



## OUTSIDE COUNSEL

BY EVAN T. BARR

### *'Russell': Prosecuting Defense Counsel for Obstruction*

Last year, federal prosecutors in Connecticut charged a local defense attorney with obstruction of justice after the government determined that the attorney had destroyed a laptop computer containing child pornography. The prosecution recently ended with a plea to a slightly reduced charge.

But the case has raised some troubling questions about the scope of the sweeping Sarbanes-Oxley obstruction statute, and the ethical quandaries faced by a lawyer in deciding how to handle potential evidence of a crime.

#### **Laptop Computer, Child Porn**

According to the indictment in the case, the laptop in question belonged to a man named Robert Tate, the longtime choirmaster at a church in affluent Greenwich, Conn. On Oct. 7, 2006, a church employee using Mr. Tate's laptop computer for church-related work discovered a substantial number of images of naked boys. The next day, church officials sealed and wrapped the laptop, treating it as evidence. The church also that day retained Philip Russell, a local lawyer who specialized in criminal and civil litigation, to represent the church in the matter.

The indictment alleges that Mr. Russell and two other church officials met with Mr. Tate and confronted him about the images on the computer. Mr. Tate acknowledged responsibility for the images and resigned from the church. Mr. Russell gave Mr. Tate the name of a local



criminal defense attorney and took possession of the computer. The following day, Oct. 9, 2006, Mr. Russell dismantled and destroyed

intent to impair [its] integrity and availability for use in an official proceeding" before a judge, court, magistrate judge and grand jury. The government also charged Mr. Russell with one count of violating Title 18, United States Code, §1519, the anti-shredding provision of the Sarbanes-Oxley Act, which prohibits, among other things, the knowing destruction of any tangible object "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States...in relation to or contemplation of any such matter or case," namely the FBI's investigation of Mr. Tate. Both counts are punishable by up to 20 years in prison.

Mr. Russell moved to dismiss, principally arguing that the indictment as a whole failed to allege a sufficient nexus between his purported actions and the official proceeding or investigation at issue.

While Mr. Russell acknowledged that the government did not have to show that an inquiry was actually pending at the time of the offense, he asserted that the government nevertheless had to allege that he intended to obstruct a specific and identifiable proceeding or investigation. Under the circumstances, Mr. Russell reasoned, such a showing would be impossible because at the time he destroyed the laptop, he had no reason to believe that any official proceedings were either in progress or would ever be instituted into Mr. Tate's criminal conduct. At most, Mr. Russell argued, he only could have known that Mr. Tate might have committed a crime which the authorities might or might not ever detect.

With respect to Count Two, Mr. Russell claimed his conduct did not fall within the scope of §1519 because that statute, passed in the wake of the Arthur Andersen scandal, was intended to prohibit the shredding of business records and documents, not the destruction

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the computer. Unknown to Mr. Russell, however, it turned out that on Oct. 6, 2006, the day before the church employee made his discovery, the FBI had independently initiated an investigation into Mr. Tate's possession of child pornography.

The government charged Mr. Russell with one count of obstruction under Title 18, United States Code, §1512(c)(1), alleging that he had "corruptly altered, destroyed, mutilated, and concealed" an object (the laptop) "with the

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of contraband like child pornography. Under the government's sweeping interpretation of §1519, Mr. Russell argued, it would be illegal to possess certain types of records/documents but even more illegal to destroy them.

In a decision by U.S. District Judge Alan H. Nevas,<sup>1</sup> the court denied Mr. Russell's motion. The court acknowledged that a nexus requirement applied to both obstruction statutes at issue, and cited *Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005), wherein the Supreme Court held that the "official proceeding must at least be foreseeable at the time of the obstructive act before a person can be liable for obstruction of justice under §1512." The court noted that a basic "relationship in time, causation, or logic" between the defendant's conduct and the judicial proceedings at issue had to be alleged.

### Sufficient Detail to State a Violation

The court nevertheless held that the indictment against Mr. Russell contained sufficient factual detail to state a violation, pointing to, among other things, the allegations that (1) the church had treated the computer as evidence; (2) Mr. Russell specialized in criminal defense; (3) Mr. Russell was retained by the church, not Mr. Tate; (4) Mr. Tate was being investigated by the FBI; and (5) Mr. Russell gave Mr. Tate the name of a criminal defense attorney. These allegations, the court held, more than sufficed to give proper notice to the defendant and to allow the obstruction case to proceed to trial.

