violated his rights under the Confrontation Clause. *Id.*

The Supreme Court found that Covington's statements were not testimonial; accordingly, their admission did not violate the Confrontation Clause. It held that "the circumstances of the interactions between Covington and the police objectively indicate that the 'primary purpose of the interrogation' was to 'enable police assistance to meet an ongoing emergency.'" *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

The Facts of *Bryant*

In *Bryant*, police officers were dispatched to a gas station parking lot to respond to a report that a man had been shot. *Id.* at 2. The officers found Covington lying in the parking lot, bleeding from a gunshot wound to the abdomen. *Id.* At the time, the officers did not know the victim's identity, the location of the shooting, the shooter's identity or location, or the motives for the shooting. *Id.* at 25.

In the 5 to 10 minutes it took for emergency medical services to arrive, the police interrogated Covington about the shooting, asking him, among other questions, what had happened, who had shot him, and where the shooting had occurred. *Id.* at 2. During this time, Covington lay bleeding on the ground, appeared to be in great pain, and had trouble speaking and breathing. *Id.* at 29. In response to questioning by the police, Covington identified Bryant as his shooter and provided a description of Bryant's voice. He stated that he had been shot at Bryant's house and had then driven to the gas station where he was found. *Id.* at 2. Covington did not know Bryant's whereabouts at the time of his questioning by the police.

Discussion and Application of the Law

Reviewing the history of Confrontation Clause jurisprudence, the Supreme Court stated that under *Crawford* and *Davis*, the proper inquiry for Confrontation Clause violations is whether the evidence is "testimonial." To make this determination, the Court confirmed that courts should consider whether there was an ongoing emergency and, if so, whether "the primary purpose of the interrogation is to enable police assistance to meet [it]." *Id.* at 9–11 (internal quotations omitted). Because the facts in *Bryant* did not involve a domestic dispute, the Court found that there was a need to clarify and further expand on the "ongoing emergency" circumstances and the "primary purpose of the interrogation" inquiries that had previously been employed. *Id.* at 12.

The Court first confirmed that the "primary purpose of the interrogation" inquiry is objective. *See id.* at 12. It stated that under *Davis*, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." *Id.* at 13. The circumstances of the interrogation, including the location of the interrogation (at or near the scene of the crime), the timing of the interrogation (during an ongoing emergency or afterward), and the statements and actions of both the interrogators and the respondents are all factors to be considered in determining what the primary purpose of the interrogation would be for reasonable participants. *Id.* at 13.

The Supreme Court then attempted to flesh out several of the circumstances of the interrogation: (1) the existence of an ongoing emergency; (2) the statements, actions, and conditions of both the interrogator and declarant, including the medical condition of the declarant; and (3) the formality of the interrogation. It used these circumstances to determine, first, the existence of an ongoing emergency in *Bryant* and, second, given the ongoing emergency, whether the primary purpose of Covington's interrogation was "to create a record for trial" or gain information necessary to address the emergency.

Existence of an Ongoing Emergency

The court stated that the existence of an ongoing emergency is the "most important circumstance," although not the sole circumstance, for the primary purpose inquiry. *Id.* at 14. In the Court's view, the existence of the ongoing emergency is important because it "focuses the participants on something other than proving past events potentially relevant to later criminal prosecution." *Id.* at 14 (quoting *Davis*, 547 U.S. at 822, 832). The Court reasoned that, like the rationale behind the excited utterance hearsay exception, "the prospect of fabrication in statements given for the primary purpose of resolving [the ongoing] emergency is presumably diminished." *Id.* Thus, these types of non-testimonial statements are permitted despite the Confrontation Clause's requirement for cross-examination.

In *Bryant*, as in *Davis*, the Supreme Court left the boundaries of ongoing emergencies undefined. It recognized that determining whether there is an ongoing emergency is a "highly context-dependent inquiry." *Id.* at 16. The Court explained, however, that the scope of the "ongoing emergency" extends "beyond an initial victim to a potential threat to the responding police and the public at large." *Id.* at 12. Thus, the ongoing emergency assessment must encompass not only the initial threat to the first victim but also the potential continued threat, if any, to first responders and the public. *Id.* at 17. The Court made clear that the end of the violent act does not necessarily mean that the broader emergency has also ended. *Id.* at 27. Similarly, if the police do not know the identity or motivation of an assailant, the emergency does not automatically abate just because the first victim is secured. *Id.* at 17.

