

**UNDERSTANDING  
WHITE COLLAR CRIME**

**Second Edition**

**2010 Supplement**

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**UNDERSTANDING  
WHITE COLLAR CRIME**

**Second Edition**

**2010 Supplement**

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## Chapter 1

### INTRODUCTION TO WHITE COLLAR CRIME

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#### § 1.02 RECURRING ISSUES IN WHITE COLLAR INVESTIGATIONS AND PROSECUTIONS

##### [A] The Harm Caused by White Collar Crime

P. 4: [*Insert at end of first paragraph of note 8:*]

Lay died before his sentencing, and his conviction was vacated. *See* Kate Murphy, *Judge Throws Out Kenneth Lay's Conviction*, N.Y. TIMES, Oct. 18, 2006, at C1. In another headline-grabbing case, investment banker Bernard Madoff pleaded guilty to fraud involving a Ponzi scheme that cost investors at an estimated \$50 billion and was sentenced to 150 years in prison. *See* Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years* N.Y. TIMES, June 30, 2009, at A1; Henriques, *More Names of Note Appear on Madoff List*, N.Y. TIMES, Feb. 5, 2009, at B1.

## Chapter 4

### MAIL FRAUD, WIRE FRAUD, AND RELATED OFFENSES

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#### § 4.03 THE SCHEME TO DEFRAUD

##### [B] Materiality

##### [2] The “Reasonable Reliance” Issue

**P. 70:** *[Delete first sentence of third paragraph and replace with the following:]*

In a subsequent case, however, the Eleventh Circuit overturned the ruling in *Brown*,<sup>44a</sup> agreeing with other circuits that had held that mail fraud exists even if the person relying upon the deception is unusually gullible.

#### § 4.05 DEPRIVATION OF MONEY, PROPERTY, OR HONEST SERVICES

##### [B] Section 1346 and the Deprivation of “Honest Services”

##### [3] The Definition of “Honest Services”

##### [a] Prosecutions of Public Officials

**P. 84:** *[Replace note 107 with the following:]*

See *United States v. Thompson*, [484 F.3d 877](#) (7th Cir. 2007) (reversing conviction of state official who arranged to have a state contract awarded to a politically-favored travel agency); *United States v. Bloom*, [149 F.3d 649, 656-57](#) (7th Cir. 1998) (reversing conviction of city official, and holding that an employee deprives his employer of his honest services only if he misuses his position [or the information he obtained in it] for personal gain).

##### [b] Prosecutions of Private Parties

##### [i] Bribery/Kickback and Self-Dealing Cases

**P. 88:** *[Insert the following at the end of the section:]*

Where there is no evidence that the agent was acting contrary to the principal’s interests, however, there may be no breach of duty. In *United States v. Brown*, a case known as the “Enron barge” case, the Fifth Circuit reversed the private sector honest services conviction because the defendants acted to benefit rather than to harm the employer.<sup>126a</sup> The government charged the defendants with mail fraud, alleging that they participated in a sham transaction designed to assist Enron in meeting its earnings projections. Because the defendants were acting in Enron’s economic interests, the court held, they did not deprive Enron of their “honest services.” The court concluded that “[t]his case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is

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<sup>44a</sup> *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009).

<sup>126a</sup> 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007).

disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest.”<sup>126b</sup>

P. 91: [*Insert new section:*]

**[c] The *Skilling* Decision**

In *Skilling v. United States*,<sup>137a</sup> a case against former Enron President and Chief Executive Officer Jeffrey Skilling, the United States Supreme Court attempted to resolve many of the issues discussed in the two preceding subsections. In that case, the government alleged that Skilling “engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, ... about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading.” In this way, the government alleged, Skilling deprived Enron and its shareholders of their intangible right to his honest services.

In an opinion by Justice Ginsberg, the Court reversed Skilling’s conviction. Relying on pre-*McNally* cases, the Court concluded that the core honest services cases only included those where the defendants were alleged to have participated in bribery or kickback schemes. The Court thus limited § 1346 to such schemes. Responding to Skilling’s vagueness challenge, the Court concluded that “[r]eading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.” Applying the new interpretation of the law to Skilling’s case, the Court stated: “The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.”

In a concurring opinion joined by two others, Justice Scalia agreed that Skilling’s conviction should be reversed but also asserted that § 1346 is unconstitutionally vague. First, Justice Scalia stated that “in transforming the prohibition of “honest-services fraud” into a prohibition of ‘bribery and kick-backs’ [the Court] is wielding a power we long ago abjured: the power to define new federal crimes.<sup>137b</sup> Second, he also found that the statute remained, even after the majority’s limiting interpretation, unconstitutionally vague in critical respects, including the scope of fiduciary duties that establish an agent-principal relationship for private sector honest services fraud cases and the nature of the breach required for public sector cases. These issues will undoubtedly continue to be the subject of litigation even after *Skilling*.

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<sup>126b</sup> 459 F.3d at 522.

<sup>137a</sup> 130 S. Ct. 2896 (2010).

<sup>137b</sup> *Id.* at 2935 (Scalia, J., concurring).

