

SECOND CIRCUIT REVIEW

Expert Analysis

Assessing District Court Decision To Let Jury Take Indictment Home

This month, we discuss *United States v. Esso*,¹ in which the U.S. Court of Appeals for the Second Circuit affirmed the defendant's conviction, following a jury trial, of two counts of fraud. The court's opinion, written by Judge Gerard Lynch and joined by Judges John Walker and Christopher Droney, considered a matter of first impression in any appellate court: whether the district court deprived the defendant of a fair trial by allowing the members of the jury, after the beginning of deliberations, to take copies of the indictment home overnight to review.

Background

In 2006 and 2007, George Esso was employed by GuyAmerican Funding Corporation, a mortgage brokerage, as a loan officer. Esso's duties as a loan officer included finding borrowers to buy property through GuyAmerican and arranging the loans to those borrowers, for which he received commissions. The borrowers Esso and other GuyAmerican employees found, however, were not qualified for the loans for which they were applying, and, in addition, included in their applications false information. At least one borrower, with Esso's aid, secured a loan on the basis of an application containing false income and employment information as well as misstatements about the purpose for which the property was to be used.

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In July 2010, Esso was indicted, along with several others, for his participation in the mortgage fraud conspiracy. Esso was charged with conspiracy to commit bank and wire fraud,² as well as the substantive offense of bank fraud.³

In August 2010 Esso was tried on both charges in a jury trial that lasted approximately two weeks. At 4:25 p.m. on the first day of the jury's deliberations, the jury sent out two notes: one that informed the district court that the jury intended to cease its deliberations at 4:30 p.m. and resume them the next day at 10 a.m., and a second that asked whether the jurors were permitted to take copies of the indictment home with them to review.

Over the objection of Esso's counsel, the district court ruled that the jurors would be permitted to take copies of the indictment home to read overnight. The district court then informed the jury that it could take the indictment home, and gave several cautionary instructions. Specifically, the district court instructed the jurors:

not to show [the indictment] to a spouse, not to show it to a grown child, not to show it to anyone. Just if you want to read it quietly, it's the same thing as reading it here in the jury room tomorrow morning at ten,

it just saves some time. But you have to be able to follow that instruction. Anybody have any doubt about being able to follow that instruction? Nobody has any doubt. OK.⁴

The district court further instructed the jurors "not to do any research on your own" and that they should not "even think of going on the Internet" to conduct research,⁵ and again asked the jurors if any of them would have difficulty following the instructions given. The district court also reiterated its instruction, given previously, that "[a]n indictment is not evidence in any way. It's just a charge by the government."⁶ The jurors were then provided with copies of the indictment to take home.

Deliberations resumed the next morning. Later that day, the jury returned a verdict convicting Esso on both counts against him.

The Second Circuit's Decision

On appeal, Esso argued that by allowing the jury to take home the indictment to read, the district court deprived him of his constitutional right to a fair trial. Specifically, Esso argued that collective deliberation forms the core of the jury trial process, and that allowing the jury to review the indictment at home "encouraged the jurors to consider the case, not collectively with their fellow jurors, but on their own," thus "depriv[ing] [Esso] of the right to a proper jury verdict...."⁷

The Second Circuit began its analysis by rejecting out of hand Esso's contention that allowing the jurors to take the indictment home with them was error simply because "it might lead the jurors to form ideas about the case by themselves."⁸

The panel then noted that “[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences,”⁹ and acknowledged that having the indictment at home, without the court and fellow jurors to ensure compliance with the court’s instructions, heightened the risk that a juror might discuss the case with family members or impermissibly conduct independent research. The Second Circuit also acknowledged the risk identified by *Esso* that allowing a jury to review the indictment at home may “overemphasize[] its significance, since it is a one-sided presentation of the prosecution’s view of the case.”¹⁰

In light of these risks, the panel sounded a note of caution, counseling district courts against adopting a general practice of allowing jurors to take indictments home to review, and emphasizing the importance of limiting instructions when jurors are so permitted. Nonetheless, notwithstanding the heightened risks it had identified, the Second Circuit held that it could not find that the district court had committed error in allowing the jury to bring the indictment home to review.