In this manner, the Court contrasted *Davis* with *Bryant*. According to the Court, *Davis* involved a confined ongoing emergency with "a narrower zone of potential victims"—in *Davis*, there was one victim, an identified assailant, a weaponless attack, and a known motivation. *See id.* at 16–17. In contrast, *Bryant* was "a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." *Id.* When the police arrived, nothing indicated to them whether the dispute was a private one, what the motives for the shooting were, or whether the threat had ended. *Id.* at 26. Because the violence was committed with a gun, the Court concluded that physical separation "was not necessarily sufficient to end the threat in this case." *Id.* at 27. As a result, the Court determined that there was an ongoing emergency in existence when Covington was interrogated by the police.

The Court acknowledged that an ongoing emergency could evolve into an ended emergency. For example, if the police learned information from the declarant, showing that "what appeared to be an emergency is not or no longer is an emergency or what appeared to be a public threat is actually a private dispute," the ongoing nature of the emergency could end. *Id.* at 18. Similarly, the Court stated that the ongoing emergency could terminate upon the apprehension of the suspect, his disarming, surrender, or flight. *See id.* The Court did not attempt to determine when the ongoing emergency ended in regard to Covington, as the interactions all took place shortly after the police found him and well before they had secured the scene of the shooting or located Bryant. *Id.* at 28.

Statements and Actions of Both the Declarant and Interrogator

The Court also explained that the primary purpose inquiry needed to account "for both the declarant and interrogator." *Id.* at 12. The Court reasoned that a mixed inquiry is more reliable than focusing solely on one participant's actions because that participant—either the interrogator or declarant—could have mixed motives for asking the questions or providing the answers. *Id.* at 21. Although it recognized that the declarant's statements, not the interrogator's questions, are subject to the Confrontation Clause, the Court claimed that it was best to allow courts engaged in a primary purpose test to "consult[] all relevant information, including the statements and actions of interrogators." *Id.*at 23.

The Court further explained that the medical condition of the victim/declarant is relevant to the primary purpose inquiry because the medical condition of the declarant "sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 17–18. Similarly, the medical condition of the declarant provides context that can assist first responders in determining "the existence and magnitude of a continuing threat to the victim, themselves, and the public." *Id.*

Having concluded that there was an ongoing emergency with respect to Covington, the Court proceeded to determine, given the context of Covington's interrogation, whether the primary purpose of the interrogation was testimonial or whether it was to enable police assistance for the ongoing emergency. *Id.* at 28. In doing so, it examined separately the circumstances of the inquiry from both the interrogator's and the declarant's perspectives.

The Court emphasized the nature of Covington's injuries and condition, observing that he had been lying in a parking lot, bleeding from a gunshot wound to the abdomen; that his answers were interspersed with questions about when emergency medical services would arrive; and that he was "obviously in considerable pain and had difficulty breathing and talking." *Id.* It concluded that "we cannot say a person in Covington's situation would have had the primary purpose to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 29 (internal quotations omitted).

The Court also examined the circumstances of the police, emphasizing that when they responded to the report, "they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime had occurred." *Id.* The Court further observed that the questions the police asked were those that would enable the police to assess the situation and the safety threat presented, reasoning therefore that they solicited the information for the purposes of the ongoing emergency. *See id.* at 30.

Formality of the Interrogation
Finally, the Court explained that the formality of the interrogation is another factor in the primary purpose inquiry. In the Supreme Court's opinion, the more formal the interrogation, the less likely that there is an ongoing emergency and the more likely that "the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 19 (internal quotations omitted).

Applying this to the facts before it, the Court considered the informality of the situation and interrogation that occurred in the gas station parking lot. *Id.* at 31. It observed that the circumstances surrounding Covington's interrogation were "fluid and somewhat confused." *Id.* at 31. Likening the situation to the 911 call in *Davis*, as opposed to the police station interrogation in *Crawford*, the Court concluded that "[t]he informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements." *Id.* at 31.

