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Stringer May Not Be Dead Yet

Monday, Jun 02, 2008 --- Recent developments in the much-followed case of United States v. Stringer,[1] suggest that the Ninth Circuit's April 4, 2008 decision may not be the last word, and that the full court may reconsider the case en banc.

Stringer has been closely watched by the criminal and securities bars because the district court dismissed the indictment based on alleged improper cooperation and collusion between the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC").[2]

Employing seldom-used Ninth Circuit General Order 12.10(b),[3] on May 7, 2008 Chief United States District Judge for the District of Oregon, Ancer L. Haggerty, submitted a formal comment to the Ninth Circuit Court of Appeals "respectfully disagree[ing]" with the court's decision in Stringer.[4]

General Order 12.10 provides district court judges with a procedure through which they may communicate with the Ninth Circuit, such as when a district judge believes that the Ninth Circuit has made "a mistake in a disposition ... involving an appeal from that judge's decision."[5]

Suspecting that the parties will seek en banc review, and perhaps in an attempt to aid their arguments, Judge Haggerty made the surprising and uncommon choice to implore the Ninth Circuit to correct what he perceived as its mishandling of the facts in its Stringer opinion.[6]

Defendants J. Kenneth Stringer ("Stringer"), J. Mark Samper ("Samper"), and William N. Martin ("Martin") were indicted on Sep. 17, 2003 with fifty counts of securities related offenses.[7] Each individual defendant filed a motion to dismiss the indictment, alleging violations of their Fourth and Fifth Amendment rights.[8]

After eleven days of evidentiary hearings and two days of oral argument, Judge Haggerty issued an opinion dismissing the indictment because the government violated the defendants' due process and Fifth Amendment rights by engaging in "grossly shocking" and "outrageous" behavior.[9]

In sum, Judge Haggerty found that the Oregon United States Attorney's Office ("USAO") and the SEC colluded to intentionally hide the USAO's abated, but anticipated, criminal prosecution from Stringer, Samper and Martin to collect otherwise unobtainable incriminating evidence against the defendants through the SEC's civil investigation.[10]

The Ninth Circuit, in an opinion written by former Chief Judge Schroeder,

vacated Judge Haggerty's judgment, holding that there was "no deception or affirmative misconduct on the part of the government" during its investigations.[11]

Thirty-three days later, Judge Haggerty wrote to the Ninth Circuit to formally remark on the three-judge panel's reversal of his opinion, "the panel's treatment of [his] findings of fact," and its apparent disregard for the proper standard of review.[12]

The Ninth Circuit's self-published standard of review manual, available on its website,[13] states that although the Ninth Circuit reviews de novo a district court's dismissal of an indictment based on a violation of constitutional rights,[14] the trial court's findings of fact are reviewed for clear error.[15]

Clear error, as defined in the Ninth Circuit's manual, means that if the trial court's factual findings are plausible in light of the entire record, the court of appeals may not reverse, even if it would have weighed the evidence differently.[16]

Or as the Ninth Circuit put it in Hayes v. Woodford, "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old unrefrigerated dead fish."[17]

Judge Haggerty took issue with the Ninth Circuit's opinion because it was "vague as to both the standard of review applied and the degree to which the panel found clear error."[18]

The Ninth Circuit's opinion does fail to mention the applicable standard of review and it is difficult to see where in the opinion the court applied the clearly erroneous standard to the district court's factual findings.

Judge Haggerty complained that the Ninth Circuit opinion made conclusions that were unsupported by, and in fact, appear to be directly contrary to his factual findings, such as when the Circuit concluded that there was an ongoing parallel criminal investigation, and the SEC civil investigation was "not a pretext for the USAO's criminal investigation."[19]

Judge Haggerty's letter states that the panel instead "provides its own selective version of the facts."[20] Among the facts that Judge Haggerty believes the Ninth Circuit ignored are:

(1) that the SEC and DOJ agencies agreed to halt the criminal investigation to continue receiving evidence through the civil investigation;

(2) that the USAO had indicated to the SEC that Stringer, Samper, and Martin were potential "targets" and a criminal prosecution was likely;

(3) that the SEC and USAO agreed that if Stinger, Samper, and Martin knew of an ongoing criminal proceeding, it would negatively impact the SEC's

ability to get information;

(4) that the government was concerned that the presence of a criminal investigation would lead Stringer, Stamper, and Martin to probably invoke their constitutional rights and demand discovery be conducted under the criminal rules rather than the civil rules;

(5) that the government was aware there was no parallel criminal proceeding;

(6) that the USAO's delay in investigating was not to review evidence to determine if the case warranted prosecution;

(7) that the USAO was actively involved in the civil investigation, advising what information was needed for a successful criminal prosecution, even specifically instructing how best to conduct interviews; and

(8) that the USAO repeatedly discussed with the SEC when it would be best for the USAO to surface and conduct an overt criminal investigation.[21]

Judge Haggerty asked the panel to amend its opinion to clarify the standard of review it applied, and whether it implicitly rejected the factual findings Judge Haggerty made in his opinion.[22]

He stressed that without clarification, he could not fathom "a basis for rejecting [his factual findings] in toto as clearly erroneous."[23]

Judge Haggerty's letter also suggests that on remand, regardless of whether the panel amends its current Stringer opinion or the decision changes after en banc review, he might be inclined to dismiss the indictment again under the district court's supervisory powers.[24]

Judge Haggerty expressly referred to his authority to dismiss an indictment on the grounds of prosecutorial misconduct, citing in support the recent Ninth Circuit case United States v. Chapman.[25]

Judge Haggerty's en banc suspicions were realized when, on May 19, 2008, defendants Stringer, Samper, and Martin, each independently filed petitions for rehearing and petitions for rehearing en banc ("PFR/EB").[26]

Under Ninth Circuit Advisory Committee Note 2 to Rules 35-1 to 35-3, any Ninth Circuit judge, active or senior, may, within twenty-one days from May 19, request that the three-judge panel provide a recommendation on the PFR/EB. After the panel's recommendation, any judge has fourteen days to call the case for en banc consideration, with a vote taken by all active judges in due course.[27]

If a majority of active judges vote to reconsider the case en banc, then Judge Schroeder's opinion will be vacated,[28] and current Chief Judge Kozinski and 10 other randomly selected active judges will rehear the case.[29]

Judge Haggerty's letter foreshadows probable discussions within the Ninth Circuit judiciary as judges transmit internal correspondence regarding potential en banc review.