## Chapter 6

### COMPUTER CRIME

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#### § 6.06 CONSTITUTIONAL AND STATUTORY CONSTRAINT

##### [B] First Amendment Issues

**P. 142:** *[Insert at end of paragraph at top of page:]*

In 2000, the Court, in *United States v. Playboy Entertainment Group*,<sup>76a</sup> held unconstitutional a federal law requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours. Four years later, in *Ashcroft v. American Civil Liberties Union*,<sup>76b</sup> the Court held that the plaintiffs were likely to prevail on their claim that Child Online Protection Act violated the First Amendment by burdening adults' access to protected speech. In *United States v. Williams*,<sup>76c</sup> however, the Court upheld a provision of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act that more narrowly criminalized the pandering and solicitation of child pornography.

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<sup>76a</sup> 529 U.S. 803 (2000).

<sup>76b</sup> 542 U.S. 656 (2004).

<sup>76c</sup> 128 S. Ct. 1830 (2008).

## Chapter 8

### **BRIBERY AND GRATUITIES**

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#### **§ 8.06 DEFINITION OF “OFFICIAL ACT” UNDER § 201**

##### **[B] The Scope of the Public Official’s Duties**

**PP. 179-80:** [Replace paragraph at bottom of p. 179 to top of p. 180:]

The court also reversed the conviction in *Valdes v. United States*.<sup>42</sup> In *Valdes*, an undercover agent paid the defendant, a District of Columbia police detective, as a reward for the defendant’s search of a police database. In a split decision, the *en banc* D.C. Circuit reversed the gratuities conviction. Citing *Muntain*, the court held that the official act element was not met. All the defendant did was to disclose the information; his actions did not involve, in the language of the statute, “any decision or action . . . which may at any time be pending.” The dissent argued that the defendant’s actions fell within the scope of his official duties, and that the actions therefore qualified as “official acts.”<sup>43</sup> A concurring opinion emphasized that Valdes had originally been charged with bribery but was convicted instead of the lesser-included offense of gratuities. A bribery conviction could have been affirmed under the theory that the bribe was paid to induce the defendant to act in violation of his “official duty” under § 201(b)(2)(C).<sup>43a</sup>

#### **§ 8.08 FEDERAL PROGRAM BRIBERY**

##### **[C] Scope of § 666**

**P. 186:** [Insert new section:]

##### **[4] The Meaning of “Misapplies”**

Among other acts, § 666 criminalizes “intentionally misapply[ing]” \$5,000 or more of property. In *United States v. Thompson*,<sup>72</sup> the defendant was a state official who manipulated a state contract bidding process so that a contract would be awarded to a politically connected travel agency. The government charged the defendant with violating § 666 by depriving another bidder of the contract. The government’s theory was that this benefited the defendant because the raise she received was in part based on her actions involving the contract award. The Seventh Circuit reversed the conviction, reasoning that § 666 essentially criminalizes bribery. The court concluded that the section should be limited to “theft, extortion, bribery, and similarly corrupt acts.”<sup>75</sup>

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<sup>42</sup> 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*).

<sup>43</sup> *Id.* at 462 (Garland, J., dissenting).

<sup>43a</sup> *Id.* at 459-60 (Kavanaugh, J., concurring).

<sup>72</sup> 484 F.3d 877 (7th Cir. 2007).

<sup>75</sup> *Id.* at 881.

## Chapter 10

### FALSE STATEMENTS

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#### § 10.04 FALSITY AND CONCEALMENT

##### [A] Implied Falsity and Concealment

**P. 203:** *[Insert following paragraph at the end of the section:]*

Most courts do seem to require the existence of a duty. For example, in *United States v. Safavian*,<sup>22a</sup> a case arising out of the Jack Abramoff lobbying scandal, the defendant was a federal employee who had sought an ethics opinion concerning a trip that Abramoff had proposed that defendant take with Abramoff. The government brought § 1001 charges on several grounds, including the theory that defendant had failed to disclose certain facts when seeking the ethics opinion concerning whether he should take the trip. The Court of Appeals reversed the convictions on that theory, finding that voluntarily undertaking to seek an advisory ethics opinion does not itself create a duty to disclose all relevant facts.

**P. 203:** *[Insert at end of note 24:]*

The court held likewise in *United States v. Safavian*, [528 F.3d 957](#) (D.C. Cir. 2008).

#### § 10.07 JURISDICTION

##### [A] Statements Made to the Federal Government

**P. 207:** *[Insert new note 49:]*

[18 U.S.C. § 1001](#)(b). Courts have split as to whether a false statement made by a defendant to a probation officer preparing a report in advance of the defendant's sentencing falls within § 1001. Compare *Manning*, [526 F.3d at 619-21](#) (because probation officer did not act as mere conduit to the judge but performed an independent function, defendant's false statements fell within § 1001), with *United States v. Horvath*, [492 F.3d 1075](#) (9th Cir. 2007), *reh'g en banc denied*, [522 F.3d 904](#) (9th Cir. 2008) (statement made to probation officer concerning a matter that the law required to be included in the presentence report fell within the judicial proceeding exception).

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<sup>22a</sup> 528 F.3d 957 (D.C. Cir. 2008).