The Implications of *Bryant*
In *Davis*, the Supreme Court noted that the factors differentiating *Davis* from *Hammon* were the existence of an immediate threat to the victim, who was presently unprotected by the police; the contemporary description of ongoing events; and the frantic nature of the interrogation. In light of these differences, despite the clearly domestic nature of *Hammon*, the distinction between *Bryant* and *Hammon* seems somewhat artificial. For all the police knew when they arrived at the gas station parking lot, *Bryant* could have been a domestic or familial dispute that involved a gun rather than fists and a victim located in a public place, not a residence. In both cases, the declarant was physically separated from his or her attacker and protected by a police presence during the interrogation. It is difficult to argue that either declarant was in immediate danger from his or her attacker; it seems unlikely that the attacker would have been able to break through the police protection at the scene of the interrogation to cause further injury. Similarly, in both *Bryant* and *Hammon*, the declarant discussed past events as opposed to describing a contemporary threat. While Covington required medical attention to treat his gunshot wounds, he had already fled from the threat posed by Bryant and was physically separated by time and distance from the attack. Finally, although the *Bryant* court described the nature of the situation and interrogation as "fluid," it is also clear that the interrogation took place in the presence of police and outside the presence of the attacker, as in *Hammon*.

It is important to note that even in *Davis*, where the Supreme Court found that the declarant's initial statements to the 911 operator were non-testimonial, the Court indicated that after the attacker had fled, her subsequent statements made in the same conversation to the 911 operator were testimonial. *See Davis*, 547 U.S. at 828–29. The ongoing emergency interrogation had evolved into a testimonial interrogation. *See id.* This is so although there was still a potential threat to first responders if the attacker had chosen to return. The 911 operator did not know whether the attacker in *Davis* would return, possibly with a weapon, or commit other acts of violence against other members of the public as a result of his anger.

In the wake of *Bryant*, unpredictability in the case law is likely to increase. Although the Court claimed to have followed the precedent set in *Crawford* and *Davis*, the approach that *Bryant* announced resembles the multifactor "indicia of reliability" evaluation criticized in *Crawford* for its unpredictability. First, there is no guidance as to the weight courts should give the various factors of the primary purpose inquiry, beyond the heavy weight given to the existence of an ongoing emergency. Moreover, after *Bryant*, the universe of circumstances contributing to the primary purpose inquiry is still undefined, leaving it up to the lower courts or subsequent Supreme Court opinions to announce what other circumstances may play a role in determining the primary purpose of an interrogation. Second, there is no clear answer regarding the outer boundaries of an ongoing emergency. Questions still remain regarding how wide an exception *Bryant* creates for hearsay evidence. In the dissents by Justices Ginsburg and Scalia, it was claimed that *Bryant* "creates an expansive exception to the Confrontation Clause for violent crimes." *Michigan v. Bryant*, Scalia, J., dissent, at 10 (quoted in Justice Ginsburg's dissent, slip op. at 1). Third, the *Bryant* Court's reference to reliability reopens the question of what relevance reliability has to Confrontation Clause analyses.

Unpredictable Results of the Multifactor Balancing Test

In *Crawford*, Justice Scalia complained of the unpredictability inherent in applying *Roberts*, objecting that "reliability is . . . amorphous, if not entirely subjective" and that "countless factors bear[] on whether a statement is reliable." *Crawford*, 541 U.S. at 63. Instead, the *Crawford* Court chose what it considered to be a purer constitutional standard—whether or not a statement was "testimonial." *Id.* In *Davis*, Justice Scalia, writing for the Court, attempted to clarify further what was meant by "testimonial." Now, in his dissent from *Bryant*, Justice Scalia objected that "[i]nstead of clarifying the law, the Court makes itself the obfuscator of last resort." *Bryant*, Scalia, J., dissent, at 1.

In *Bryant*, the Court's multifactor primary purpose evaluation considered the formality of the situation, the existence of an ongoing emergency, and the actions and statements of both the declarant and interrogators. The Court, however, did not confine the "circumstances of the encounter" to just those four circumstances. Nor did it explain how the factors should be weighed if found to conflict, beyond stating that an ongoing emergency is the most important circumstance to consider. Thus, defendants and prosecutors are left to argue over what other

circumstances may play a role in Confrontation Clause evaluations, and the lower courts are left to decide those circumstances and their relative weights.

