No. 09-4018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PAUL M. WILKINSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Judge William M. Nickerson)

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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MISCELLANEOUS

Nothing in Wilkinson's brief undermines the government's showing that the district court's finding of no loss to DESC is impossible to square with the Guidelines and the record in this case. Resentencing is required.

I. THE GOVERNMENT PROVED SIGNIFICANT LOSS TO DESC FROM THE FRAUD.

Wilkinson pled guilty to conspiring to defraud the United States, "admit[ting] as fact the allegations contained in the Indictment," A26-A28 (¶¶2-4), including the obstruction of DESC's competitive-bidding procedure for several into-plane and PC&S fuel supply contracts at various locations, A12-A17 (¶¶13-14). The government's evidence showed that DESC, after learning of the fraud, reawarded the affected contracts at an administrative cost of $26,813, A53; A65, and at a higher fuel cost of $566,109: $474,686 in higher contract prices, A54; A67, and $91,423 in higher fuel prices for purchases made on the spot market before the reawarded contracts became operational, A53-A54; A66. [1] By contrast,

[1] DESC terminated the contracts because of its policy not to deal with criminals. A439. There is no credible evidence to support Wilkinson's claim (Br. 31) that the termination was for reasons unrelated to the fraud. (Below, Wilkinson cited several e-mails, with his own editorial comments interspersed, in support of his claim (A352-A359), but the e-mails themselves do not prove what he claims.) Since DESC's refusal to deal with criminals was well known, Wilkinson could reasonably have foreseen that if DESC discovered the fraud, the agency would terminate its contracts, reaward them, and purchase fuel on the spot market in the interim – potentially at higher prices.

Wilkinson presented no credible evidence to support his claim that the government's costs were zero. Thus, the existence of at least some loss to DESC cannot reasonably be disputed.[2]

Wilkinson's main arguments are indirect attacks on Application Note 3(A)(v)(II) to U.S.S.G. § 2B1.1. First, Wilkinson argues that the administrative costs of reawarding the affected contracts are not properly attributable to the misconduct because DESC works on a budget and does not incur opportunity costs. Wilkinson Br. 30-31 (citing A273; A637). As the government explained in its opening brief, however, this argument defies common sense. U.S. Br. 24. All government agencies work on a budget. The Sentencing Commission would not have written Application Note 3(A)(v)(II), expressly and unqualifiedly including such administrative costs in the calculation of government loss in procurement fraud cases, if it did not want those costs to be compensable without proof of overtime or temporary hires, as Wilkinson argued was necessary below (A273; A637).[3]

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[2] Wilkinson's variously-stated claim that the government did not take seriously the issue of DESC loss (Br. 5, 23, 36-37) is silly. DESC's restitution depended on proof of its loss, and the government consistently discussed those losses first. A52-A54; A438-A449.

[3] Wilkinson does not argue that DESC personnel spent too much time reawarding the contracts, or valued that time too highly.

Wilkinson's main argument with respect to the loss to DESC from higher contract prices – that the government should have compared the new contract price to Avcard's prior bid, instead of the prior FERAS/Aerocontrol contract price, *see* Wilkinson Br. 31-32 (citing A512); A494-A497 – is also inconsistent with the Guidelines. *See* U.S. Br. 23-24. Nowhere in his brief or in the proceedings below has Wilkinson ever sufficiently explained how the "increased costs to procure the product or service involved," U.S.S.G. § 2B1.1, App. Note 3(A)(v)(II), could be computed other than by comparing the price under the original contract with the price under the replacement contract. Wilkinson is wrong to suggest (Br. 32) that Dr. Untiet conceded error on cross-examination. Dr. Untiet clearly testified that loss to DESC from higher contract prices "is the per gallon increase in price the DESC must pay for contract fuel" in the new contract. A497. The Guidelines support Dr. Untiet's methodology and calculations. *See* U.S. Br. 23-24 (explaining that increased reprocurement costs are considered a form of consequential damages under Application Note 3(A)(v)(II) and are calculated as a contractual measure of damages by comparing the contract and cover price).

Wilkinson also repeats his argument from below that the government made a calculation error at Burgas, and that correcting for the error reduces DESC's loss from higher contract prices from $474,686 to $50,246. Wilkinson Br. 32 (citing

A274). But Dr. Untiet testified that Wilkinson was wrong and explained why. *See* U.S. Br. 10 (summarizing Dr. Untiet's testimony at A445-A449). Wilkinson asked Dr. Untiet no questions on the subject on cross-examination and even now does not explain why Dr. Untiet's testimony was inaccurate.[4]

In addition, the government proved that DESC incurred $91,423 in losses from higher spot fuel purchases at four locations. A53-A54; A66. Though Wilkinson claims that he "presented location-specific evidence that contradicted the existence of spot market purchases" (Br. 31), Dr. Untiet testified that he saw the actual spot purchases records, A441, and Wilkinson did not cross-examine him on the subject (and does not now claim that Dr. Untiet was lying or that the records were fakes). Moreover, Wilkinson never made any "location-specific" challenges with respect to the spot purchases at two of the four locations. *See* A273-A274.[5]

Wilkinson suggests (Br. 2, 10, 23-25) that the district court was justified in rejecting the government's evidence of loss to DESC, because Dr. Untiet was

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[4] Even if Wilkinson's claim were correct, however, his argument still would not justify the ruling below, because it presumes contract loss of $50,246.