## Chapter 11

### PERJURY AND FALSE DECLARATIONS

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#### § 11.03 THE ELEMENTS OF A PERJURY CASE

##### [F] The “Two-Witness” Rule

**P. 224:** *[Insert after the first full paragraph, following the discussion of Davis:]*

A similar issue arose in the prosecution of Peter Bacanovic, Martha Stewart’s stockbroker and co-defendant.<sup>48a</sup> Bacanovic was convicted of perjury based on statements he made during testimony before the SEC in its investigation of ImClone stock trading. Bacanovic testified that he recalled leaving a message with Stewart’s assistant asking Stewart to return his call, but also testified that he did not remember saying during the conversation that the price of ImClone stock was declining. The government alleged that Bacanovic’s stated lack of recollection was false, and offered as proof Stewart’s assistant’s testimony and an electronic message that the assistant wrote for Stewart stating that “Peter Bacanovic thinks ImClone is going to start trading downward.” On appeal, the Second Circuit rejected Bacanovic’s argument that the electronic message – admitted under the business records exception to the hearsay rule – did not qualify as corroborating evidence because it came from the same source (the assistant). Acknowledging that “the case presents a close question,” the court found the message sufficiently corroborative.<sup>48b</sup> The court reasoned that “[t]he assurance of accuracy and contemporaneousness that characterize a business record distinguishes that category of document from personal notations, which have been found insufficient to corroborate the author’s testimony for purposes of the two-witness rule.”<sup>48c</sup>

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<sup>48a</sup> United States v. Stewart, 433 F.3d 273, 315-17 (2d Cir. 2006). Stewart’s securities fraud conviction is discussed *supra*, at § 5.04[C][2].

<sup>48b</sup> 433 F.3d at 316.

<sup>48c</sup> *Id.* at 317.

## Chapter 13

### TAX CRIMES

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#### § 13.05 MENS REA — WILLFULNESS

##### [C] Defenses

##### [1] Good Faith

**P. 265:** *[Insert at end of note 60:]*

For another case holding that a defendant's disagreement with the tax laws does not negate willfulness, see *United States v. Ambort*, 405 F.3d 1109, 1115 (10th Cir. 2005) (defendant's assertion that certain people could claim to be "non-resident" aliens who were not subject to taxation was irrelevant to the issue of willfulness because the defendant knew this view had never been accepted).

#### § 13.06 METHODS OF PROOF

##### [B] Indirect Methods

**P. 272:** *[Insert at end of note 108:]*

See *United States v. Boulware*, [384 F.3d 794, 811](#) (9th Cir. 2004) (under the bank deposits method, the government need not prove the exact amount of underpayment but need only prove a substantial difference between the bank deposits and the reported income).

## Chapter 15

### MONEY LAUNDERING

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#### § 15.03 PROOF OF THE DEFENDANT’S MENTAL STATE

##### [A] Section 1956

##### [2] Second Level of Mens Rea — Four Possible Theories

##### [a] Evidence of a Design to Conceal or Disguise Dirty Money Under § 1956(a)(1)(B)(i) and § 1956(a)(2)(B)(i)

**P. 296:** *[Insert at end of section:]*

In an international money laundering case under § 1956(a)(2)(B)(i), may a conviction rest on proof that the defendant used complex and secretive means to conceal cash by, for example, hiding cash under the floorboard of a car while attempting to transport it out of the country? In *Cuellar v. United States*,<sup>62a</sup> the United States Supreme Court held that such evidence, standing alone, is insufficient. Although the government is not required to show an intent to give the proceeds the appearance of legitimate wealth required, it is required to show some additional evidence of an intent to conceal. The Court found that the transportation's purpose must be to conceal or disguise the funds' nature, location, source, ownership, or control.

**P. 297:** *[Insert at end of note 54:]*

See *United States v. Flores*, [454 F.3d 149, 155-56](#) (3d Cir. 2006) (attorney found to have been willfully blind as to the illegal source of the client's money).

#### § 15.04 PROOF THAT THE PROPERTY WAS THE PRODUCT OF CRIMINAL ACTIVITY

**P. 303:** *[Insert new § [C]:]*

##### [C] “Proceeds”: Net Receipts or Net Profits?

One issue that had split lower federal courts concerned the interpretation of the word “proceeds” in § 1956. Some courts had held that the term meant net receipts from the illegal activity, while others had held that the term referred to the net profits from such activities.<sup>89a</sup> The United States Supreme Court addressed this conflict in *United States v. Santos*.<sup>89b</sup> In that case, the Court held five-to-four that the term “proceeds” in § 1956 is ambiguous. Applying the rule of lenity, the Court held that “proceeds” means to “profits,” not “receipts.”

After *Santos* was decided, however, Congress passed the Fraud Enforcement and Enhancement Act of 2009 (FERA). FERA amends the money laundering statutes to provide that “the term ‘proceeds’ means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.”

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<sup>62a</sup> 128 S. Ct. 1994 (2008).

<sup>89a</sup> Compare, e.g., *United States v. Iacoboni*, 363 F.3d 1 (1st Cir. 2004) (“proceeds” means gross income), with *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002) (“proceeds” means net profits).