In addition, the *Bryant* Court did not provide guidance on how to resolve scenarios of "mixed motives," in which the declarant's and the interrogator's intentions conflict. For example, *Bryant* did not identify whose perspective is more important in the primary purpose analysis. As Justice Scalia claimed, although the Court created a mixed-motive inquiry, it did "not provide an answer to this glaringly obvious problem, probably because it does not have one." *Bryant*, Scalia, J., dissent, at 3.

A court may find itself presented with a situation in which the police officers are gathering information to meet what they perceive to be an ongoing emergency, but the declarant, believing himself or herself to be safe once the police arrive, provides information "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In such a case, despite the declarant's intent, it is unclear whether his statements would be excluded as testimonial because of the police officers' conflicting motives. According to Justice Scalia, the benefit of *Bryant*'s primary purpose inquiry, despite its disregard for the concerns that prompted the Confrontation Clause, is its "totality of the circumstances" approach, which "leaves judges free to reach the 'fairest' result.'" *Bryant*, Scalia, J., dissent, at 5.

No Clear Answer for What Ends an Ongoing Emergency

Questions also remain over how wide the *Bryant* exception is for hearsay evidence that may be admitted despite a lack of confrontation. Although the *Bryant* Court noted the importance of Covington's gunshot wound, it did not confine its analysis to only those situations involving guns. Moreover, the Court noted that "[a]n emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim," *id.* at 27, and that an emergency, "at least as to certain weapons," cannot be said to "last only precisely as long as the violent act itself." *Id.* The Court further commented that "an out-of-sight sniper paus[ing] between shots" does not end the emergency between during those pauses. *Id.* Although an ongoing emergency would seem to clearly encompass a situation in which an unseen sniper pauses between shots, to reload or target a new victim, it is unclear how much further an ongoing emergency extends. The Court noted that did not mean to suggest that the ongoing emergency in *Bryant* extended until Bryant's arrest in a different state a year later, but the Court also noted that at the time of Covington's statements, the police did not know the location of the shooter or his motives. *Bryant*, slip op. at 27–28. Justice Scalia argued in dissent that the police's lack of knowledge regarding a suspect's motive or location is a "dangerous definition of emergency," as "[m]any individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act." *Bryant*, Scalia, J., dissent, at 10.

Practically speaking, using the police's lack of knowledge regarding a perpetrator's motive or location could open up a much lengthier period for Confrontation Clause exceptions than the hour or less found in *Bryant*. If the police canvas a neighborhood the evening of a shooting,

could all witness statements be considered non-testimonial? What if the search lasts longer and covers an area where the police believe a suspect, still armed, *may* be located? Further, what if the unidentified, un-located assailant is armed with not a gun, but a knife? Does that make the assailant sufficiently less of a threat to the public and first responders such that the situation would no longer be considered an ongoing emergency? Finally, returning to the unknown shooter identified in *Bryant*, what if, like the D.C. sniper, the police investigation takes much longer than one evening, and the "paus[e] between shots" is longer than a few moments? *See id.* at 27. At what point does the ongoing emergency end, if not when the declarant is provided with police protection or when the suspect is taken into custody or at least located?

The Role of Reliability in the Confrontation Clause Evaluation

Finally, the *Bryant* Court's discussion of reliability also raises questions as to whether reliability is still a factor in Confrontation Clause evaluations and, if so, how. Reviewing the case law, the Court stated, "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Bryant*, slip op. at 14. It further stated that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 11–12. With such statements, Justice Scalia claimed that the Court's opinion in *Bryant* "is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned." *Bryant*, Scalia, J., dissent, at 12. More mildly, Justice Ginsburg claimed that the majority's opinion in *Bryant* "confounds our recent Confrontation Clause jurisprudence" that states that reliability is irrelevant to determinations regarding whether a statement is testimonial. *Bryant*, Ginsburg, J., dissent, at 1.

It is not clear how, if at all, the Court considered reliability in deciding *Bryant*. Certainly, the Court did *not* state that reliability was a factor in its determination, nor did it discuss why Covington's statements could be considered reliable. However, with its statement regarding *Davis* and the rules of hearsay, the majority of the Supreme Court left open for interpretation how, if at all, courts should treat reliability when conducting a primary purpose inquiry.

