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White Collar Watch

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Supreme Court Makes It More Difficult for Judges to Impose Sizable Criminal Fines

By Christopher R. Hall and Nicholas C. Stewart

In its just completed term, the Supreme Court limited the power of judges to enhance criminal fines in *Southern Union Co. v. United States*. Southern Union Co. had been convicted for storing liquid mercury without a permit in violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"), a felony punishable by a fine of $50,000 for each day of the violation. The district court determined that the maximum fine was $38.1 million based on a storage period of more than two years as alleged by the indictment, but imposed a lesser fine of $6 million, plus a "community service obligation" of $12 million.

Southern Union Co. contested the fine at sentencing. The company argued that it would be unconstitutional for the district court to impose a fine above $50,000 because the trial judge had instructed the jury that it could find the natural gas distributor guilty if it had stored the liquid mercury without a permit for a single day. The defendant relied upon *Apprendi v. New Jersey*, 530 U.S. 446 (2000), which held that a jury must first find facts beyond a reasonable doubt that increase the maximum punishment.

The district court agreed that *Apprendi* did apply, but concluded that the jury had necessarily found that the violation endured for 762 days based on the "content and context" of the verdict form, which had stated that the approximate dates of the alleged violation spanned that period of time. The U.S. Court of Appeals for the First Circuit disagreed with the district court. It rejected the notion that the jury had necessarily found that the violation had endured for 762 days, but the First Circuit nevertheless upheld the $6 million fine because it also disagreed with the district court on the question whether *Apprendi* applied to criminal fines (the Court of Appeals determined that it did not). On appeal, the Supreme Court resolved a split in the Circuits on the question of whether *Apprendi* applies to fines, reversing the First Circuit and holding that it does.

Writing for the majority, Justice Sonia Sotomayor explained that *Apprendi*'s "core concern" is to preserve the jury's "historic role as a bulwark between the State and the accused at the trial for an alleged offense." Juries perform this function by deciding all facts that support the punishment imposed. This principle applies regardless whether the sentence is imprisonment or death as in *Apprendi*, or a criminal fine. Indeed, "[f]ines were by far the most common form of noncapital punishment in colonial America,"

the Court noted, and "[t]hey are frequently imposed today, especially upon organizational defendants who cannot be imprisoned."

But the majority placed limits on its holding. "[W]here a fine is so insubstantial that the underlying offense is considered 'petty,'" the Court observed, "the Sixth Amendment right of jury trial is not triggered and no *Apprendi* issue arises." Nevertheless, "not all fines are insubstantial, and not all offenses punishable by fines are petty."

The dissent – authored by Justice Stephen Breyer and joined by Justices Anthony Kennedy and Samuel Alito – protested that "the Sixth Amendment permits a sentencing judge to determine sentencing facts . . . ." Facts supporting a fine are "facts that are not elements of the crime but are relevant only to the amount of the fine the judge will impose." In the present case, the statute itself considered the number of storage days to be a sentencing fact, relevant only "upon conviction."

The dissent posited that the Court's holding ultimately "will lead to increased problems of unfairness in the administration of our criminal justice system." Not only will sentencing be more inconsistent, but parties will be "nudg[ed]" toward plea bargains in the face of complex jury trial requirements.

Some commentators have asked whether this decision will matter. After all, 97 percent of federal convictions result from a guilty plea and, moreover, very few companies go to trial. Although it is true that companies rarely seek jury trials, the Supreme Court's decision in *Southern Union Co.* will make the prosecutor's job more difficult. Instead of having to prove just a single statutory violation (to which a sizable monetary punishment could have previously attached), a prosecutor now has to prove additional facts to support the financial penalty the government intends to seek. This additional burden may provide companies with more bargaining power at the plea negotiation table.

Does "Hidden" ESI Meet the Government's Burden of Producing Evidence in "Reasonably Usable" Form? Or Is It Pie-in-the-Skype?