<sup>89b</sup> 128 S. Ct. 2020 (2008).

## Chapter 16

### RICO

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#### § 16.04 THE ENTERPRISE

##### [E] The “Association-in-Fact” Enterprise

##### [2] The Proof Required for an Association-in Fact Enterprise

**PP. 314-15:** [*Replace the first two paragraphs of this section with the following:*]

In *United States v. Turkette*,<sup>64</sup> the Supreme Court described an “enterprise” as “an entity separate and apart from the pattern of activity in which it engages.” The Court went on to state that an enterprise is “proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”

When applying *Turkette*, the circuit courts vary in the proof required for an association-in-fact enterprise. Most circuits, for example, require at least two elements. First, an enterprise must function as a continuing unit.<sup>65</sup> Second, the participants in the enterprise must function with a common purpose.<sup>66</sup> Some courts also require a third element – that the enterprise have an identifiable structure.<sup>67</sup>

**P. 315:** [*Replace the first sentence in the first paragraph with the following:*]

The decision in *United States v. Console*<sup>68</sup> illustrates an application of the three-part test.

**P. 316:** [*Insert following first paragraph at top of page:*]

In *Boyle v. United States*,<sup>75a</sup> the United States Supreme Court held that indeed an association-in-fact enterprise must have a discernable structure. The Court stated that “an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.”

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<sup>64</sup> 452 U.S. 576, 583 (1981).

<sup>65</sup> *See, e.g.*, *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (the enterprise itself must “function as a continuing unit,” requiring “some continuity of both structure and personality”).

<sup>66</sup> *See, e.g.*, *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981) (“an associated-in-fact enterprise requires proof of a ‘common purpose’ animating its associates”), *citing* *United States v. Turkette*, 452 U.S. at 583.

<sup>67</sup> *See, e.g.* *United States v. Darden*, 70 F.3d 1507, 1520-21 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996).

<sup>68</sup> 13 F.3d 641 (3d Cir. 1993).

<sup>75a</sup> 129 S. Ct. 2237, 2244 (2009).

## **[F] Proof of “Enterprise” as Distinct from Proof of “Racketeering Activity”**

### **[1] The Circuit Court Split and the *Boyle* Decision**

**PP. 316-17:** [*Replace the section with the following:*]

The circuits almost evenly split as to whether the proof of the enterprise requires proof of some structure that is distinct from the illegal activity itself.<sup>77</sup> Five circuits held that the proof of the enterprise need not be distinct from the proof of the illegal activity.<sup>78</sup> Four circuits, on the other hand, held that proof of an enterprise must include more than just proof of the predicate acts.<sup>79</sup>

The Supreme Court resolved this split in *Boyle v. United States*.<sup>80</sup> The Court stated that the existence of an enterprise “may be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity . . . . We recognized in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise ‘may in particular cases coalesce.’”

## **§ 16.07 ISSUES UNIQUE TO CIVIL RICO**

### **[A] RICO Actions Brought by Private Plaintiffs**

#### **[2] Standing**

**P. 340:** [*Insert before the last paragraph of the section:*]

In *Anza v. Ideal Steel Supply Corp.*,<sup>220a</sup> the Supreme Court similarly found that the plaintiff lacked standing. In that case, Ideal Steel brought a RICO action against Anza, a business competitor. Ideal Steel alleged that Anza committed mail and wire fraud by filing false state tax returns that did not disclose that Anza was not requiring cash-paying customers to pay state sales tax. According to the complaint, Anza’s practice allowed it to charge lower prices, thus damaging Ideal Steel, in violation of § 1962(c). The Supreme Court held that these allegations did not meet the *Holmes*’ proximate cause requirement. New York State was deprived of tax revenue and was the party directly injured by the defendant’s actions.<sup>220b</sup>

In *Bridge v. Phoenix Bond and Indem. Co.*,<sup>220c</sup> on the other hand, the Court held that the plaintiffs had standing even though they were not the parties deceived by the defendants’ mail fraud scheme that formed the basis of the RICO plaintiffs’ RICO claims. The *Bridge* plaintiffs alleged in a civil RICO action that the defendants had rigged the bidding during a local government’s auctions of valuable assets. The defendants had used the mails to deceive the local government during the scheme. The plaintiffs alleged that the scheme injured them by denying them the opportunity to buy the assets at the auctions. The Supreme Court distinguished *Anza*, and held that the plaintiffs had

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<sup>77</sup> See *Odom v. Microsoft Corp.*, 486 F.3d 541, 550 (9th Cir. 2007).

<sup>78</sup> *Id.* at 550, *citing* *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001); *United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983); *accord* *Odom v. Microsoft Corp.*, 486 F.3d at 551.

<sup>79</sup> See *Odom v. Microsoft Corp.*, 486 F.3d at 549-50, *citing* *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982).

<sup>80</sup> 129 S. Ct. 2237, 2245 (2009).

<sup>220a</sup> 126 S. Ct. 1991 (2006).

<sup>220b</sup> *Id.* at 1997-98.

