Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials

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I. INTRODUCTION

On February 9, 2015, the Eleventh Circuit affirmed the conviction and nine-year prison sentence of Jean Rene Duperval on charges of accepting bribes while he served as the director of Haiti's state-owned telecommunications company.[1] This decision represents the latest development in a string of recent enforcement actions by the U.S. Department of Justice ("DOJ") against bribe-taking foreign officials.[2]

Historically, the DOJ has not targeted this category of bad actors because the prosecutorial tool used to combat foreign bribery—the Foreign Corrupt Practices Act ("FCPA")—does not extend to the prosecution of foreign officials who solicit and accept bribes.[3] However, the DOJ recently has changed course by side-stepping the FCPA and instead prosecuting these foreign officials under other laws,[4] most commonly the Money Laundering Control Act[5] ("MLCA") and related conspiracy charges.

This article examines whether the DOJ's targeting of bribe-taking foreign officials under the MLCA is an illegal end run around the limitations of the FCPA. First, this article will review the jurisdictional scope of the FCPA, and the Fifth Circuit's decision in *United States v. Castle* which clarified that bribe-taking foreign officials are outside the FCPA's reach. Next, this article will discuss the DOJ's bellwether prosecution of Thai official Juthamas Siriwan on MLCA charges relating to bribes she accepted during her tenure as governor of the Tourism Authority of Thailand. In the early stages of the Siriwan prosecution, Judge George Wu of the Central District of California suggested that charging a foreign official under the MLCA potentially violates congressional intent because lawmakers meant to shield bribe-taking foreign officials from prosecution when drafting the FCPA.[6] Siriwan's U.S. prosecution was subsequently stayed pending the outcome of her prosecution in Thailand, and during that time, the DOJ has managed to successfully convict a number of bribe-taking foreign officials on MLCA charges without raising the same judicial concerns expressed by Judge Wu. While the recent conviction of Jean Rene Duperval may suggest a resignation to the DOJ's approach of using the MLCA, no court has formally addressed the concerns raised by Judge Wu, and these concerns could pose a legal hurdle that the DOJ may need to overcome in future prosecutions.

II. THE LONG (BUT LIMITED) ARM OF THE FCPA

Congress enacted the Foreign Corrupt Practices Act in 1977 after the Watergate scandal revealed the widespread practice of U.S. companies paying foreign officials in order to obtain business from foreign governments.[7] The anti-bribery provisions of the FCPA criminalize the act of paying and offering to pay foreign officials, foreign political parties, and candidates for foreign political office in order to secure business overseas.[8]

The anti-bribery provisions of the FCPA have a wide prosecutorial reach. Under the FCPA, the DOJ and SEC have jurisdiction over all citizens, nationals, and residents of the United States; all domestic corporations that are either incorporated or have their principal place of business in the United States;[9] and all issuers of securities registered on U.S. stock exchanges, including foreign corporations.[10] Additionally, the FCPA reaches all officers, directors, employees, and agents of domestic corporations and corporations trading on U.S. stock exchanges, even when those individuals are foreign nationals,[11] as well as any foreign corporation or individual that commits an act in furtherance of a corrupt payment while in the U.S.[12]

In short, nearly every person involved in the bribery of a foreign official is subject to the FCPA when either the person or the act of bribery has some connection to the United States, even when the person bribing the foreign official is a foreign national. However, despite this expansive reach, one category of bad actors remains conspicuously outside the scope of the FCPA: the foreign officials who solicit or accept bribes.

In *United States v. Castle*, the DOJ employed a novel legal theory in an attempt to pull foreign officials within the jurisdictional ambit of the FCPA.[13] In *Castle*, the government attempted to prosecute two

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Canadian officials who allegedly accepted bribes from U.S. executives when awarding a municipal contract.[14] While prosecutors acknowledged that the FCPA does not criminalize the receipt of bribes by foreign officials, they nonetheless attempted to prosecute the Canadian officials under the federal conspiracy statute for conspiring to violate the FCPA.[15]

On appeal, the Fifth Circuit rejected this attempted utilization of the FCPA against foreign officials, citing to the Supreme Court's decision in *Gebardi v. United States*.[16] In *Gebardi*, the government attempted to prosecute a woman who agreed to be transported by her lover across state lines under a charge of conspiracy to violate the Mann Act. The Mann Act prohibited transportation of women across state lines for immoral purposes, but did not criminalize the conduct of the woman being transported.[17] The court rejected the government's attempt to reach the woman with a conspiracy charge, holding that Congress had demonstrated its intent to leave transported women unpunished because a violation of the Mann Act necessarily required the acquiescence of the woman being transported, however the Act did not make the woman's consent a crime.[18]