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Criminal Litigation
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Grand Jury Subpoenas That Reach Around the World

By Stanley A. Twardy Jr. and Doreen Klein

Technology has erased global boundaries, and so has the federal judiciary. Recent decisions by the Fourth and Ninth Circuit Courts of Appeals have upheld federal prosecutors' use of criminal grand jury subpoenas to obtain foreign documents brought into the United States under the compulsion of civil discovery and governed by civil protective orders. These decisions enhance prosecutors' ability to conduct international investigations at a time when the Department of Justice (DOJ) is aggressively targeting international antitrust and Foreign Corrupt Practices Act (FCPA) violations. *See* News Release, Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *see also* Dep't of Justice, Antitrust Division Update Spring 2011.

Prosecutors may thus, in certain cases, be able to sidestep the lengthy international methods for obtaining foreign discovery, which not only require notice to the foreign sovereign but also a determination from the sovereign, regarding whether the material should be produced at all. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, art. 12 (signatory may refuse request to the extent it "considers that its sovereignty or security would be prejudiced thereby"); art. 23 (permitting signatory to declare at time of ratification that it will not execute Letters of Request issued for the purposes of obtaining pretrial discovery of documents); *see also* U.S. Department of State Judicial Assistance Circular, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (State Department cautions that "[s]ome countries require case-by-case permission from the foreign central authority before a voluntary deposition can be taken.").

The circuit courts have long been divided on the interplay between grand jury subpoenas and civil protective orders with respect to documents maintained by domestic companies. The Fourth, Ninth, and Eleventh Circuit Courts adhere to the rule that grand jury subpoenas trump civil protective orders. *In re Grand Jury Subpoena* (*Under Seal*), 836 F.2d 1468 (4th Cir. 1988); *United States v. Janet Greeson's A Place For Us* (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*), 62 F.3d 1222 (9th Cir. 1995); *In re Grand Jury Proceedings* (*Williams*), 995 F.2d 1013 (11th Cir. 1993). The Second Circuit holds the view that grand jury subpoenas yield to civil protective orders "absent a showing of improvidence in the grant of a . . . protective order or some extraordinary circumstance or compelling need." *Martindell v. ITT*, 594 F.2d 291, 296 (2d Cir. 1979). Each of these stands in contrast to the middle ground taken by the First and Third Circuits, where there is a rebuttable presumption that grand jury subpoenas take priority over civil protective orders. *In re Grand Jury Subpoena* (*Roach*), 138 F.3d 442 (1st Cir. 1998); *In re Grand Jury*, 286 F.3d 153 (3d Cir. 2002).

With two circuits now taking the position that foreign documents are no different than domestic, and with the U.S. Supreme Court declining to weigh in on the issue, *White & Case LLP v. United States*, 79 U.S.L.W. 3728 (June 27, 2011), the specter of government involvement surrounds every decision a party—domestic, multinational, or foreign—makes regarding how to respond to civil discovery demands. A party facing parallel civil and criminal proceedings must consider throughout every step of the civil discovery process whether and to what degree the government might be a partner with a civil adversary.

The Ninth Circuit case is noteworthy in part for the innocuous manner in which the issue arose. After the DOJ began a criminal investigation into price fixing in the sale of thin film transistor liquid crystal display (LCD) panels, private litigants filed civil actions against the manufacturers, which were consolidated in the Northern District of California. *In re: TFT-LCD* (*Flat Panel*) *Antitrust Litig.*, No. 3:07-md-01827 (SI). The DOJ intervened in the civil proceeding, citing its concern about preventing the broad civil discovery rules from circumventing the limited discovery available to unindicted defendants in the criminal case. In response to the DOJ's concerns, the court ordered restrictions on the scope of discovery that were designed to protect the secrecy of the criminal investigation. To ensure that the parties adhered to those restrictions, the court permitted the DOJ to review, but not copy, discovery produced by the defendants pursuant to a stipulated protective order entered in the case. The DOJ apparently liked what it saw, which included documents from the manufacturers' foreign home offices and deposition transcripts of foreign employees—materials the defendants' counsel had in their possession solely because of the civil proceedings. In May 2009, the DOJ moved to modify the court order to permit it to receive photocopies of discovery, rather than merely review the material. However, the special master recommended that the DOJ be limited to reviewing access only, reasoning that the discovery was brought into the United States under court order and that the defendants did not "'choose to avail themselves'" of the courts or voluntarily bring evidence from overseas. Rather, "they were hauled, kicking and screaming, into our courts and have vociferously argued against producing either their documents or their employees into this country during this entire litigation." Report & Recommendation Re: Toshiba Entities Motion for Modifications to the Discovery Schedule and Plan, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 (N.D. Cal. Aug. 24, 2009). The court adopted that recommendation. Order Denying United States' Objections to Special Master's August 24, 2009 Report and Recommendation; Adopting Report and Recommendation, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 (Oct. 20, 2009).