<sup>220c</sup> 128 S. Ct. 2131, 2138 (2008).

standing. First, the plaintiffs were not required to show that they themselves had relied upon the defendants' misrepresentations; it was enough that the mails were used in furtherance of the scheme. Second, unlike *Anza*, here the plaintiffs alleged proximate cause they were deprived of the opportunity to profit from the auctions.

## Chapter 17

### INTERNAL INVESTIGATIONS AND COMPLIANCE PROGRAMS

#### § 17.03 COMPLIANCE PROGRAMS

##### [B] Department of Justice Policies

**P. 347:** *[Replace the section with the following:]*

The Department of Justice had adopted policies that penalized corporations that asserted the attorney-client privilege during criminal investigations. The DOJ deemed the assertion to evidence failure to cooperate that the government would consider when evaluating whether to bring criminal charges against the corporation. In responses, the DOJ watered down these policies. Critics still contended that the DOJ was applying inappropriate pressure on corporations to waive the privilege, and Congressional critics threatened to overturn the policies.<sup>20</sup>

In August 2008, the DOJ rescinded the earlier policies and issued the “Filip Memorandum.” This memorandum prohibits federal prosecutors from considering a corporation’s decision not to waive the attorney-client privilege when deciding whether to charge the corporation. Instead, “prosecutors must measure cooperation by the extent to which the organization voluntarily discloses ‘relevant facts and evidence.’”<sup>21</sup>

##### [C] Compliance Programs and Corporate Liability

**P. 348:** *[Insert following last paragraph:]*

In addition, the United States Sentencing Guidelines allow for a reduction in the sentence if the “offense occurred despite an effective program to prevent and detect violations of law.”<sup>25</sup> The benefit is forfeited, however, if a high level employee participated in, condoned, or willfully ignored the wrongdoing.<sup>26</sup>

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<sup>20</sup> See Elkan Abramowitz & Barry A. Bohrer, *The Defense of Corporate America: The Year in Review*, N.Y.L.J., Jan. 2, 2007, at 6, col. 3.

<sup>21</sup> See Khizar A. Sheikh & Matthew M. Oliver, *SEC Prohibits Staff Attorneys from Seeking Privilege Waivers During Investigations*, N.Y.L.J., Feb. 9, 2009. The SEC has also adopted a similar policy. *Id.*

<sup>25</sup> U.S.S.G. § 8C2.5(f)(1). See Chapter 21, Sentencing, *infra*, at § 21.05, for a discussion of organizational sentencing under the Guidelines and the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005).

<sup>26</sup> U.S.S.G. § 8C2.5(f)(3).

## Chapter 18

### GRAND JURY ISSUES

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#### § 18.06 GRAND JURY SECRECY

P. 357: *[Insert new subsection:]*

##### **[E] Disclosure to Grand Jury Witnesses**

The circuit courts are split as to whether a grand jury witness has a right to review a transcript of the witness's own grand jury testimony under Rule 6(e)(3)(E)(i).<sup>41</sup> The circuits are split on this issue. In one leading case, the D.C. Circuit found that witnesses do have a right to view the transcripts.<sup>42</sup> The court reasoned that "grand jury witnesses have a strong interest in reviewing the transcripts of their own grand jury testimony. The government has little good reason to prevent witnesses from reviewing their transcripts."<sup>43</sup>

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<sup>41</sup> See *In re: Grand Jury*, 490 F.3d 978, 986-988 (D.C. Cir. 2007) (reviewing circuit split and listing cases).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 990.

## Chapter 20

### CIVIL ACTIONS, CIVIL PENALTIES, AND PARALLEL PROCEEDINGS

#### § 20.03 PARALLEL AGENCY PROCEEDINGS

**P. 366:** *[Insert at end of section:]*

Generally the government is free to conduct parallel civil, administrative, and/or criminal investigations and proceedings. A defendant may argue, however, that such proceedings violate relevant constitutional provisions in certain circumstances. In *United States v. Stringer*,<sup>10a</sup> for example, the SEC began an investigation into the defendants' activities. The SEC subsequently referred the matter to the Department of Justice, which later obtained criminal charges against the defendants. The defendants sought dismissal of the charges on the ground that their rights under the Due Process Clause were violated by the conduct of the parallel proceedings. The trial court agreed and dismissed the criminal charges, finding that the SEC had conducted the civil enforcement proceedings to obtain evidence for the criminal case and had misled the defendants about the criminal investigation. On appeal, the Ninth Circuit found that there was no basis for these factual conclusions. The court thus reinstated the charges.

#### § 20.07 QUI TAM ACTIONS

##### **[B] Qualifying as a Relator**

**P. 375:** *[Replace note 47 with the following:]*

[282 F.3d 787](#) (10th Cir. 2002), *rev'd after remand sub nom*, *Rockwell International Corp. v. United States*, [127 S. Ct. 1397, 1405](#) (2007).

