16-0308-cr(L),
16-1094-cr(CON), 16-353-cr(XAP), 16-1068-cr(XAP)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

– v. –

HSBC BANK USA, N.A., HSBC HOLDINGS PLC,

Defendants-Appellants,

– v. –

HUBERT DEAN MOORE, JR.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* PROFESSOR BRANDON L. GARRETT IN SUPPORT OF APPELLEE

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of Professor Brandon L. Garrett ("Amicus Curiae") in support of the Appellee in this case. Professor Garrett believes that this appeal raises important issues of public policy which transcend the common law and First Amendment issues raised and argued by the parties. Amicus Curiae therefore respectfully submits this brief to lend his academic perspective to these important issues.1

INTEREST OF *AMICUS CURIAE*

Professor Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law, where he has taught since 2005. This amicus brief represents his individual views and research, and not those of the University of Virginia School of Law or of any institution. Professor Garrett's research and teaching interests include corporate crime, criminal procedure, habeas corpus, scientific evidence, and constitutional law. Over the

[1] Pursuant to Federal Rule of Appellate Procedure 29 and Rule 29.1 of the Local Rules of this Court, Amicus Curiae and his counsel represent that Professor Garrett has authored the entirety of this brief, and that no person or entity other than the Amicus Curiae or his counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to F.R.A.P. 29 (a), all parties in the case have consented to the filing of this brief.

past decade Professor Garrett's research has focused on legal developments in corporate prosecutions and corporate prosecution agreements. In 2014, he authored a major study of deferred prosecutions, Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (Harvard University Press, 2014) (hereinafter, "Too Big to Jail").[2]

For several years Professor Garrett, with assistance from the University of Virginia Law Library, has compiled and maintained a comprehensive database of prosecution agreements between corporations and federal prosecutors. That database remains the most complete source for information about federal deferred and non-prosecution agreements with organizations,[3] and it accompanies a larger collection of federal corporate convictions.[4] Professor Garrett has testified before Congress concerning corporate prosecution agreements and served as a reporter on

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[2] Professor Garrett's prior work on the subject of corporate prosecutions includes: Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011), Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917 (2009), and "Collaborative Organizational Prosecution," in PROSECUTORS IN THE BOARDROOM, ed. Rachel Barkow and Anthony Barkow (New York: New York University Press, 2011).

[3] Brandon L. Garrett and Jon Ashley, Federal Organizational Prosecution Agreements, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

[4] Brandon L. Garrett and Jon Ashley, Federal Organizational Plea Agreements, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/plea_agreements/home.php.

an American Bar Association subcommittee for a task force on corporate monitors.[5] Professor Garrett has a substantial professional interest and expertise in the legal issues raised by this appeal and their broader implications for law and policy relating to organizational prosecutions.

ARGUMENT

The sections that follow describe: (I) the public importance of the HSBC monitorship itself; (II) the long practice of making public information concerning corporate monitorships and corporate prosecutions generally; (III) the public interest in monitor reports, (IV) the overstated practical objections to the release of carefully redacted monitors reports, and (V) the reasons why the Speedy Trial Act permits judicial supervision of corporate monitors in a public manner.

I.

THE HSBC MONITORSHIP PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE CONCERNING FEDERAL CORPORATE PROSECUTIONS

Corporate criminal enforcement has exploded in this country. As documented in Too Big to Jail, *supra,* billion dollar fines are now routine across a

[5] The American Bar Association House of Delegates adopted the black letter of those standards. ABA Standards for Criminal Justice: Monitors (August 2015), at http://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/108a.pdf (hereinafter "ABA Standards").

range of industries, where they were unimaginable a decade ago. These criminal prosecutions often present issues of great public interest. There have been over 400 federal deferred or non-prosecution agreements with organizations since 1992. Over two-thirds were with public companies; one-fifth were Fortune 500 and one-fifth were Global 500 firms.[6] Some of the well-known companies that have entered such agreements include: AIG, America Online, Barclays, Boeing, Bristol-Myers Squibb, CVS Pharmacy, General Electric, GlaxoSmithKline, HealthSouth, JPMorgan, Johnson & Johnson, Merrill Lynch & Co., Monsanto, and Sears.