In *Castle*, the Fifth Circuit reviewed the legislative history leading to the enactment of the FCPA and determined that, because Congress had enumerated a list of those individuals within the Act's reach, which included "virtually every possible person connected to the payments except foreign officials," it was therefore "only logical to conclude that Congress affirmatively chose to exempt this small class of persons from prosecution."[19] The court concluded that, as with the Mann Act, Congress passed the FCPA to deter and punish an activity that necessarily involves the agreement of at least two parties but chose to punish only one party to the agreement, and therefore using the federal conspiracy statute to prosecute the other party violated legislative intent.[20] The *Castle* court noted that this legislative policy was likely the product of Congress's concern about the "inherent jurisdictional, enforcement, and diplomatic difficulties" raised by the application of the bill to noncitizens of the United States.[21]

III. THE DOJ'S RECENT APPROACH IN *UNITED STATES V. SIRIWAN*

The Fifth Circuit's decision in *Castle* largely halted enforcement efforts against bribe-taking officials for nearly two decades. However, over the past five years the DOJ has launched a series of prosecutions of bribe-taking foreign officials under laws other than the FCPA.[22]

To prosecute these officials, the government primarily relies on charges under the MLCA, which makes it a crime to launder money obtained as a result of the commission of certain specified unlawful activities ("SUAs").[23] Under the MLCA, prosecutors have jurisdiction over foreign nationals where any of the money laundering activity takes place in the United States and the value involved is greater than $10,000.[24] The DOJ therefore prosecutes foreign officials under the theory that, even though these officials cannot be prosecuted for accepting bribes under the FCPA, they can nonetheless be prosecuted under the MLCA where any transaction involved in the execution or cover-up of the bribe takes place in the United States.

One of the government's earliest, and by far its most problematic prosecution of a foreign official, is the ongoing case of *United States v. Siriwan*.[25] During her tenure as governor of the Tourism Authority of Thailand from 2002 to 2007, Juthamas Siriwan and her daughter Jittisopa allegedly accepted $1.8 million in bribes from Hollywood movie producers Gerald and Patricia Green in exchange for $13.5 million in contracts to produce the Bangkok International Film Festival.[26] In 2009, a jury sent the Greens to federal prison on nine counts of violating the FCPA and seven counts of money laundering.[27]

While Juthamas Siriwan's status as a foreign official shielded her from charges under the FCPA, in January 2010 the DOJ unsealed an indictment of Siriwan and her daughter on charges of money laundering and conspiracy to commit money laundering based upon the Siriwans' misuse of the U.S. financial system in transferring their bribery funds.[28]

The government argued that the funds laundered by the Siriwans were obtained as a result of two underlying SUAs. First, prosecutors argued that the Siriwans violated Thai anti-bribery laws, which constituted the underlying SUA of an "offense against a foreign nation involving . . . bribery of a

public official."[29] Second, the prosecutors based the MLCA charges on the SUA of aiding and abetting the Greens' violation of the FCPA.

In their motion to dismiss these charges, the Siriwans objected to the government's attempt to "evad[e] the FCPA's limits on charging foreign officials" by "recasting the transfer of alleged bribe payments as money laundering transactions."[30] At the January 2012 hearing on this motion, Judge Wu indicated that he found this argument persuasive. Referencing the Fifth Circuit's decision in *Castle*, Judge Wu stated that where there is "a congressional determination that [a foreign official] should not be charged for receipt of" a bribe, the fact that the official could be charged for essentially the same conduct under a different statute "should not all of the sudden negate the congressional concern that these individuals should not be prosecuted."[31]

The government countered these concerns by reminding Judge Wu that Ms. Siriwan was not being charged for accepting bribes, but rather for the entirely separate crime of misusing the U.S. financial system.[32] In support of its position, the government relied on *United States v. Bodmer*,[33] a 2004 case decided in the Southern District of New York. In *Bodmer*, the defendant was a foreign national—but not a foreign official—whom the government prosecuted for violating the FCPA and for laundering funds that resulted from the SUA of violating the FCPA. After determining that the official could not be criminally penalized for violations of the FCPA, the court nonetheless allowed the money laundering charges against the defendant to stand even though they were based on the underlying activity of violating the FCPA.[34] The *Bodmer* court reasoned the language of the MLCA "clearly penalizes the *transportation of monetary instruments in promotion* of unlawful activity, not the underlying unlawful activity."[35] The court therefore concluded that "the elements of a money laundering offense do not include, or even implicate, the capacity to commit the underlying unlawful activity."[36] Reasoning from this case, the government prosecutor in *Siriwan* argued that "just because a foreign official can't be prosecuted under the FCPA doesn't mean that they have free rein to use our financial system to help others violate the FCPA."[37]