Although his original dismissal opinion was vacated, Judge Haggerty's letter is rife with arguments that may be mined in support of an en banc call.[30]

He argues that the Ninth Circuit's opinion failed to state a proper standard of review, and implies that the court incorrectly applied a de novo review to the district court's factual findings.

Judge Haggerty's letter also suggests that some of his factual findings, which support a contrary result than one arrived at by the court, remain undisturbed by the Ninth Circuit's opinion.[31]

Functioning as an amicus brief of sorts, a Ninth Circuit judge could very well use Judge Haggerty's letter's assertions, statements normally unavailable, to support an en banc call in a very timely arena – the boundaries of SEC and DOJ cooperative investigations.

Moreover, Judge Haggerty's letter, which the Ninth Circuit required be sent to all parties,[32] in essence, instructs the defendants to file renewed motions to dismiss the indictment should the case return for trial.[33]

By taking the unusual step of writing this letter, Judge Haggerty has simultaneously alerted Ninth Circuit judges to potential improprieties in one of its opinions, suggested to the defendants that if the case returns to the district court they should renew their motions to dismiss the indictment, and put the Ninth Circuit on notice that Judge Haggerty will dismiss the indictment under the district court's supervisory powers.

Although the panel's decision in Stringer may have originally been viewed as ending the uncertainty about parallel proceedings created by Judge Haggerty's decision (as well as the decision of District Judge Bowdre in United States v. Scrushy[34] to suppress evidence for similar reasons), Judge Haggerty's letter has signaled that the battle is far from over.

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[1] 521 F.3d 1189 (9th Cir. 2008) ("Stringer II").

[2] United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006) ("Stringer I").

[3] Ninth Circuit General Order 12.10 (2007) is entitled "Communication From Other Courts Regarding Cases." Subsection (b), "Petitions for Rehearing," states in part that, "[w]hen a district judge ... wishes to comment formally on a filed disposition before the mandate has issued, the judge may send a written communication to the Clerk of the Court ... The Clerk shall file the communication and distribute it to the panel before whom the petition for rehearing is pending, and, if there is a pending petition for rehearing en banc, to all judges on the court."

[4] Letter from Judge Haggerty, Chief United States District Judge for the District of Oregon, to Molly Dwyer, Clerk of the Court, Ninth Circuit Court of Appeals (May 7, 2008) (on file with the Ninth Circuit Court of Appeals).

[5] Ninth Circuit General Order 12.10(a) allows for communications from a district judge when he "has reason to believe that the affected parties may not point out the mistake, and believes that justice will be disserved if the mistake is not corrected."

[6] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 1 & n.1 (noting that he was employing General Order 12.10(b) because he expected the parties to file a petition for rehearing and a petition for rehearing en banc).

[7] Stringer I, 408 F. Supp. 2d at 1084.

[8] Id. (The defendants also filed alternative motions to suppress testimony on the same grounds).

[9] Id. at 1089-90, 92.

[10] Id. at 1087-89.

[11] Stringer II, 521 F.3d at 1201.

[12] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 1.

[13] www.ca9.uscourts.gov (click on the link entitled "Standard of Review -9/22/06" under the heading "Rules & Changes").

[14] See United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir. 2004).

[15] See United States v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir. 2000).

[16] See Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002).

[17] 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation marks omitted), vacated on other grounds by, Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) (en banc).

[18] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 1.

[19] Stringer II, 521 F.3d at 1192, 98.

[20] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 1.

[21] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 2-3.

[22] Id. at 2.

[23] Id.

[24] Id. at 3.

[25] --- F.3d ----, 2008 WL 1946744, at *9 (9th Cir. May 6, 2008). In Chapman, the Ninth Circuit approved a district court's dismissal of an indictment for prosecutorial misconduct during discovery. Id. at *10-11.

[26] Docket numbers 86, 87, and 88, available at ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseSummary.js

[27] Ninth Circuit Advisory Committee Note 5 to Rules 35-1 to 35-3.

[28] Ninth Circuit Advisory Committee Note 3 to Rules 35-1 to 35-3.

[29] Ninth Circuit Rule 35-3.

[30] Fed. R. App. P. 35(b) (2005) provides that a petition for rehearing en banc must assert that en banc review is required to maintain uniformity because the three-judge panel's opinion either conflicts with appellate court or United States Supreme Court precedent, or en banc review is warranted because the issues are "of exceptional importance." Subsections (b)(1)(A), (B).

Here, Judge Haggerty's letter supports both grounds for en banc review – (1) ignoring the clearly erroneous standard of review for a district court's factual findings conflicts with Ninth Circuit precedent; and (2) the limits of SEC and DOJ investigative cooperation must be clearly established to protect the constitutional rights of targets.

[31] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 2.

[32] See Ninth Circuit Rule 35-4(b).

[33] See Letter from Judge Haggerty to Molly Dwyer, supra note 5, at 3.

[34] 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