Deferred prosecution agreements ("DPAs") with corporations raise a host of issues that the typical criminal resolution of an individual does not. Such agreements do not typically limit their focus to just criminal fines, forfeiture, restitution, or community service payments, but typically include "structural reforms." *See* Brandon L. Garrett, *Structural Reform Prosecution,* 93 Va. L. Rev. 853 (2007). These reforms can include detailed compliance programs, such as requirements for the hiring of additional compliance personnel, governance changes, and periodic reporting and evaluation of compliance.[7] Some agreements require the retention of independent corporate monitors to supervise compliance,

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[6] Too Big to Jail, *supra,* at 62-63 (describing agreements entered from 2001-2012).

[7] *Id.* at 72-74.

although they only rarely call for the court to select or approve the selection of the monitors.[8] Additionally, the agreement to enter a DPA commonly includes parallel settlements and compliance with civil regulators, or settlements with private plaintiffs.[9] These agreements typically last for just two to three years.[10] The agreements may be negotiated with multiple parties, including prosecutors from multiple offices, a range of regulators, and attorneys representing victims; some involve foreign governments and their prosecutors and regulators. Standard agreements require cooperation in the investigations of employees, and the agreements may directly impact those employees, including by an organizational waiver of the attorney client or work product privileges.[11] As a result, these agreements may implicate the criminal procedure rights of individual defendants.[12]

The prosecution of HSBC was a watershed in the modern history of corporate prosecutions. Before 2008, prosecutions of banks were quite rare in federal courts. The fines were in the millions of dollars. The first billion-dollar

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[8] *Id*. at 178 (noting that judges chose only one monitor among the deferred and non-prosecution agreements entered from 2001-2012).

[9] *Id.* at 68-69.

[10] *Id.* at 75.

[11] *Id*. at 92.

[12] *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008); *United States v. Stein*, 435 F.Supp.2d 330, 382 (S.D. N.Y. 2006).

settlement in a federal prosecution of a bank was in the UBS/AG case, regarding tax violations, in 2009. The HSBC agreement, entered in 2012, was twice as large as any prior settlement in a bank prosecution, imposing a stipulated penalty of nearly two billion dollars.[13]

Due to its importance, a great deal of information about the HSBC case was made public. HSBC, headquartered in the U.K., is one of the world's largest financial institutions, with over $2.5 trillion in assets and operations in over 80 countries around the globe. The case was settled through a DPA, filed and approved by the District Court. In announcing the DPA reached with HSBC, the then U.S. Attorney for the Eastern District of New York, Loretta Lynch, noted that the "historic agreement" imposed "the largest penalty in any [Bank Secrecy Act] prosecution to date, makes it clear that all corporate citizens, no matter how large, must be held accountable for their actions."[14]

HSBC gained important advantages by settling the case using a DPA, including avoiding a formal indictment and also a possible conviction. In return, it agreed to a statement of stipulated facts filed in court, to waive its Speedy Trial

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[13] Brandon L. Garrett, *The Rise of Bank Prosecutions,* 126 YALE LAW JOURNAL FORUM 33, 50-51 (2016).

[14] Ben Protess and Jessica Silver-Greenberg, *HSBC to Pay 1.92 billion to Settle Charges of Money Laundering,* N.Y. TIMES DEALBOOK, December 10, 2012.

Act and other rights, and to adhere to a series of terms. These terms included, for example, an agreement to allow corporate monitoring for five years and to create a new compliance program.