At the January 2012 hearing, Judge Wu distinguished *Bodmer* because the defendant was not a foreign official in that case. Judge Wu noted that the reason that the defendant in *Bodmer* could not be criminally prosecuted under the FCPA was based upon an ambiguous jurisdictional issue, and this was therefore "not a situation where Congress has made a determination that this person in his status of being a foreign official is not subject to the FCPA."[38] Judge Wu additionally noted that penalties for violating the MLCA exceed the penalties for violating the FCPA, and therefore he deemed it unlikely that Congress would refuse to allow foreign officials to be prosecuted for accepting bribes under the FCPA but nonetheless would subject them to harsher sentences under the MLCA for engaging in virtually the same conduct.[39]

At a later hearing, Judge Wu also expressed his reluctance to consider MLCA charges against the Siriwans based upon the SUA of violating Thai anti-bribery laws. Judge Wu refused to engage with "the ins and outs of Thai law" in order to determine whether the Siriwans violated these foreign statutes.[40] Instead, he stated that it behooved the court to see how these foreign laws might be applied in a potential enforcement action by Thai authorities, stating that "it seems to me that what will happen in Thailand will inform this court as to what this court's proper response should be to the motion to dismiss."[41] Judge Wu ultimately stayed the case until Thailand concludes any potential domestic enforcement actions and extradites the Siriwans to stand trial in the U.S.[42]

Unfortunately, Thai authorities have been slow to take action against the Siriwans and have been incommunicative with U.S. authorities regarding their plans for extradition. In November 2012, nearly three years after the U.S. indicted the Siriwans, Thai authorities finally responded to the government's extradition request by informing prosecutors that they were still investigating the Siriwans and that extradition would be postponed pending the outcome of this investigation. Two years later, in November 2014, the DOJ learned via an article published in the *Bangkok Post* that Thai authorities had indicted Juthamas Siriwan.[43] As of this writing, however, more than five years have passed since the U.S. indictment of the Siriwans, and it remains unclear when proceedings against Juthamas Siriwan will begin in Thailand and whether Thai authorities will agree to extradite her and her daughter following these proceedings.

IV. OTHER ENFORCEMENT ACTIONS

Aside from *Siriwan*, the DOJ has experienced relative success in four other prosecutions of bribe-taking foreign officials. However, while the *Siriwan* court seemed to be on the brink of ruling on a novel legal question, none of the courts in these proceedings have directly addressed whether the MLCA can be used to prosecute a foreign official when the underlying SUA is a violation of the FCPA.

One reason courts have not engaged with this issue is because the bribe-taking foreign officials have pleaded guilty in the majority of these prosecutions. One such prosecution against Venezuelan official Maria de los Angeles Gonzalez de Hernandez was unsealed by prosecutors in the Southern District of New York in May 2013.[44] Both the DOJ and U.S. Attorney Preet Bharara filed charges related to Gonzalez's acceptance of bribes while working at a state-run economic development bank, including charges of money laundering and conspiracy to commit money laundering based on the underlying SUA of violating the FCPA.[45] Gonzalez did not argue that the MLCA prosecutions violated congressional intent, but rather pleaded guilty to these charges in November 2013.[46]

In 2009, the DOJ also brought charges in the Southern District of Florida against Robert Antoine, Patrick Joseph, and Jean Rene Duperval, three directors of Haiti's state-owned telecommunications company who accepted bribes during their tenure.[47] As in *Siriwan*, the government premised its MLCA charge on the underlying SUA of violating the FCPA and violating Haiti's anti-bribery laws, as well as on the commission of wire fraud.[48] Joseph and Antoine both pleaded guilty to these charges and received approximately 1-year and 4-year sentences respectively.[49] However, Duperval took his case to trial and was convicted on all counts and sentenced to nine years in prison.[50]

Both at trial and on appeal, Duperval never argued, as did the Siriwans, that the MLCA charges contravened the congressional intent to shield bribe-taking foreign officials. Instead, Duperval argued up through his appeal to the Eleventh Circuit that there was no underlying FCPA violation because his role as the director of a state-run telecommunications company did not qualify him as a "foreign official" under the FCPA. The Eleventh Circuit rejected this argument, affirming Duperval's conviction and nine-year sentence, but never addressed the concerns about congressional intent raised by Judge Wu in the *Siriwan* proceedings.[51]

V. CONCLUSION

In a November 2014 press conference, Assistant Attorney General Leslie Caldwell trumpeted the DOJ's recent efforts to "attack corruption at its source" by prosecuting "corrupt officials who betray the trust of their people."[52] Now, on the heels of the Eleventh Circuit's affirmation of Jean Rene Duperval's conviction, it appears likely that the DOJ will continue its efforts to prosecute bribe-taking foreign officials under MLCA charges based on underlying violations of the FCPA.