**P. 375:** *[Insert after the second paragraph:]*

On remand, the District Court found that Stone had not effectively communicated Stone's allegations to the government. On appeal, the Tenth Circuit reversed, and the Supreme Court granted certiorari.<sup>47a</sup> The Court found that Stone did not qualify as an original source as to events at issue, which occurred at Rockwell in 1987 and 1988. Stone left Rockwell in 1986, and he therefore had no personal knowledge of the events upon which the *qui tam* action was based.<sup>47b</sup>

**P. 376:** *[Insert at end of section:]*

##### **[C] Claims Made to Private Entities**

One issue that has arisen is whether claims not made directly to obtain money from the government are actionable under the FCA. The United States Supreme Court confronted this issue in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*.<sup>51b</sup> In *Allison Engine*, subcontractors falsely stated to government contractors that the subcontractors had adhered to government requirements in

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<sup>10a</sup> 521 F.3d 1189 (9th Cir. 2008); See Eli Ewing, Comment: *Too Close for Comfort: United States v. Stringer and United States v. Scrusby Impose a Stricter Standard on SEC/DOJ Parallel Proceedings*, 25 YALE L. & POL'Y REV. 217 (2006).

<sup>47a</sup> *Rockwell International Corp. v. United States*, 127 S. Ct. 1397, 1405 (2007).

<sup>47b</sup> *Id.* at 1409-10.

<sup>51b</sup> 128 S. Ct. 2123, 2126 (2008).

completing the work. Although the subcontractors were paid with government funds, there was no evidence that the false statements were made to obtain the funds from the government. Employees of one of the subcontractors brought a *qui tam* action under the FCA seeking damages from the subcontractors.

The Supreme Court held that an FCA action could not be brought in such circumstances. The Court rejected the appeals court's holding that "proof of an intent to cause a false claim to be paid by a private entity using Government funds was sufficient."<sup>51b</sup> Instead, the Court stated, "If a subcontractor or another defendant makes a false statement to a private entity and does not intend the government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim 'by the government.'" The Court concluded, "In such a situation, the direct link between the false statement and the government's decision to pay or approve a false claim is too attenuated to establish liability."<sup>51c</sup>

Congress responded to the *Allison Engine* decision in the Fraud Enforcement and Recovery Act of 2009 ("FERA"). FERA amends the FCA in several important respects, including a provision designed to overturn *Allison Engine*. The definitional section of the statute, among other things, deletes the "by the government" language upon which the *Allison Engine* decision relied. FCA liability now covers requests for funds to a contractor, grantee, or other recipient, if the funds are "to be spent or used on the government's behalf or to advance a government program or interest."

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<sup>51b</sup> *Id.* at 2129.

<sup>51c</sup> *Id.* at 2130.

## Chapter 21

### SENTENCING

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#### § 21.03 INDIVIDUAL SENTENCING UNDER THE GUIDELINES

##### [G] Relevant Conduct

P. 384: *[Insert at end of section:]*

Even after the Booker opinion, courts will take acquitted conduct into account when calculating have continued to consider acquitted conduct after *Booker*.<sup>34a</sup>

#### § 21.04 CONSTITUTIONALITY OF THE GUIDELINES

##### [B] The Sixth Amendment Right to a Jury Trial

##### [2] Issues Created by *Booker*

##### [c] The Definition of Reasonableness

P. 391 *[Insert at the end of the section:]*

In *Rita v. United States*,<sup>75a</sup> the Supreme Court attempted to resolve this split and held that a federal appeals court “may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines.” The Court emphasized that this was an appellate presumption only, and does not apply at the trial level. In his dissent, Justice Souter argued that this result will nonetheless lead district courts to in effect apply a presumption of reasonableness to Guidelines-range sentences, in violation of *Booker*, because a “trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range.”<sup>75b</sup>

Another issue related to reasonableness is whether it is proper for a court of appeals to review sentences under a “sliding scale” approach. Under that approach, the court applies a presumption that “the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance.”<sup>75c</sup> The Supreme Court rejected that approach in *United States v. Gall*.<sup>75d</sup> The Court held that an appeals court reviews the sentence under a deferential reasonableness standard for (1) procedural error<sup>75e</sup> and (2) substantive error. Further, the Court stated that trial courts may not presume that Guidelines-range sentences are reasonable, and that appeals courts may not presume that non-Guidelines sentences are unreasonable. Finally,

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<sup>34a</sup> See, e.g., *United States v. Brown*, 516 F.3d 1047, 1050 (D.C. Cir. 2008); *United States v. Tyndall*, 521 F.3d 877, 883 (8th Cir. 2008); *United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006).

<sup>75a</sup> 127 S. Ct. 2456, 2462 (2007).

<sup>75b</sup> *Id.* at 2488 (Souter, J., dissenting).

<sup>75c</sup> *Rita*, 127 S. Ct. at 2467; see, e.g., *United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006) (holding that “[a]n extraordinary reduction must be supported by extraordinary circumstances”).

<sup>75d</sup> *United States v. Gall*, 128 S. Ct. 586 (2008).

<sup>75e</sup> Procedural errors that can render the trial court’s sentencing procedure unreasonable include (1) miscalculation of the Guidelines sentence, (2) treating the Guidelines as mandatory, (3) failure to consider the § 3553(a) factors, (4) using clearly erroneous facts, (5) failure to explain the sentence adequately. *Id.* at 591.

the Court held that an appeals court may not required “extraordinary” circumstances to justify a non-Guidelines sentence.