Grand jury subpoenas were then issued to the four law firms holding the discovery material, including White & Case LLP. After the district court quashed the subpoenas, the DOJ appealed to the Ninth Circuit, which reversed in a two-paragraph opinion issued in December 2010. *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010) (*White & Case*), *cert. denied*, 79 U.S.L.W. 3728 (2011). The Ninth Circuit simply applied its per se rule that "a grand jury subpoena takes precedence over a civil protective order." *Id.* at 1144; *see United States v. Janet Greeson's A Place For Us* (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*),

62 F.3d 1222 (9th Cir. 1995). Noting that no collusion between the civil suitors and the DOJ was established or even suggested, the court reasoned that "[b]y chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." *In re Grand Jury Subpoenas*, 627 F.3d at 1144.

The brevity of the decision belied its import. It resurrected the controversy over whether criminal process trumps civil, and it expanded the controversy to foreign documents brought into this country under compulsion of the more generous dimensions of civil discovery. In so doing, it effectively granted the DOJ permission to bypass established international agreements for procuring foreign materials. A prompt petition for certiorari to the United States Supreme Court filed by White & Case captured the issue: "[w]hether a grand jury subpoena trumps a civil protective order regardless of any countervailing considerations, thus permitting federal prosecutors to obtain discovery produced in a parallel civil action under all circumstances." Petition for Writ of Certiorari at 2, *White & Case LLP v. United States*, No. 10-1147 (Feb. 25, 2011). Despite six amici curiae briefs filed in support of the petition by diverse entities, including the National Association of Criminal Defense Lawyers and the Japan Competition Law Forum, the Supreme Court denied the application in June 2011. *White & Case LLP v. United States*, 79 U.S.L.W. 3728 (2011).

The irony is apparent. The DOJ initially entered the civil case to prevent unindicted civil litigants from obtaining information about the criminal case through civil discovery provisions. Ultimately, however, the DOJ used those same broad provisions to access material for its criminal case that it could otherwise obtain only through cumbersome international procedures.

While the Supreme Court was considering White & Case's petition, the Fourth Circuit issued a decision in June 2011 arising from the DOJ's use of grand jury subpoenas in comparable circumstances. In *United States v. Under Seal* (*In re Grand Jury Subpoena*), No. 10-4815, 2011 U.S. App. LEXIS 12043 (4th Cir. June 15, 2011), the Fourth Circuit relied on *White & Case* in similarly ruling that grand jury subpoenas could reach foreign documents governed by a protective order. In contrast to the *White & Case* decision, the Fourth Circuit wrote a lengthy decision in which it made clear that the issue of collusion, mentioned only in passing by the Ninth Circuit, would be central to the controversy.

The case arose from a lawsuit initiated by E.I. DuPont de Nemours against Kolon Industries, a Korean company, for the alleged theft of trade secrets relating to synthetic fiber manufactured by DuPont. *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, Case No. 3:09CV58- REP (E.D. Va. 2011). (In its decision, the Fourth Circuit identified Kolon only as Company 1 and DuPont as Company 2). The DOJ had begun an investigation of Kolon prior to the civil proceeding, but, as of January 2009, the government indicated that its investigation was "'dead.'" *United States v. Under Seal* (*In re Grand Jury Subpoena*), 2011 U.S. App. LEXIS 12043, at *4. Subsequently, with the DOJ's blessing and after the DOJ had reviewed DuPont's complaint, DuPont initiated

the civil proceeding. In August 2009, a grand jury subpoena was issued to DuPont, seeking documents that Kolon had produced to DuPont and employing language drafted for the government by DuPont. In 2010, Kolon produced additional documents to DuPont, designated as "Confidential" and/or "Confidential - Attorneys' Eyes Only" pursuant to a protective order entered in the civil proceeding. Shortly thereafter, the DOJ obtained a second grand jury subpoena, again directed to DuPont, specifically requesting the Kolon documents designated "Confidential" and/or "Confidential - Attorneys' Eyes Only."

