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OUTSIDE COUNSEL

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Jury Instructions Involving Cooperating Co-Defendants

IN *U.S. v. Ramirez*[1] the U.S. Court of Appeals for the Second Circuit recently reversed a conviction on the grounds that the trial court refused to instruct the jury that they may not consider the guilty plea of a cooperating co-defendant to the same or similar charges as evidence of a defendant's guilt. This holding benefits defense counsel in cases involving cooperating co-defendants.

The significance of this case is that it was the first reversal of a conviction based on this issue even though the rule had been mentioned in prior Second Circuit cases.

While the Second Circuit has indicated it would reverse a conviction based on this type of error, it also indicated that there would be limits in the application of the rule. As a result of this decision, this instruction must always be requested by defense counsel if a cooperating co-defendant testifies for the government.

This article will focus on how the decision in *Ramirez* affects the strategy of defense counsel concerning this jury instruction in cases where a cooperating co-defendant enters a guilty plea and testifies on the direct case of the government.

Defendants Amaury Ramirez and Simon Turbides were indicted on six counts of drug related offenses.[2] Mr. Turbides pled guilty to all the counts against him except for two possession counts.

This case began when a search warrant was executed by the Bureau of Alcohol, Tobacco and Firearms. ATF agents seized cocaine, cocaine base, narcotics paraphernalia and a loaded firearm from a concealed hole in apartment 32A, which was leased to Mr. Turbides. They also seized cocaine from the dining room table. In addition, a receipt for a beeper in the name of Mr. Ramirez and letters ad-

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dressed to him were seized from the apartment. Shortly before they executed the warrant, an ATF agent saw Mr. Ramirez, a teenage boy and child leave the apartment and walk across the hall to apartment 34A. Thereafter, the ATF agents executed the warrant on apartment 32A and arrested Mr. Ramirez.

At trial, the ATF agents testified to the execution of the search warrant and the seizures made at apartment 32A. Defendant Turbides then testified that he had pled guilty to three counts in the indictment and that he had signed a cooperation agreement with the government.

Prior to the case being submitted to the jury, it was requested that the jury be given the following instruction not to consider the guilty plea of the co-defendant to similar charges in assessing the guilt or innocence of Mr. Ramirez:

> You have heard testimony from a government witness who pled guilty to charges arising out of the same facts as this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. That witness's decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

In support of the request, the defense cited *United States v. Gibbons,* 602 F2d 1044 (2d. Cir.), cert. denied, 444 U.S. 950, 100 S.Ct. 421, 62 L.Ed2d 319 (1979); *United States v. Kelly,* 349 F2d 720 (2d Cir., 1965) cert. denied 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed2d 544 (1966) and Leonard B. Sand, *Modern Federal Jury Instructions,* Instruction 7-10, 7.01 at 7-43 (1992). The court refused the defense request. After deliberation, the jury found the defendant guilty of all four counts of the indictment and sentenced him to 295 months imprisonment and eight years supervised release.[3]

History and Analysis

Prior case law had articulated this rule, but did not overturn trial court convictions. For instance, in *U.S. v. Kelly,*[4] the Second Circuit held that the trial court had properly instructed the jury that they may not consider the guilty plea of a co-defendant as evidence of the defendant's guilt.[5] Affirming the conviction, the appellate court held that jury instruction requests made by the trial counsel were defective.[6]

Similarly, in *U.S. v. Light,*[7] the Second Circuit affirmed a conviction where the jury was cautioned that they should draw no inference of the defendant's guilt from the plea of a co-conspirator.[8] Two other cases have been affirmed on appeal where the trial court instructed the jury that a defendant was entitled to be judged solely on the basis of the evidence and that the plea of a co-defendant to similar charges should not color their view.[9] These cases established this rule while affirming the convictions on appeal.

A slightly different argument was raised on this issue in *U.S. v. DeLamotte.*[10] In *DeLamotte,* trial counsel did not request the cautionary instruction and did not object to the court's charge on this point. On appeal, it was urged that the effect of allowing the jury to decide the case without the instruction was prejudicial and "plain error."[11] In upholding the conviction, the Second Circuit held that "[t]he instruction would undoubtedly been given if requested," but did not find its omission plain error.[12] The case made clear that the failure to request this instruction would result in the charge being silent on this issue.

In reversing the *Ramirez* conviction and remand for a new trial,[13] the Second Circuit held that "[t]his court has clearly stated that when a jury has been informed that a co-defendant has pleaded guilty to a crime charged against the defendant on trial, the trial judge should instruct the jury that they may not consider the guilty plea as evidence of the defendant's guilt." [14]

As this court stated, "This instruction was explicitly requested; the request was accompanied by the citation of governing Second Circuit authority [and] an exception was taken on the record to the denial of the request . . ." [15]

In carving out this rule, the court noted that "it is clear that the court's error may have prejudiced the defendant." The only evidence of Mr. Ramirez's participation and role in the conspiracy and substantive crimes was provided by Mr. Turbides.[16] This "testimony was the substance of the case establishing that Ramirez was guilty of the crimes charged in the indictment." [17] Thus the court was drawing boundaries on this rule for future cases on this point.