[5] Wilkinson also argues (Br. 31) that the higher spot purchase costs were not reasonably foreseeable because the contracts would have been terminated anyway. That is wrong, factually, *see* note 1, *supra*, and legally, *United States v. Vinyard*, 266 F.3d 320, 329 (4th Cir. 2001) (assessing whether the harm was reasonably foreseeable "*at the time of the fraud scheme*") (emphasis added).

inexperienced and did not corroborate the numbers provided to him by DESC. But Dr. Untiet testified that he has a Ph.D. in Economics from Stanford University, A436, is particularly knowledgeable about the petroleum industry, *id.*, and *did* corroborate the data provided to him by DESC, *see* A441 ("I asked [DESC] for each spot sale record."); A442-A449 (he reviewed the relevant contracts in computing loss to DESC from higher contract prices); A650. Dr. Untiet was just as qualified to calculate loss to DESC as Wilkinson's expert, Dr. Meyers, who conceded that he has never "done work on [a] criminal case[] before," A531, and thus had no prior experience calculating loss under Note 3(A)(v)(II).[6]

Wilkinson also suggests (Br. 3, 8-9, 20) that he was ill-prepared to contest loss to DESC because the government never "turned [its] data over to defense lawyers who had repeatedly requested it." But he does not claim that he ever asked DESC for the data. Indeed, his expert, Dr. Meyers, testified that he never "talk[ed]

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[6] Dr. Meyers did not address the loss to DESC from administrative costs or higher spot fuel purchases, and only briefly addressed the loss to DESC from higher contract prices, criticizing the government for assuming that, but-for the fraud, "Avcard would have performed under the contract, but at Aerocontrol's prices," A512. The government, however, never made that assumption in calculating the loss to DESC from higher contract prices. As explained above (and at U.S. Br. 23-24), increased reprocurement costs are considered a form of consequential damages under Application Note 3(A)(v)(ii), and are calculated by comparing the contract and cover price. Whether Avcard originally would have won the contracts, and the price at which it would have performed, was irrelevant.

to anyone from DESC." A530-A531. Nor does Wilkinson dispute that he had the government's loss calculations as of October 20, 2008, more than a month before sentencing, A327 (¶¶25, 27), and sought no additional information thereafter.[7]

II. THE DISTRICT COURT DID NOT APPLY NOTE 3(A)(V)(II) OR APPLIED IT INCORRECTLY SUB SILENTIO.

The government explained in its opening brief that there is nothing in the district court's ruling directly or indirectly showing that the court applied Note 3(A)(v)(II) when calculating loss to DESC. U.S. Br. 19-20. If the court applied Note 3(A)(v)(II), it must have done so silently, and gotten its application clearly wrong. *Id.* at 20-24; *see also* pp. 2-4, *supra*.[8] Wilkinson argues (Br. 38) that the district court cannot "be criticized for not citing application notes." But the

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[7] Wilkinson also intimates (Br. 16) that the lesser amount of loss charged to his co-conspirator, Cartwright, is suspicious. But Cartwright did *not* plead guilty to conspiring to defraud the government or to steal Avcard's bid information (unlike Wilkinson). A39-A40. Thus, the government did not charge Cartwright with the loss to DESC or as much loss to Avcard. *See* A619-A620.

[8] Of course, if the district court's finding of no loss to DESC was based on a misunderstanding of Note 3(A)(v)(II), then this Court would not be bound by the clearly erroneous standard when reviewing that finding. *See Sweeney Co. of Md. v. Eng'rs-Constructors, Inc.*, 823 F.2d 805, 807 (4th Cir. 1987); *see also United States v. Cochrane*, 896 F.2d 635, 639-40 (1st Cir. 1990) ("[Courts must] look carefully to see that the district court's findings of fact are not infected by legal error, and that the district court has not misconstrued the applicable legal principles. . . . [I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.") (citations and internal quotation marks omitted).

government's position is not that the court had to cite Note 3(A)(v)(II) – only that the court had to provide some indication that it applied the Note (and how), given that the Note's application was disputed and material to the proceedings. This argument is clearly supported by *United States v. Chambers*, 985 F.2d 1263 (4th Cir. 1993), in which this Court vacated the defendant's sentence because the Court could "find no basis in the record for concluding that the district court considered the factors outlined in application note 3 [to U.S.S.G. § 3B1.1(b)]," and the district court's cursory finding was insufficient to "conduct meaningful appellate review of this issue." *Id.* at 1269; *see also Gall v. United States*, 128 S. Ct. 586, 597 (2007) (noting that district courts must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing"). The same deficiencies are present here.

III. RESTITUTION IS PROPERLY BEFORE THIS COURT.

Contrary to Wilkinson's claim (Br. 2), the issue of restitution is "properly before the Court." As the government explained in its opening brief, DESC is entitled to restitution for its losses under the terms of Wilkinson's plea agreement and the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A. *See* U.S. Br. 27-28. The district court awarded no restitution to DESC in this case only because it found that DESC incurred no loss. *Id.* If this Court holds that the district court clearly

erred in finding no such loss, DESC will be entitled to restitution to the full extent of its losses determined on remand. *Id.*

Respectfully submitted.

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April 20, 2009

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,877 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Times New Roman 14-point font.

Dated: April 20, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2009, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES OF AMERICA with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I also filed eight copies of the brief with the Clerk of the Court by first-class mail.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Nickolai G. Levin

Dated: April 20, 2009 Nickolai G. Levin