If the DOJ continues to successfully convict foreign officials under these charges, then the concerns that animated Judge Wu in the *Siriwan* proceedings could recede farther into the background as the DOJ's prosecutorial tactic becomes an established norm. Nonetheless, given that the DOJ's approach is still relatively new, and that there is no definitive appellate authority evaluating its propriety, an opportunity remains for foreign officials accused of laundering funds that flow from an FCPA violation to raise the legal issue highlighted in the *Siriwan* proceedings as a defense in future DOJ prosecutions. If it does turn out that this issue is dormant rather than dead, the resurrection of this question could pose a significant hurdle to the DOJ's efforts to "attack corruption at its source."[53]

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Endnotes

1 *United States v. Duperval*, 777 F.3d 1324 (11th Cir. 2015).

2 Press Release, U.S. Dept. of Justice, Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International

Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014) (*available at* http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st) [hereinafter U.S. Dept. of Justice Press Release].

3 15 U.S.C. §§ 78dd-1, *et seq*.

4 U.S Dept. of Justice Press Release, *supra* note 2.

5 18 U.S.C. §§ 1956-1957.

6 1/30/12 Hearing Transcript, *United States v. Siriwan*, No. CR 09-81-GW (C.D. Cal. Jan. 30, 2012), Doc. 91 [hereinafter 1/30/12 Hearing Transcript].

7 U.S. Dept. of Justice and U.S. Sec. & Exch. Comm'n, A Resource Guide to the Foreign Corrupt Practices Act 3 (2012) (*available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf).

8 15 U.S.C. § 78dd-1; 15 U.S.C. § 78dd-2.

9 15 U.S.C. § 78dd-2.

10 15 U.S.C. § 78dd-1.

11 15 U.S.C. § 78dd-1; 15 U.S.C. § 78dd-2.

12 15 U.S.C. § 78dd-3(a).

13 925 F.2d 831 (5th Cir. Tex. 1991).

14 *Id*. at 832.

15 *Id*.

16 287 U.S. 112 (1932).

17 *Castle*, 925 F.2d at 832-833.

18 *Gebardi,* 287 U.S. at 123.

19 *Castle*, 925 F.2d at 835.

20 *Id*.

21 *Id*. at 835 (citing H.R. Conf. Rep. No. 831, 95th Cong. (1st Sess. 14), *as reprinted in* 1977 U.S.C.C.A. N. 4121, 4126).

22 U.S. Dept. of Justice Press Release, *supra* note 2.

23 18 U.S.C. § 1956, 18 U.S.C. § 1957.

24 18 U.S.C. § 1956(f).

25 No. CR 09-81-GW (C.D. Cal.).

26 Richard L. Cassin, Report: Charges Against Thai Officials in Green Case, The FCPA Blog (Jan. 20, 2010), http://www.fcpablog.com/blog/2010/1/21/report-charges-against-thai-official-in-green-case.html.

27 *Id*.

28 *Siriwan*, No. CR 09-81-GW (C.D. Cal. Jan. 19, 2010), Doc. 12.

29 18 U.S.C. § 1956(c)(7)(B)(iv).

30 1/30/12 Hearing Transcript, *supra* note 6, at 3.

31 *Id*. at 18.

32 *Id*. at 11.

33 342 F. Supp. 2d 176 (S.D.N.Y. 2004).

34 *Id*. at 191.

35 *Id*. (emphasis in original).

36 *Id*.

37 1/30/12 Hearing Transcript, *supra* note 6, at 15.

38 *Id*. at 14.

39 *Id*. at 16-17.

40 3/20/13 Hearing Transcript at 9, *United States v. Siriwan*, No. CR 09-81-GW (C.D. Cal. Apr. 2, 2013), Doc. 115.

41 *Id*. at 24.

42 *Id*. at 31.

43 11/19/14 Joint Stipulation at 2, *United States v. Siriwan*, No. CR 09-81-GW (C.D. Cal. Nov. 19, 2014), Doc. 124.

44 Press Release, United States Attorney's Office of the Southern District of New York, Two U.S. Broker-Dealer Employees And Venezuelan Government Official Charged In Manhattan Federal Court For Massive International Bribery Scheme (May 7, 2013) (*available at* http://www.justice.gov/usao/nys/pressreleases/May13/ClarkeetalComplaintPR.php).

45 *Id*.

46 Press Release, U.S. Dept. of Justice, High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme (Nov. 18, 2013) (*available at* http://www.justice.gov/opa/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-participating).

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48 *Id*.

49 *Id*.

50 Press Release, U.S. Dept. of Justice, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012) (*available at* http://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes).

51 *Duperval*, 777 F.3d 1324.

52 U.S Dept. of Justice Press Release, *supra* note 2.

53 *Id*.