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A 'CSI effect' for wiretapping?

Stephen A. Miller

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The impact of the insider-trading prosecution of Raj Rajaratnam will be seismic. The verdict is significant, to be sure, but the prosecutors' method of assembling the evidence in the case will be the most lasting legacy — in particular, the use of wiretaps to prove criminal intent with devastating clarity.

Southern District of New York prosecutors are rightfully savoring the jury's verdict last week. They presented a powerful case over several weeks that withstood a full-throated defense by a team of talented lawyers. The wiretap evidence proved to be irrefutable. And, make no mistake, there has to be something especially sweet to them about 12 people unanimously endorsing their view of the evidence — beyond a reasonable doubt — in the face of a wealthy defendant's continued (if implausible) protestations of innocence.

Interestingly, though, prosecutors may have unwittingly made it harder to obtain convictions in white-collar cases in the future. This is surely not because the persuasive force of wiretapped calls among conspirators will diminish in any way. Quite the contrary. The Rajaratnam wiretaps highlighted that prosecutors have this powerful surveillance technology at their disposal — and future jurors now know it. That may not be good for prosecutors in run-of-the-mill white-collar prosecutions in the future.

The best illustration of this principle is the "CSI Effect." The enormously popular CBS television show *CSI: Crime Scene Investigation* has dazzled viewers for a decade. The show has exposed the public to state-of-the-art forensic tools and techniques, and made those techniques seem "mainstream." They're not. Yet when *CSI* viewers are selected to serve on juries, they expect those sophisticated techniques to be used. If they're not, defense lawyers can sometimes plant seeds of doubt in jurors' minds based on the prosecution's failure to utilize technology that could establish definitive, forensic proof beyond a reasonable doubt. In this way, the "CSI effect" is a bugaboo to prosecutors, especially those in cash-strapped

jurisdictions that probably won't have access this decade (if ever) to the cutting-edge forensic tools shown on television.

The Rajaratnam prosecution may prove to have a similar effect on white-collar prosecutions. The use of wiretap evidence has been the story of the trial, both procedurally and substantively. Rajaratnam's defense lawyers fought like crazy to keep the wiretap evidence out of court, and understandably so — each day of trial seemed to bring a new report of increasingly incriminating, taped conversations among conspirators demonstrating their criminal intent. The wiretapped conversations were likely the main reason that the government obtained the convictions at trial.

But that pioneering use of wiretap technology could be a double-edged sword for prosecutors. Jurors may come to demand similarly clear evidence of criminal intent in future cases. Most white-collar prosecutions, not simply insider-trading cases, boil down to a dispute over criminal intent; it is usually the most difficult element of white-collar offenses for prosecutors to prove because it is not often susceptible to direct evidence. When the government fails to present wiretap evidence — or similarly unmistakable proof of criminal intent — jurors may be more readily convinced that they have a "reasonable doubt" about the defendant's state of mind. In other words, by using wiretap evidence with great fanfare to overcome this hurdle in the Rajaratnam case, prosecutors may have unintentionally raised jurors' expectations and made it harder to prove criminal intent to juries in the future.

That could be a big problem for prosecutors because most white-collar cases do not involve wiretaps. Wiretaps require a huge investment of time and money by both the investigating agency and supervising prosecutors. At least one agent must personally monitor the wire at all times over the life of the wire. This requires almost full mobilization of an entire team of agents for a long period of time, which diverts them from working on other cases. Moreover, prosecutors must continually provide the authorizing court with updates on the progress on the wire and seek renewed judicial authorization, as appropriate — all time-consuming processes that keep prosecutors from moving forward on other cases. All of these practical impediments restrict the ability of law enforcement officials to undertake wiretaps. As a result, this powerful evidence will not often be available in white-collar prosecutions.

The impact of that absence of proof in white-collar cases may prove to be the lasting legacy of the Rajaratnam prosecution. Prosecutors may soon find that they're victims of their own success. The "Raj effect"?

Stephen A. Miller is a partner in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining the firm, he clerked for Justice Antonin Scalia on the U.S. Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.