Kolon sought to quash the subpoenas, contending that they unreasonably circumvented restrictions on foreign discovery and arguing that there was collusion between the government and DuPont. The Fourth Circuit upheld the district court's denial of Kolon's motion to quash the subpoenas. Relying on *White & Case*, the court rejected Kolon's contention that the subpoenas circumvented restrictions on foreign discovery.

The court also rejected Kolon's contention that the DOJ had colluded with DuPont. The court acknowledged that the government sought DuPont's "assistance and advice in the government's investigation"; the two parties met to discuss the ongoing proceedings; and DuPont updated the government on its civil discovery progress, including advising the government that it had received a specific email about which the government had inquired. *Id.* at *4–7. However, the court held that DuPont's "substantial interaction with the government" did not establish that the government was "directing [DuPont's] civil discovery" despite what the DOJ knew or could have predicted about DuPont's conduct of the civil litigation. *Id.* at *19–20. The court also rejected Kolon's contention that it should have been granted an evidentiary hearing to determine the existence of collusion, noting that Kolon had failed to demonstrate collusion in the district court and rejecting Kolon's contention that it should be permitted to obtain communications between DuPont and the DOJ that the district court had held were work product. Because the district court's decision was filed under seal, there was no indication of the factors that led the court to hold that communications between a private party and the government were work-product materials or how, if at all, DuPont had avoided waiving the work-product protection by revealing the material to the government.

These cases raise issues as significant as they are varied. Standing alone, a criminal grand jury subpoena is a powerful tool for the government. The Supreme Court's denial of certiorari in *White & Case* leaves intact rulings in three circuits that add significant muscle to the subpoena, by according it per se priority over civil protective orders. A party facing parallel civil and criminal proceedings in those circuits has little choice but to produce the material and face potential criminal exposure from their content, or settle the civil case to avoid involuntarily supplying the government with additional material for its criminal case. The division among the circuits, in turn, raises concerns about forum shopping, because prosecutors have incentive to convene grand juries in per se districts if they have jurisdiction over potential targets.

Moreover, the rulings invite an unholy alliance between the DOJ and civil litigants, because they provide considerable ancillary benefit to both. The DOJ has incentive to monitor civil litigation in which private plaintiffs may ferret out facts that generate, strengthen, or even resurrect an investigation. Civil plaintiffs—who would welcome a parallel criminal investigation of their adversaries—not only have incentive to cooperate with the DOJ but may benefit by proactively reaching out to the government. If a party obtains documents through civil discovery that support a theory of criminal wrongdoing, the party can alert the DOJ to the claim and, thereafter, provide the documents to the DOJ pursuant to a "friendly" subpoena. For documents that originate abroad, the civil party is a source through which the DOJ can expeditiously access the materials. Thus, plaintiffs have an incentive to seek foreign documents from their adversaries, which they could then share with the DOJ pursuant to a grand jury subpoena. The "hot issues" of international antitrust and the FCPA provide irresistible opportunities for the DOJ to exploit this use of grand jury subpoenas.

Although there are no easy solutions for a company facing a criminal investigation in parallel with a civil proceeding, there are certain things to keep in mind. Civil attorneys must assume that prosecutors will piggyback on civil discovery demands when determining how aggressively to litigate over the scope of those demands. Although courts have considerable discretion in determining whether to grant a stay of civil proceedings in the face of a parallel criminal investigation, *see e.g.*, *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77–78 (1st Cir. 2004) (analyzing several nonexclusive factors), it is nonetheless essential to consider whether such an application would be appropriate. Alternatively, measures short of a wholesale stay—such as a stay of deposition discovery only—might provide an acceptable compromise. Agreed-upon protective orders may ultimately be nothing but an academic exercise in the per se jurisdictions; nonetheless, thought must be given to their terms. For example, the parties may agree to maintain and review foreign documents only abroad.