This DPA attracted immediate high-level public attention and concern. Shortly after the agreement was announced Senate Judiciary Chairman Charles Grassley objected:

> The Department has not prosecuted a single employee of HSBC—no executives, no directors, no AML compliance staff members, no one. By allowing these individuals to walk away without any real punishment, the Department is declaring that crime actually does pay. Functionally, HSBC has quite literally purchased a get-out-of-jail-free card for its employees for the price of $1.92 billion dollars.[15]

Senator Jeff Merkley voiced similar frustration, calling the DPA with HSBC a "'too big to jail' approach."[16] Senator Elizabeth Warren was troubled that "evidently, if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night."[17]

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[15] Press Release, Justice Department's Failure to Prosecute Criminal Behavior in HSBC Scandal is Inexcusable, Sen. Charles Grassley, Dec. 13, 2012.

[16] Press Release, Senator Jeff Merkley, Merkley Blasts 'Too Big to Jail' Policy for Lawbreaking Banks, December 13, 2012.

[17] Chris Good, *Elizabeth Warren Wants HSBC Bankers Jailed for Money Laundering*, ABC NEWS, May 7, 2013.

In eventually approving the DPA in this case, United States District Judge Gleeson took note of "the heavy public criticism" and that the court had also "received unsolicited input from members of the public urging me to reject the DPA." JA 157-58 (Memorandum and Order, July 1, 2013, at 13-14).

Once the DPA was approved, the public concern with the HSBC DPA did not evaporate. The HSBC monitorship remained a matter of great public interest. A fair amount of information about HSBC's progress during the monitorship has been discussed in the media, including through statements issued by HSBC itself.[18] The details of the duties and authority of the monitor are set out in a document that is public and available on the DOJ website.[19] And because Judge Gleeson asserted a supervisory power to receive quarterly summaries of the monitor's reports while the case remains on the court's docket, those summaries have provided public insight into several years of compliance efforts.

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[18] Frances Coppola, "HSBC's Catalogue of Lawsuits," FORBES, Feb. 28, 2016, (quoting from HSBC annual report), at http://www.forbes.com/sites/francescoppola/2016/02/28/hsbcs-catalog-of-lawsuits/#356c0d9e4d27.

[19] Attachment B: Corporate Compliance Monitor, U.S. v. HSBC, Case 1:12-cr-00763-ILG (Dec. 11, 2012), at https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-b.pdf.

The American public learned from these disclosures that HSBC's compliance efforts have been inadequate, according to the monitor. HSBC has admitted that its compliance remains a work in progress, but asserts it is "on track."[20] The monitor has complained of resistance to compliance measures, including in HSBC's investment banks in the U.S.[21] New possible violations have come to light through a leak—"the biggest banking leak in history"—regarding tax evasion promoted through HSBC's Swiss subsidiary, from the same time period, 2005-2007, that was the subject of the DPA.[22] HSBC publicly responded: "We acknowledge and are accountable for past compliance and control failures." *Id*.

In addition, HSBC has reported in its Annual Report that while the Monitor found the bank had made "progress" in compliance, he also "expressed significant concerns about the pace of that progress, instances of potential financial crime and

[20] Rachel Louise Ensign and Max Colchester, *HSBC Struggles in Battle Against Money Laundering*, WALL ST. JOURNAL, Jan. 12, 2015.

[21] Greg Farrell, *HSBC Falls Short on Compliance, Monitor to Report*, BLOOMBERG, Mar. 30, 2015.

[22] David Leigh et al., *HSBC files show how Swiss bank helped clients dodge taxes and hide millions*, THE GUARDIAN, Feb. 8, 2015.

systems and controls deficiencies."[23] Clearly, the monitor's concerns are of enough gravity that HSBC reported those concerns to investors and the public.

II.

THERE IS A LONG PRACTICE OF ALLOWING PUBLIC ACCESS TO INFORMATION ABOUT CORPORATE MONITORS IN FEDERAL PROSECUTIONS

A. Monitors are Widely Used in Prosecutions of Organizations

The use of DPAs in corporate prosecutions, and the use of monitorships of DPAs dates back at least to 2001 (with the appointment of a monitor in a prosecution agreement with Aurora Foods). However, the use of special masters, court-appointed experts, and other independent monitors has been common in institutional reform litigation for decades. In the 1970s, scholars described the rise of public law litigation, which involves disputes unlike those between just private parties, involving ongoing oversight, public interests, and outside involvement of "masters, experts and oversight personnel."[24] In the 1980s, federal prosecutors began to make aggressive use of special masters and trustees to oversee ambitious

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[23] See Coppola, *supra.* See also HSBC Holdings PLC, Annual Financial Report, March 18, 2016, at http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/HSBA/12744438.html.

