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Prosecutorial misconduct in FCPA case results in dismissal of indictment

By Christopher R. Hall and Charles T. Williams, III

We have recently written (*White Collar Watch* September 2011) about the uptick in prosecutions under the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.* (the “FCPA”), which prohibits, among other things, bribery of foreign officials for commercial advantage. A recent case, *United States v. Aguilar*, is an example of a case in which the government’s overzealous prosecution under the FCPA involved “flagrant” misconduct that necessitated a dismissal of the indictment against a corporate defendant and two of its officers. This case is not only a cautionary tale for the government, but also a reminder to defense counsel of the importance of building a record that may later form the basis for the dismissal of an indictment or the reversal of a conviction.

LINDSEY MANUFACTURING CO. (UNITED STATES v. AGUILAR)

In early September 2010, Enrique Aguilar and his wife, Angela Aguilar, were charged with multiple violations of the FCPA. About a month after indicting the Aguilars, the government added Lindsey Manufacturing Company (“Lindsey”), as well as Keith E. Lindsey, its President and CEO, and Steve K. Lee, its Vice President and CFO (the “Lindsey Defendants”) as defendants under the indictment, charging them with, among other things, conspiracy and substantive violations of the FCPA.

This gist of the government’s case was that the Lindsey Defendants bribed certain high-ranking officials of La Comisión Federal de Electricidad (“CFE”), an electric utility company that is wholly-owned by the Mexican government, and also one of Lindsey’s largest customers. The government alleged that the Lindsey Defendants funneled bribes to the CFE officials through a company called El Grupo Internacional de Asesores S.A. (“Grupo”), that was controlled by the Aguilars. The government alleged that, although certain Lindsey officers knew that Enrique Aguilar was under investigation in Mexico for corruption, it nevertheless paid Grupo a “sales commission” of 30 percent of the revenues Lindsey generated from CFE contracts that it earned after it hired

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Enrique Aguilar. The sales commissions paid to Grupo were alleged to be higher than the industry standard, and higher than any other commission paid by Lindsey to any of its other sales representatives. The government further alleged that these sales commissions ostensibly were used to bribe the CFE officials and to purchase certain luxury goods (both for themselves and for the CFE officials).

The record illustrates a severely flawed investigation and prosecution. For example, one of the prosecutors in the *Aguilar* case was also the lead prosecutor in an earlier case, *United States v. O'Shea* (see *White Collar Watch* September 2011), in which it was alleged that payments made to an entity called Sorvill, also controlled by the Aguilars, were used to bribe CFE officials on behalf of a company called ABB, Inc. During the trial against the Lindsey Defendants, the government pushed aggressively to link Sorvill to the Lindsey Defendants, but the court held that there was no evidence the Lindsey Defendants had ever heard of Sorvill. In addition to its attempt to manufacture a link between the Lindsey Defendants and Sorvill (and thus impute the alleged conduct in that case to the Lindsey Defendants in this case), the prosecutors engaged in "flagrant" misconduct both before and after the Lindsey Defendants were indicted, including:

- Submitting an affidavit of an investigating FBI agent that contained false and misleading statements, which later formed the basis for search warrants executed against the Lindsey Defendants;
- Obtaining communications between the Aguilars that exceeded the scope of the applicable warrant, with the intent of using the information obtained to implicate the Lindsey Defendants;
- Exceeding the scope of a search warrant by searching buildings not included within the warrant;
- Obtaining a statement from defendant Keith Lindsey without giving proper *Miranda* warnings;
- Allowing an FBI agent to give false or misleading testimony to the grand jury, which ultimately led to the indictment of the Lindsey Defendants;

- Failing to turn over potentially exculpatory evidence (e.g., transcripts of certain grand jury testimony, interview notes with potentially exculpatory witnesses, etc.) when properly requested by the Lindsey Defendants (in violation of the standard articulated in *Brady v. Maryland* and its progeny);
- Violating the court's trial instructions and orders on multiple occasions.

On May 9, 2011, before the jury began its deliberations, the Lindsey Defendants filed a motion to dismiss based on governmental misconduct. After a five week trial, but before the court decided the Lindsey Defendants' motion to dismiss, the jury returned its verdict and convicted the Lindsey Defendants on all counts.

In late 2011, the court heard argument on the Lindsey Defendants' motion to dismiss. On December 1, 2011, the court issued an opinion by which it vacated the convictions and dismissed the indictment against all of the Lindsey Defendants, holding that the "multiple acts of misconduct...undoubtedly affected the verdicts and thus substantially prejudiced the Lindsey Defendants." In dismissing the indictment with prejudice, the court expressed its hope that its ruling would have a "valuable prophylactic effect."

THE TAKE AWAY

The *Aguilar* case is a cautionary tale for the government to guard against sloppy investigations and flagrant misconduct in pursuit of a conviction. Indeed, the court noted that the "prosecutor's job isn't just to win, but to win fairly, staying well within the rules." Here, the investigators and the prosecution went well beyond the rules, and as a result undermined the confidence in the outcome of the trial. This case is also a good reminder for defense counsel of the importance of building the pre-trial and trial record that may later form the basis for an acquittal or reversal of a conviction. The court specifically noted that it was not any one instance of misconduct, but rather the "wide range" of misconduct throughout the case that necessitated dismissal of the indictment. Defense counsel was diligent in seeking evidence at each stage of the case, and

was relentless in pursuing that information when the government failed to comply fully with the court's rulings. While this case highlights particularly egregious prosecutorial misconduct that certainly is not present in most cases, it nevertheless shows that where defense counsel can establish a wide range of misconduct that spans an entire case, it may be able to show that the "drastic step" of dismissing the indictment is appropriate. At the very least, as prosecutions under the FCPA increase and the limited precedent under the statute continues to evolve, *Aguilar* will be on the minds of both the prosecution and the defense.

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