First, as the panel observed, the district court gave explicit and unambiguous instructions to the jury not to share or discuss the indictment with anyone and not to conduct research, whether on the Internet or otherwise, as well as an instruction about the purpose for which the jury could consider the indictment. Second, the panel further observed, the record was devoid of any evidence that any of the jurors had violated the district court’s limiting instructions. In the absence of any evidence to the contrary, the panel remarked, “we presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court.”¹¹

Given the risk inherent in any jury trial that jurors might disregard the court’s instructions, the panel reasoned, the incremental risk presented by allowing the jury to take the indictment home was de minimis. Accordingly, the Second Circuit held, permitting the jury to bring a copy of the indictment home to review, when accompanied by appropriate limiting instructions, did not constitute deprivation of a defendant’s right to a fair trial.

The Second Circuit noted that while it was not aware of any appellate decision addressing the issue before it, its holding was consistent with appellate decisions considering the issue of whether the jury may bring home the jury instructions. Both the California Supreme Court and the U.S. Court of Appeals for the First Circuit, in an unpublished decision, considered and rejected arguments similar to those made by *Esso*, holding that permitting the jury to take home jury instructions did not violate the defendant’s right to a fair trial.¹² “These decisions reinforce[d] [the panel’s] belief that the district court’s action did not deprive *Esso* of a fair trial,”¹³ though the panel observed, in dicta, that allowing the jury to take home evidence might heighten the risk of such a deprivation.

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In closing, the Second Circuit wrote that in reaching its decision, it was “mindful of the great discretion accorded to trial judges to manage their own courtrooms” as well as of the “desirability of allowing a measure of careful experimentation with trial management procedures that may at first seem undesirable simply because they are untraditional.”¹⁴ The panel nonetheless reiterated its skepticism of the wisdom of allowing a jury to take a copy of the indictment home, cautioning that “the Constitution does not prohibit every practice that may appear of questionable value to appellate judges.”¹⁵

Conclusion

In *Esso*, the Second Circuit, in an issue of first impression, held that permitting a jury to bring home a copy of the indictment for review, when accompanied by appropriate limiting instructions, does not violate a defendant’s right to a fair trial. Nonetheless, in light of the Second Circuit’s strong expression of skepticism about the wisdom of such a practice, as well as its observation that allowing the jury to take home evidence may be constitutionally problematic, it is

unclear what practical impact *Esso* will have on a district court’s willingness to permit jurors to take materials home for review during deliberations.

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1. Docket No. 11-570-cr, 2012 WL 2401639 (2d Cir. June 27, 2012). *Esso* appealed both his conviction and his sentence. In a separate order filed the same day as the decision discussed in this column, the Second Circuit vacated *Esso*’s sentence and remanded to the district court for resentencing. See Docket No. 11-570-cr, 2012 WL 2401683 (2d Cir. June 27, 2012).

2. 18 U.S.C. §1349.

3. 18 U.S.C. §1344.

4. 2012 WL 2401639, at *2.

5. *Id.*

6. *Id.*

7. *Id.* at *3 (internal quotations and citations omitted).

8. *Id.* (internal quotations and citations omitted).

9. *Id.* (internal quotations and citations omitted).

10. *Id.* (internal quotations and citations omitted).

11. *Id.* at *4 (quoting *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir.1997)).

12. See *People v. Ledesma*, 140 P.3d 657 (Cal. 2006); *McGonagle v. United States*, 137 F. App’x 373 (1st Cir. 2005). *State v. Morgan*, a New Jersey Superior Court case, relied on *Ledesma* and *McGonagle* in reaching the same conclusion. 423 N.J. Super. 453 (N.J. Super. Ct. 2011).

13. 2012 WL 2401639, at *5. Though the Second Circuit recognized the “special caution appropriate with respect to the handling of indictments,” the fact that the *Ledesma* and *McGonagle* decisions involved jury instructions rather than an indictment did not, in the mind of the panel, compel a different conclusion. The Second Circuit noted that the indictment was sent home with the jurors at the jury’s request, seemingly to expedite deliberations, rather than at the suggestion of the district court, and that, moreover, in granting the jury’s request the district court indicated it was doing so in order to save time. As such, the panel reasoned, the jury “was unlikely to interpret the district court’s decision to grant its request as a signal that it should put particular weight upon the indictment.” *Id.*

14. *Id.*

15. *Id.* at 6.