[24] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1284, 1298 (1976).

efforts using civil RICO to combat labor racketeering in unions. Professor James Jacobs has detailed such court-supervised monitoring in his work, including a landmark book. James B. Jacobs, *Mobsters, Unions, and Feds: The Mafia and the American Labor Movement* 246 (New York University Press 2006).[25]

In a wide range of areas, the Department of Justice has led the way in establishing independent monitoring to reform institutions, and it typically has insisted that the reports of such monitors be made public. For years the quarterly reports of the independent monitor of the Los Angeles Police Department have been made public.[26] It is standard for reports of policing monitorships established through DOJ consent decrees to be made public. Many of these reports contain extremely detailed findings concerning compliance by the police departments subject to the decrees.[27] This is particularly the case where a civil suit is to be dismissed without prejudice upon satisfaction of the terms of the settlement.

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[25] *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713. 1715 n.3 (2007 (exploring historical roots of corporate monitors).

[26] See Quarterly Reports of the Independent Monitor, at http://www.lapdonline.org/office_of_constitutional_policing_and_policy/content_basic_view/9010.

[27] *See, e.g.* Monitor's First Report, Compliance Levels of the Albuquerque Police Department and the City of Albuquerque with Requirements of the Court-Approved Settlement Agreement, at https://www.justice.gov/usao-nm/file/796886/download.

The Los Angeles Sheriff's Department entered into such an agreement with the DOJ's Civil Rights Division in 2015, for example.[28] A detailed report from the Monitoring Team was released six months after the agreement was entered, and it is just the first semi-annual report discussing steps to remedy a pattern and practice of racial profiling.[29] Such work involves building trust and relationships with the Sheriff's Department, community groups, and members of the public, and the reporting clearly is understood to enhance transparency and promote trust. Reports are made public in many federal consent decrees imposed on school districts relating to desegregation or special education programs, as well as in other types of monitorships.[30]

In criminal cases, a similar role can be observed in court ordered probation where, pursuant to special conditions, federal courts have long appointed special

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[28] Stipulation and Order Approving Settlement Agreement and Order of Resolution and Entry of Judgment, U.S. v. Los Angeles County Sheriff's Department, 2:15-cv-03174-JFW-FFM (C.D.C.A. May 15, 2015), at https://www.justice.gov/crt/file/762056/download.

[29] Los Angeles County Sheriff's Department Antelope Valley Evaluation Monitoring Team, Six-Month Report (Dec. 22, 2015), at http://www.nccdglobal.org/sites/default/files/publication_pdf/antelope-valley-6-mo-report.pdf.

[30] *See, e.g.* Los Angeles Unified School District, Office of the Independent Monitor, Reports, at http://oimla.com/reports.htm.

masters or corporate monitors.[31] Over two-thirds of convicted corporations are put on probation.[32] According to sentencing guidelines, companies shall be put on probation if they lack an effective compliance program and have more than fifty employees or were otherwise required to have such a compliance program.[33] In addition, such probation can be more actively monitored if "special conditions" are imposed to ensure "changes are made within the organization to reduce the likelihood of future criminal conduct." U.S.S.G. §8C2.5(g)(3). Corporate probation is court-supervised and a judge can make information about the process public and available on the docket.

Special master reports can be quite detailed. In some cases, reports and hearings involving testimony of a special master discussing compliance of a company on corporate probation are part of the federal docket.[34] In still other

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[31] *See* U.S. SENTENCING GUIDELINES MANUAL §8D1.1 (2012).

[32] *See, e.g.*, U.S. Sentencing Commission, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, table 54 (2013).

[33] U.S. SENTENCING GUIDELINES MANUAL § 8D1.1(a)(3).