By Christopher R. Hall, Sarah F. Lacey and Meghan J. Talbot

"Production of something in a manner which is unintelligible is really not production." Civil litigants often raise this argument to compel opponents to produce electronically stored information (ESI) in "reasonably usable" form as required by the civil rules. But the criminal rules do not address the issue, and little judicial guidance exists. This vacuum will shortly end. A criminal defendant recently won a motion for new trial on this ground in *United States v. Stirling*, No. 1:11-cr-20792-CMA, slip op. at 4-5 (S.D. Fla. June 5, 2012), ECF No. 214. The ESI at issue was a log of the defendant's Skype communications obtained from a "hidden" file on his computer's hard drive, a forensic image of which had been provided to the defense. The government has appealed[1] and the Eleventh Circuit will now have the opportunity to consider whether the civil ESI standards apply in criminal cases.

The *Stirling* Case and Rule 16(a)(1)(B)

In October 2011, the U.S. Coast Guard intercepted the *Atlantis V* on suspicion of narcotics trafficking in international waters off the coast of Jamaica. Onboard the *Atlantis V* were its skipper, John Stirling; four other men; and more than 800 pounds of cocaine. The Coast Guard also seized Stirling's laptop computer. A federal grand jury in Miami indicted all five men for violations of the Maritime Drug Law Enforcement Act. All but Stirling pleaded guilty.

Pretrial discovery proceeded under a standing order that required the government to comply with Rule 16(a)(1)(B). That rule obligates the government to "disclose . . . , and make available" to the defendant upon request "any relevant written

1 The government filed its notice of appeal on July 3, 2012. Stirling, No. 1:11-cr-20792-CMA, ECF No. 232.

or recorded statement by the defendant" where the statement is in the government's possession and "the attorney for the government knows – or through due diligence could know – that the statement exists." The standing order did not address the form of disclosure or production of any ESI.

A month before trial, the government provided to Stirling's defense counsel a hard drive containing a mirror image of the contents of Stirling's computer hard drive. The copy enabled the defense to view all "visible" files and folders in their native form as they would have appeared on the laptop. According to the briefing on the motion for a new trial,[2] hidden or non-visible files existing on the hard drive could be reviewed only through "forensic analysis," which Stirling, an indigent, did not undertake.[3] The government, however, employed an FBI computer examiner to analyze Stirling's hard drive. Shortly before trial, the examiner discovered non-visible files related to the Internet communications platform Skype.[4] After downloading a program to analyze the content of the Skype files, the examiner created a 214-page log of relevant inculpatory communications between Stirling and others.[5]

Four days prior to trial, counsel for the government called defense counsel to inform her that "inculpatory evidence was discovered on the computer" and warned her that "if [Stirling] took the stand and testified falsely, evidence on the computer could be used by the Government in its rebuttal case." Critically, the motion briefing indicates that defense counsel "neither asked the Government to identify the evidence nor inquired further as to the nature of the evidence,"[6] but instead "assumed it had to do with a photograph of the defendant with large amounts of cash money . . . which is commonly known to be the type of evidence introduced by the government in a drug case."[7]

Stirling testified at trial to support his defense of duress. On rebuttal, the government called the FBI computer examiner and simultaneously turned over to the defense the Skype communications log. The defense objected, but the trial judge overruled. The jury then convicted Stirling on all counts.

Stirling moved for a new trial on the ground that "notwithstanding the Government's technical compliance with its discovery obligations under [Rule] 16(a)(1)(B) by the furnishing of an exact replica of the hard drive," the withholding of the Skype log until rebuttal "so seriously impaired [Stirling's] trial strategy that there should be a new trial." *Stirling*, slip op. at 3, ECF No. 214. The government relied upon Fifth and Sixth Circuit precedent and recent district court opinions[8] to support the manner in which it had discharged its Rule 16 obligations. The government noted that the rule stands silent as to the form of disclosure. The prosecutor argued that the government need not produce ESI in more than one form, particularly where the ESI is a mirror image of the defendant's computer.

The trial court rejected the government's position. The prosecution tactic, the court determined, effectively denied the defendant the "opportunity for rehabilitation or for the selection of a reasonable defense and trial strategy by counsel . . . ." The trial judge reasoned that "without the information or advice to search metadata or apply additional programs to the . . . hard drive, production . . . . has been made in a manner that *disguises* what is available." *Id.* at 5 (emphasis added). The court agreed that the "reasonably usable" standard of Civil Rule 34(b)(2)(E)(ii) should apply. "If, in order to view ESI, an indigent defendant such as Stirling needs to hire a computer forensics expert and obtain a program to retrieve information not apparent by reading what appears in a disk or hard drive, then such a defendant should so be informed by the

2 The briefing on the motion for a new trial may be found at ECF Nos. 199 (defendant's motion), 204 (government's response), 207 (defendant's reply), and 210 (government's surreply). *Stirling*, No. 1:11-cr-20792-CMA (S.D. Fla.).