Finally, courts of appeal disagreed as to whether a policy disagreement with the Sentencing Guidelines is an appropriate basis for a non-Guidelines sentence. The Supreme Court held in *Kimbrough v. United States*<sup>75f</sup> that trial judges may indeed use policy disagreements as the basis for imposing a non-Guidelines sentence.

As one federal appeals court has noted,<sup>75g</sup> the decisions in *Booker*, *Rita*, *Gall*, and *Kimbrough* provide some overarching principles for determining a “reasonable” sentence under the Guidelines:

- Trial courts may not presume that a Guidelines-range sentence is reasonable.
- Trial courts may base sentencing upon disagreements with policies reflected in the Guidelines are based.
- Policy disagreements are subject to closer review where those policies were based upon empirical study undertaken by the Sentencing Commission.
- Appellate courts may, but are not required to, presume that a Guidelines-range sentence is reasonable.
- Appellate courts may not presume that an outside Guidelines-range sentence is unreasonable.
- Appellate courts should defer to trial courts’ sentencing determinations because those courts are more experienced at determining sentences and are in a better position to determine the facts relevant to sentencing.
- Appellate courts may not apply a “sliding scale” approach that requires a proportionately greater justification the farther the sentence is from the Guidelines range.
- Appellate courts may not require “extraordinary” circumstances for a non-Guidelines-range sentence.
- Appellate courts may, however, require that a substantial variance from the Guidelines range be supported by a more substantial justification than a minor variance.
- Appellate courts should apply the abuse of discretion standard, and should not reverse a conviction based merely on disagreement as to the correct sentence.

#### **[d] The Standard of Review on Appeal**

**PP. 391-92:** *[Delete the last paragraph and replace with the following:]*

In its *Gall* decision, the Court made clear that, after *Booker*, the abuse of discretion standard once again applies.<sup>79</sup> Thus, appellate courts may not engage in de novo review, or apply a heightened

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<sup>75f</sup> 128 S. Ct. 558 (2008) (sentencing judges can consider the 100-to-1 sentencing disparity in crack-cocaine cases to ensure that a sentence for a cocaine conviction is “sufficient but not greater than necessary” under the Guidelines).

<sup>75g</sup> *United States v. Jones*, 531 F.3d 163, 170-74 (2d Cir. 2008); see <http://www.nyfederalcriminalpractice.com/2008/06/second-circuit-issues-notable-5.html>.

<sup>79</sup> 128 S. Ct. at 594.

standard of review to a non-Guidelines-range sentence. As the Court stated in *Gall*, “the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable....’ [T]he familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.”<sup>80</sup>

### [e] Post-*Booker* Deference to the Guidelines

**PP. 392-94:** [*Delete section and replace with the following:*]

It is unclear whether federal trial and Appellate courts will adhere to the strictures established by *Rita*, *Gall*, and *Kimbrough*. Early indications are that some substantial inconsistencies are likely, both among trial courts and appellate courts.<sup>81</sup>

It does appear that *Gall* and *Kimbrough* have accelerated the post-*Booker* trend towards an increase in non-Guidelines-range sentences. In the three years before *Booker* was decided in 2005, within-range sentences averaged from about 65 to 72 percent of all sentences. After *Booker* but before *Kimbrough* and *Gall*, 61.3 percent of sentences were within the Guidelines range. After *Gall*, and *Kimbrough* were decided 59.7 percent of sentences were within Guidelines.<sup>75h</sup>

### [f] Substantial Assistance

**P. 393:** [*Insert at the end of the section:*]

In one high profile case, *United States v. Martin*,<sup>94a</sup> the Eleventh Circuit reversed a downward departure as unreasonably lenient. The defendant was Michael Martin, a former HealthSouth Corporation Chief Financial Officer. Martin pled guilty to conspiracy to commit securities fraud and mail fraud and falsify books and records in connection with a major accounting scandal that resulted, among other damages, in a loss of \$1.4 billion to HealthSouth shareholders. The parties agreed that the Guidelines range sentence was 108 to 135 months’ imprisonment, and that Martin’s substantial assistance merited a downward departure pursuant to § 5K1.1.

At the first sentencing, the trial judge sentenced Martin to 60 months’ probation. The Eleventh Circuit vacated the sentence for lack of a record capable of meaningful appellate review and remanded for resentencing. At the resentencing, although the government recommended a downward departure to 42 months’ imprisonment, the district judge imposed a sentence of seven days’ imprisonment based principally on Martin’s “extraordinary” assistance to the government in its investigation of the fraud.<sup>94b</sup>

The government appealed, and the Eleventh Circuit once again vacated the sentence. Acknowledging the extent of Martin’s cooperation, the court nonetheless concluded that the seven-day sentence “was unreasonable where Martin’s crimes yielded an advisory guidelines range of 9-11 years’ imprisonment and a potential sentence of 15 years. Martin’s cooperation, while commendable

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<sup>80</sup> *Id.*

<sup>81</sup> Inconsistencies are appearing even among different panels within the same circuits. Compare, e.g., *United States v. Jones*, 2008 U.S. App. LEXIS 13278 (2d Cir., June 24, 2008) (deferring to trial court’s sentencing determination), with *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008) (overturning sentences in white collar case and finding that trial judge abused discretion in making factual determinations underlying the sentence).