[34] For example, a series of hearings are available in the case of Ionia Management S.A. U.S. v. Ionia Management S.A., Fifth Special Master's Hearing, (D.Ct. Jan. 12, 20111), at https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2007cr0134-343-2.

cases, the corporation makes public all of the various compliance reports and court-appointed monitor's reports, as Duke Energy has done during probation.[35]

Most federal prosecutions of organizations are resolved through guilty pleas, in which the entire process is court-supervised. Indeed, there has been a shift towards using guilty pleas even in the largest cases involving banks in recent years. *See, e.g.*, Garrett, *The Rise of Bank Prosecutions, supra*. In other areas of enforcement, the DOJ has emphasized the importance of judge-supervised compliance. The Antitrust Division has emphasized importance of "effective compliance programs," and that the Division will "reserve the right to insist on probation, including the use of monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism."[36] Similarly, it is standard in environmental cases for a monitor or master to supervise a compliance plan. [37]

The past decade has seen a remarkable rise in the use of corporate monitors in the largest criminal cases, taking cues from prior usage in RICO and other

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[35] Duke Energy, Environmental Compliance plans, at https://www.duke-energy.com/environment/reports/ecp.asp .

[36] William J. Baer, Assistant Attorney General, *Prosecuting Antitrust Crimes*, Sept. 10, 2014.

[37] For just a few recent examples, see U.S. Department of Justice, Environment and Natural Resources Division, *Prosecution of Federal Pollution Crimes,* at https://www.justice.gov/enrd/prosecution-federal-pollution-crimes.

institutional reform cases.[38] The stated goal is for the firm to benefit from "expertise in the area of corporate compliance from an independent third party."[39] It is extremely important that compliance be taken seriously in these prosecutions. After all, corporations cannot literally be jailed. Fines may be borne by shareholders or passed on through prices to consumers, without affecting the employees or officers involved in the conduct. Corporate monitoring is one effort to assure corporations subjected to criminal penalties engage in compliance.[40]

There is a growing field of scholarship examining the widespread role of these monitors in criminal prosecutions of organizations.[41] Scholars have asked

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[38] *E.g.*, Kathleen M. Boozang & Simone Handler-Hutchinson, ''Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care, 35 AM. J.L. & MED. 89, 93 (2009).

[39] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., for Heads of Dep't Components and U.S. Att'ys (Mar. 7, 2008) (hereinafter "Morford Memorandum"), at http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[40] Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1777 (2011).

[41] *See, e.g.* F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 n.2 (2011); Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 732-34 (2009) (discussing the difficulties inherent in being a corporate monitor); Vikramaditya Khanna, *Reforming the Corporate Monitor?,* in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 238-41, 244 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

questions such as whether monitors could be selected in a fairer or more impartial manner; whether monitors effectively supervise and improve compliance; and whether their role is adequately defined. Scholars have asked why monitors are often *not* appointed in DPAs, if prosecutors are concerned that compliance programs be effective. *See* Garrett, Too Big to Jail, *supra*, at 194-175.

B. The Work of Monitors is Often Available to the Public

The American Bar Association adopted standards on the subject of corporate monitors in 2015.[42] Those standards take no position on whether monitor reports should or should be made public, but it is standard practice in civil and criminal cases for monitor reports to be made public, and the ABA Standards set out a process for making monitor reports public:

> If a written report may be publicly disclosed or provided to third parties, the Monitor should consult with the Government and Host Organization, or if appointed by a court, the court, for purposes of protecting against the disclosure of sensitive or disparaging information concerning individuals who may be named in the report, and the disclosure of proprietary, confidential, or competitive business information.

[42] The DOJ has addressed corporate monitorships and issued guidance on that subject. *See generally* Morford Memo, *supra* note 41. The DOJ has not issued principles for deciding how to calculate corporate fines or penalties, which in itself suggests how important such monitors are to the practice of corporate prosecutions.