As trial counsel knows too well, the testimony of a cooperating co-defendant is devastating and is often believed by a jury. Armed with the decision in 'Ramirez,' the defense team can now argue this principle in its opening statement and summation since the case law is firmly established.

The Second Circuit then distinguished *Ramirez* from other cases cited by the government which were affirmed on appeal in other circuits. It also distinguished cases where testimony as to the involvement of the defendant on trial came from law enforcement officers on the direct case of the government or where an accomplice testified in rebuttal.[18]

The court held that these cases were significantly different. Even in those cases, it was noted that "the better practice is to give a cautionary instruction." [19] These cases, raised without success by the government, are not Second Circuit decisions and were testimonially distinguishable. The *Ramirez* court concluded:

> In sum, if this record does not establish reversible error with respect to the refusal to give the cautionary instruction, it is hard to imagine any that would.[20]

Therefore, it appears that this court now requires that the requested jury instruction be given when a substantial portion of the testimony comes from a cooperating defendant. In cases where testimony also comes from law enforcement witnesses, it still would be practical to give this jury instructions to avoid possible reversible error.

The court did not indicate where it would draw the line, but it did state "that in many cases, a failure to give the instruction requested would not result in significant prejudice, and therefore would constitute harmless error."[21]

But the court did not explain or illustrate a situation which would result in harmless error. Thus, the safer practice for trial counsel is to make the written request and take exception if the instruction is denied. The Second Circuit would then be required to evaluate the testimony of the various witnesses to determine prejudice and extent of the error involved.

As trial counsel knows too well, the testimony of a cooperating co-defendant is devastating and is often believed by a jury. Armed with the decision in *Ramirez,* the defense team can now argue this principle in its opening statement and summation since the case law is firmly established. In addition, the defense can plan their case with the knowledge that they will receive the jury instruction.

As a result of *Ramirez,* the trial court must, upon request, give this cautionary instruction. By the appellate court's decision, however, it has set boundaries on this rule. Although the court could deny the request if substantial evidence is elicited from witnesses other than the cooperating co-defendant, it would be wiser for the trial judge to resist flirtation with possible reversible error by the Second Circuit. It is also clear that the instruction need not be given at all if trial counsel fails to make the request for this instruction. Therefore, this jury instruction should always be prepared and requested when defending a client that will face testimony from a defendant that has pled guilty to the same or similar charges and is cooperating.

(1) 973 F2d 102 (Second Circuit, 1992).

(2) Conspiracy to possess with intent to distribute cocaine and cocaine base within 1,000 feet of a school (21 USC 846); 3 related possession counts (21 USC 812, 841, 860(a)); using or carrying a firearm in relation to a drug trafficking crime (18 USC 924(c)); and one count against Turbides of maintaining an apartment for the purpose of manufacturing and distributing cocaine and cocaine base (21 USC 856(a)).

(3) Defendant Ramirez was convicted of conspiracy to possess with intent to distribute cocaine and cocaine base within 1,000 feet of a school (21 USC 846); possession of a controlled substance (21 USC 812, 841 and 860(a)); and use or carrying a firearm in relation to a drug trafficking crime (18 USC 924(c)).

(4) 349 F2d 958 (2d Cir., 1976).

(5) Id. at 767, 768.

(6) Id. at 767.

(7) 394 F2d 908, 914-915 (2d Cir., 1968).

(8) Id. at 915.

(9) *United States v. Tolliver,* 541 F2d 958, 967 (2d Cir., 1976). See also *United States v. Gibbons,* 602 F2d at 1048. In *Gibbons,* the jury was not told codefendants had pled guilty during trial and were instructed that the "disposition of the case as to them should not in any way affect or influence your verdict with respect to the remaining two defendants."

(10) 434 F2d 289 (2d Cir., 289, 294 (2d. Cir., 1970) cert. denied 401 U.S. 921, 91 S.Ct. 910, 27 L.Ed. 2d 825 (1971).

(11) 434 at 294.

(12) Id.

(13) On remand, Ramirez entered a plea of guilty to reduced charges and was sentenced to 17 months imprisonment, which was the amount of time served up to that point. This author believes this was due to several factors. First, the co-defendant had absconded and could not be used to testify. Second, it was urged that his prior recorded testimony could not be used since the Second Circuit expressly stated that cross-examination of the bias of this witness may have been curtailed 973 F2d 106, 107. This issue also was raised on this appeal, citing: *Delaware v. Vanarsdall,* 475 U.S. 673, 670-680 (1986); *Davis v. Alaska,* 415 U.S. 3081 316-317 (1974); *United States v. Abel,* 469 U.S. 46, 50-52 (1984).

(14) 973 F2d at 105.

(15) Id. at 106.

(16) Id. at 105.

(17) Id.

(18) Id. at 106, citing: *United States v. Braxton,* 827 F2d 556 (7th Cir., 1989); *United States v. Schmaltz,* 562 F2d 558, 560 (8th Cir.), cert. denied. 434 U.S. 957, 98 S.Ct. 485, 54 L.Ed.2d 315 (1977).

(19) 877 F2d at 565.

(20) 973 F2d at 106.

(21) Id.