

## Sixth Circuit Vacates White-Collar Conviction For Insufficient Evidence

February 5, 2012, By Sarah Riley Howard

In an unusual move, the Sixth Circuit ordered that a Tennessee businessman's conviction for bank fraud must be vacated. Timothy Parkes has apparently spent more than two years in prison awaiting appeal. The Sixth Circuit held that the jury convicted him with insufficient evidence of guilt beyond a reasonable doubt. The Sixth Circuit also held that the Court improperly excluded motive evidence critical to the defense.

Finally, the Sixth Circuit held that the federal prosecutor committed misconduct when it implied a falsehood on an excluded issue. The Sixth Circuit, acting through Judges Ray Kethledge, Jane Branstetter Stranch, and District Judge James Gwin, ordered that Mr. Parkes' conviction be vacated, and that an acquittal be entered.

Mr. Parkes' business made car floor mats, and borrowed money from a local bank. The business suffered enormous losses when a new manufacturing process failed, resulting in the mats melting in summer sunshine. The business eventually began importing its mats from China, and essentially acting as a distributor. This kept the business going, but it still owed more than \$2 million to the bank. The bank also honored bounced checks of the business, essentially converting those amounts to new loans. Soon the loan size exceeded lending limits. To avoid FDIC scrutiny, the bank president falsified entries on the books to make it appear that the amount loaned had gone to several different shell entities. The Government charged Mr. Parkes with participating in the scheme based on a vague fax from the business to the bank. However, there was no evidence that Mr. Parkes was the author of the fax, which was subject to a few plausible explanations. In addition, although the bank president had plead guilty pursuant to a plea agreement requiring cooperation, the Government

never introduced his testimony to establish that Mr. Parkes intended that fraudulent bank entries be made.

What the jury did not hear was that the bank president had been embezzling for years from the bank, and one reason why he might make false entries on his own would be to avoid triggering FDIC scrutiny if the large loans had been discovered. In addition, the jury did not hear how the bank president had concealed – on his own – loans exceeding limits from other businesses. Critically, of course, this would have explained to the jury why the bank president might do this for Mr. Parkes' business without Mr. Parkes' intent that it be done, when it would not seemingly benefit the president otherwise. The Court excluded this as Rule 404(b) evidence because telling the jury that he was an embezzler tended to discredit any testimony that the bank president might give, but the Sixth Circuit held it was relevant for a legitimate purpose for Mr. Parkes' defense – his motive or lack thereof. It also held that the relevance of an item has to be judged in relation to the issues in the case.

Finally, the Sixth Circuit criticized the prosecutor for suggesting that Mr. Parkes would receive a windfall if not convicted, when the Government had successfully argued to keep out evidence that Mr. Parkes had paid back most of the loans pursuant to his personal guarantees.