<sup>75h</sup> See [http://www.ussc.gov/USSC\\_Kimbrough\\_Gall\\_Report\\_July\\_08\\_Final.pdf](http://www.ussc.gov/USSC_Kimbrough_Gall_Report_July_08_Final.pdf). These statistics are through May 13, 2008.

<sup>94a</sup> 455 F.3d 1227 (11th Cir. 2006).

<sup>94b</sup> *Id.* at 1234.

and extremely valuable, is not a get-out-of-jail-free card.”<sup>94c</sup> The court found that the sentence failed to consider the seriousness of Martin’s crimes and failed to provide the needed deterrence.<sup>94d</sup>

In a post-*Gall* case also arising out of the HealthSouth matter, *United States v. Livesay*,<sup>94e</sup> the appellate court once again reversed a substantial assistance downward departure. In reversing a sentence of probation, the appeals court found that the trial court had committed procedural error by considering the defendant’s withdrawal from the conspiracy when determining the extend of the substantial assistance downward departure. Because the trial judge stated that he would have imposed the same sentence employing the § 3553(a) factors, the appellate reviewed the reasonableness of the sentence and found that the trial court had failed to explain adequately the basis for the sentence. The court remanded for resentencing.

## § 21.05 ORGANIZATIONAL SENTENCING UNDER THE GUIDELINES

### [A] Overview

**P: 395:** [*Insert at end of note 96:*]

*See generally* Timothy A. Johnson, Note, *Sentencing Organizations After Booker*, [116 YALE L.J. 632](#) (2006).

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<sup>94c</sup> *Id.* at 1238.

<sup>94d</sup> *Id.* at 1239-40.

<sup>94e</sup> 525 F.3d 1081 (11<sup>th</sup> Cir. 2008). Upon remand, a different district court judge again sentenced Livesay to probation. Again, the court of appeals reversed, this time holding that no sentence of probation would be reasonable. *See United States v. Livesay*, 587 F.3d 1274 (11<sup>th</sup> Cir. 2009).

## Chapter 22

### FORFEITURES

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#### § 22.03 FEDERAL CRIMINAL STATUTES PROVIDING FOR THE RESTRAINT AND FORFEITURE OF PRIVATE PROPERTY

##### [A] Statutory Forfeiture Provisions

P. 408: *[Insert at end of section:]*

Under a provision enacted as part of CAFRA and amended in 2006, the government may seek criminal forfeiture whenever civil forfeiture is authorized under the civil forfeiture statutes.<sup>68a</sup> Accordingly, the full range of civil forfeiture provisions now may be employed in criminal cases.<sup>68b</sup>

##### [C] The Scope of Forfeitable Property

###### [3] Proceeds

P. 411: *[Delete the last sentence and insert at end of section:]*

The United States Supreme Court resolved this conflict in *United States v. Santos*.<sup>83a</sup> The Court held that the term “proceeds” in the money laundering statute is ambiguous. Applying the rule of lenity, a five-member majority “proceeds” refers to “profits,” not “receipts,” in the case before it, which involved a stand-alone illegal gambling operation. In his concurring opinion, Justice Stevens argued that in instances where the legislative history is clear, the meaning of the term “proceeds” may mean “receipts” rather than profits.

#### § 22.04 CONSTITUTIONAL DEFENSES

##### [A] Procedural Due Process

###### [1] Civil Forfeitures

P. 415: *[Insert at end of section:]*

Courts have also recognized constitutional constraints on the pre-trial seizure of personal property necessary to pay attorneys’ fees. As discussed in § [E] below, the Supreme Court has held that the government may obtain forfeiture of property needed for attorneys’ fees. A different issue arises, however, when the government seeks to obtain control over such property even before forfeiture has been ordered.

Although a pre-trial hearing may require disclosure of grand jury materials, courts have held that defendants’ constitutional rights compel such a hearing. The court in *United States v. E-Gold, Ltd.*,<sup>123a</sup> for example, stated “while we recognize the weightiness of the government’s concern in grand jury secrecy, we find nothing that outweighs the defendant’s constitutional rights to due

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<sup>68a</sup> [28 U.S.C. § 2461\(c\)](#).

<sup>68b</sup> See, e.g., *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (finding that mail fraud may give rise to criminal forfeiture under § 2461(c)).

<sup>83a</sup> 128 S. Ct. 2020 (2008).

<sup>123a</sup> 521 F.3d 411 (D.C. Cir. 2008).

process and to counsel under the Fifth and Sixth Amendments.” The court thus found that “defendants have a right to an adversary post-restraint, pretrial hearing for the purpose of establishing whether there was probable cause ‘as to the defendant[s]’ guilt and the forfeitability of the specified assets’ needed for a meaningful exercise of their rights to counsel.”<sup>123b</sup>

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<sup>123b</sup> *Id.*, citing *United States v. Monsanto*, 924 F.2d 1186, 1195 (2d Cir.1991).