Moreover, attorneys must be concerned that prosecutors may use the civil discovery process to gain access to discovery material. The focus on collusion as a means of attacking grand jury subpoenas in these circumstances becomes a paramount concern, and counsel must be vigilant to look for improper coordination of the civil case and any parallel criminal investigation. The wealth of case law that has developed involving parallel investigations by government agencies provides insight into how to approach this concern, beginning with the seminal case of *United States v. Kordel*, 397 U.S. 1 (1970), and including the much-publicized decisions in *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), and *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), *vacated, rev'd & remanded*, 521 F.3d 1189 (9th Cir. 2008), *amended*, 535 F.3d 929 (9th Cir. 2008). In broad strokes, these cases analyze whether the civil proceeding was improperly merged with the criminal investigation and whether the defendant was deceived regarding the existence of the criminal investigation. The paradigm is not precise, and there are no easy formulas—one might be loath to ask a private adversary pointed questions, for fear of giving him an unwelcome idea. However, where one suspects that a criminal investigation is afoot, it is imperative to try to determine the degree to which the criminal

investigator is involved in decision making regarding the direction of the civil proceeding. Depending on the answers, or lack of them, it may be appropriate to serve formal discovery requests regarding the adversary's communications with the government.

In addition, even third parties wholly unconcerned with criminal exposure must be aware of the potential for mischief when the government comes calling, because the issues posed by the government's use of civil discovery in criminal proceedings do not end with the grand jury. If a third party is required to comply with a grand jury subpoena and the material that is produced to the government contains the producing party's confidential or proprietary information, the party must consider whether the government will ultimately be obligated to turn over the information to a defendant in satisfaction of its own discovery obligations. Accordingly, civil attorneys must monitor where their protected material ends up and take appropriate steps to safeguard these documents in the criminal proceeding.

These issues do not allow for easy answers. Civil discovery carries with it potential concerns entirely separate from the civil proceeding that prompts it. Counsel must be wary of government involvement and think strategically in anticipating where it might lead, including even criminal exposure for foreign subsidiaries or employees. What does seem clear is that the world has become incrementally smaller because of a two-paragraph opinion issued by the Ninth Circuit that promises to have a ripple effect across the ocean.

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NEWS & DEVELOPMENTS

Ex-Galleon Trader Sentenced to 66 Months for Insider Trading

Former Galleon Group LLC hedge fund trader Craig Drimal pled guilty in April 2011 to six counts of conspiracy and securities fraud resulting from a scheme whereby Galleon traded insider information that Drimal had obtained from lawyers working on transactions involving 3Com, Corp. and Axcan Pharma, Inc. On August 31, 2011, Judge Richard Sullivan of the U.S. District Court for the Southern District of New York sentenced Drimal to a 66-month term of imprisonment. Drimal made personal profits of nearly $6.5 million from trades in 3Com and Axcan based on the inside information, and he also provided material nonpublic information to Galleon trader Michael Cardillo, whom prosecutors allege earned $731,505 as a result of the scheme. According to prosecutors, when Securities and Exchange Commission personnel originally interviewed Drimal in July 2008, he lied to them about why he bought Axcan stock.

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Baseball Great Roger Clemens to Be Retried after Mistrial

A federal judge has ruled that Roger Clemens will face a new trial on charges that he lied to Congress about using performance-enhancing drugs, after determining that a second trial would not violate Clemens's constitutional rights. Two days into the first trial, Judge Reggie Walton of the U.S. District Court for the District of Columbia declared a mistrial after prosecutors showed jurors evidence that he had already ruled to be inadmissible. Although Judge Walton chastised prosecutors for their apparent blatant disregard of his ruling, he ultimately determined that he could not bar prosecutors from moving forward with a second trial. Clemens's attorney argued that the prosecutors' error was in fact a tactic used to get a new trial, because the first trial was going so badly for the government. Federal prosecutor Steven Durham took the blame for the prosecution's showing of the inadmissible evidence and acknowledged his wrongdoing, pleading with the judge not to hold the government responsible for his error. While Judge Walton condemned the prosecution and its actions, he held that precedential case law ultimately required that he grant another trial.

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