The court also readily dismissed Mr. Russell's claim regarding the scope of §1519. The court noted that although one of the law's drafters had indicated that the statute was intended to respond to the Enron-related shredding of audit papers which was beyond the reach of then-existing obstruction laws, nothing in the legislative history supported the conclusion that the drafters intended to circumscribe its application solely to the destruction of business records and documents as Mr. Russell suggested.

### Misprision

Before the case could be tried, Mr. Russell ended up pleading guilty to the lesser charge of misprision of a felony.<sup>2</sup> Misprision is an esoteric offense which essentially makes it a crime to fail to report the commission of a felony. Mr. Russell is scheduled to be sentenced on Dec.

17, 2007, and likely faces between eight to 14 months in prison under the federal sentencing guidelines. But even if Mr. Russell ultimately avoided the obstruction charge, the precedent established by the case, and by the court's ruling on the motion to dismiss, should make every other defense lawyer in the state of Connecticut and elsewhere extremely uneasy.

On the issue of whether there was a foreseeable proceeding to obstruct, the court basically confined itself to determining whether the indictment contained sufficient factual particularity to put the defendant on notice of the charges, a low threshold. But the court also should have explored how these allegations, even if established at trial, ever could have led to a sustainable finding of guilt beyond a reasonable doubt. The court failed to explain how the fact that the FBI was investigating Mr. Tate even before Mr. Russell became involved logically could make any difference at all in that analysis, given the uncontroverted fact that Mr. Russell had no knowledge of the existence of that inquiry.

The rest of the allegations (regarding the manner in which the church reacted to the discovery of pornography on Mr. Tate's computer, and Mr. Russell's background and sophistication in criminal law) might look like troubling conduct to the average juror. And one could argue from these allegations that Mr. Russell knew that a prosecution or investigation was certainly possible. But the mere possibility of an official proceeding is not enough to meet the legal standard of "reasonable foreseeability" established by the Supreme Court in *Arthur Andersen*.

Furthermore, these allegations are equally consistent with the defense's theory, namely: that the church had decided to deal with Mr. Tate quietly, without notifying the authorities. The only reasonable inference Mr. Russell, as the church's lawyer, would have drawn from that situation is that there would be no official proceeding at all, because the matter was, as best he could tell, going to be resolved in-house. The fact that Mr. Russell was ultimately allowed to plead to misprision (essentially, failing to report Mr. Tate's crime) suggests that the government in the end came to accept that theory as the better fit for Mr. Russell's conduct.

### Analysis

As a matter of discretion, the government should in the future simply limit these kinds of obstruction prosecutions to defendants

whose actual knowledge of an investigation can be established. Otherwise, we may face the possibility of more individuals (and especially lawyers) being charged with impeding merely hypothetical proceedings, surely an odd application of the federal obstruction statutes.<sup>3</sup>

Equally troubling, in addressing whether Mr. Russell could be held accountable under §1519 for destroying the laptop, while the court may have been correct in holding that the legislative history did not restrict the statute's application to document shredding, the court basically dodged the tougher question of whether under the interpretation of the statute urged by the government, a lawyer in possession of items like Mr. Tate's computer essentially would have a legal duty to preserve contraband that is otherwise illegal to possess.

The court pointed out that an "innocent possessor of contraband" (if such a thing exists under the child pornography laws) would not be subject to prosecution under §1519 for destruction of the contraband/evidence absent proof that an official investigation was foreseeable.

But given how readily this court, at least, was willing to conclude that the government could meet that "foreseeability" standard, other lawyers who come into possession of questionable material from their clients would be well-advised in light of *Russell* to assume the worst, and contact the authorities right away, rather than face the dilemma of being blamed either for retaining or destroying the contraband in question.<sup>4</sup>

1. *United States v. Russell*, No. 3:07 Cr. 31 (AHN) (D. Conn. Aug. 22, 2007).

2. The federal misprision statute, Title 18, United States Code, §4, provides: "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both."

3. *Russell* opens a Pandora's box for in-house lawyers. Taking the government's theory to its logical extreme, an in-house lawyer would be forced to consider investigations imagined but as yet unknown prior to making virtually any document-retention decision that could lead to the destruction of potential evidence of a crime.

4. Consider, for example, the problem corporate counsel might face in finding exclusively adult pornography on an employee's computer and then trying to determine whether such material does or does not violate the notoriously subjective ("I know it when I see it") federal anti-obscenity laws.