3 Stirling applied for and was granted $3,400 in investigative costs under the Criminal Justice Act. No funding was sought or used for forensic analysis of Stirling's laptop.

4 Skype permits computer users to make video and voice calls to other Skype users for free, make calls and send text messages to mobile phone users for a fee, and send instant messages or "chats."

5 A user's Skype chat history typically is maintained on the user's computer in a non-visible file called "main.db." Instructions for locating this file and translating it into a searchable plain text format abound on the Internet. *E.g.*, Skype, "How Do I Back Up My Configuration and Instant Message History?," https://support.skype.com/en-us/faq/FA413/How-do-I-back-up-my-configuration-and-instant-message-history (last visited July 8, 2012).

6 ECF No. 204 at 3, *supra* note 2.

7 ECF No. 207 at 3, *supra* note 2.

8 *United States v. Warshak*, 631 F.3d 266, 296 (6th Cir. 2010); *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010); *e.g., United States v. Healy*, No. 11 Cr. 132 (SAS), 2012 WL 213611, at *4 (S.D.N.Y. Jan. 24, 2012) (determining that Rule 16 imposes "no duty to direct a defendant" to inculpatory evidence "within a larger mass of disclosed evidence, even when that larger mass is enormous") (internal quotation omitted). Notably, in *Healy*, a child pornography case, the ESI at issue was a video found on the defendant's computer. The court found the government met its Rule 16 burden when it "mentioned the video at a pre-trial conference . . . and the defense had [physical] access to it." 2012 WL 213611, at *4-5.

Government, which knows of the existence of the non-apparent information." *Id.* at 4-5 (citing *United States v. Briggs*, No. 10CR184S, 2011 WL 4017886, at *8 (W.D.N.Y. Sept. 8, 2011)).

Practical Strategies for Defense Counsel

In April 2012, Skype reported that 40 million users had signed on to its service.[9] By the end of May 2012, the number of users per month reached 250 million, and Skype estimated that its service provided 1.4 billion minutes of voice and video calls per day.[10] It is increasingly likely that potential defendants and witnesses will have used Skype (and Facebook, Twitter, e-mail, text messaging, and other instant chat programs) to communicate in a manner that could pertain to a criminal case. In short, the "new normal" for evidence is not a photograph of the defendant with cash, but ESI consisting of a chat log that either rebuts or bolsters a defense.

Irrespective of how the Eleventh Circuit rules in *Stirling*, the case offers important lessons for 21st century discovery and trial strategy. The district court in *Stirling* had appointed counsel and had to pay for all reasonable forensic expenses. The shift of that financial burden to the court likely played a substantial role in the trial judge's decision. This means that defense counsel for clients with independent financial means cannot bank on the same degree of judicial help, and should instead develop independent strategies for identifying pertinent ESI. To that end, counsel (even in CJA cases) should ask clients what digital data may exist. To engage meaningfully with clients on this topic, counsel need to understand deeply the mechanics of their client's business (whether lawful or unlawful) and to stay abreast of the latest forms of electronic communication and data storage. Effective client interviews on this important topic will narrow the scope of required forensic analysis, and the funds required. And—in cases brought against defendants of limited means—these questions may provide information that permits the defense to win the court's assistance in pressing the government to fulfill its obligation to "disclose and make available" evidence under Rule 16.

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9 Jennifer Caukin, "40 Million People: How Far We've Come," The Big Blog (posted Apr. 10, 2012), http://blogs.skype.com/en/2012/04/40_million_people_how_far_weve.html.

10 Darren Murph, *Skype CEO Tony Bates Confirms 250m Monthly Users*, ENGADGET, May 31, 2012, *available at* http://www.engadget.com/2012/05/31/skype-ceo-tony-bates-microsoft-kinect-future-voip-communication-d10/.

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