ABA Standards at 12. The ABA Standards note the relevant court order or agreement "should state whether the Monitor's report is to be confidential or whether it is to be made available to the public, in part or in whole." *Id.*

It is also routine for a wide array of information in corporate prosecutions to be made public. Even in cases settled out of court with non-prosecution agreements, the terms are made public. Detailed public statements of facts accompany DPAs.[43] The goal of these lengthy statements is to inform the public of what happened; the agreements typically state the corporations admits all of the facts contained in those detailed statements and cannot deny them or risk breach of the agreement.[44]

In cases involving DPAs, all of these types of documents are available through the federal dockets, through PACER or on Westlaw and other federal dockets databases. Cases appearing on federal dockets involve a host of judicial documents; one may read motion practice surrounding the approval of a deferred prosecution agreement, or transcripts of hearings discussing the agreement. In cases resolved through pleas, one commonly sees on dockets extremely detailed

[43] Garrett, Too Big to Jail, *supra,* at 61 (describing how 80 percent of deferred and non-prosecution agreements from 2001-2012 included statements of facts).

[44] *Id*. at 61-62.

information including transcripts of plea hearings with corporations.[45] All of this information is made public to inform citizens about the actions taken in court by prosecutors, and to promote public confidence in the criminal justice system.

The reports of corporate monitors in deferred and non-prosecution agreements have also been made public, and disclosure serves the same purposes as in the commonly disclosed monitor reports in civil cases and in criminal cases resolved through plea agreements. For example, complete reports of monitors in the University of Medicine and Dentistry of New Jersey are available, in redacted form, to the public.[46] The reports were made public in the New York Racing Association case, in redacted form.[47] Valuable information is contained in these reports. The reports suggested the approach taken (an "Independent Private Sector Inspector General" approach) was a good one.[48] The monitor provided not just a

[45] For example, the transcripts of the plea hearings involving the Siemens corporation are described in Garrett, Too Big to Jail, at 151-152.

[46] The Federal-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, January 3, 2008, at http://blog.nj.com/southjersey_impact/2008/01/MonitorReport.pdf.

[47] Monitor's Final Report, Part I – Public Report, at http://www.osc.state.ny.us/reports/nyra/nyrareport905.pdf.

[48] *Id.* at 2-3.

"detailed paragraph by paragraph analysis" of the compliance, but also a set of lessons for other monitoring efforts.[49]

Other monitorships have entered the public record due to actions of monitors and how they were selected. For example, monitorships of five companies which entered agreements in the District of New Jersey in 2007, became the subject of Congressional hearings in 2009 due to concerns regarding the appointment of a former U.S. Attorney General as monitor and the fixed fee portion of the retainer paid.[50] The DOJ made changes to rules for reviewing retention of monitors in response.[51] Such examples show how more transparency serves an important public purpose—and has led to changes in policy.

III.

THERE IS A STRONG PUBLIC INTEREST IN DISCLOSURE OF MONITORS' REPORTS

Perhaps the most important stage of a corporate prosecution is the implementation of an agreement. Corporate prosecutions invariably settle, and some of the most significant cases have settled with DPAs. Garrett, Too Big to

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[49] *Id.*

[50] Garrett, Too Big to Jail, *supra,* at 187-190.

[51] *Id.*

Jail, *supra,* at 62. The role of the monitor in implementing a DPA uniquely serves the public interest. The DOJ's Morford Memorandum observes that the monitor is not an "agent of the corporation or of the Government." Morford Memorandum, *supra*, at 4. The monitor is independent, and serves the public interest—and in a DPA the monitor informs the court.

In any given case, there is a public interest in knowing if the monitorship is accomplishing the ends of justice contemplated by the DPA. Indeed, past actions by corporate monitors have been the subject of great public interest and discussion. For example, at the urging of its corporate monitor, Bristol-Myers Squibb removed its chief executive, after uncovering new violations.[52] In some cases, the conduct of the monitor raised real concerns that might have been averted had the monitor's role been more public and transparent. In the prosecution of several hip and knee joint replacement companies, the Zimmer corporation complained that its monitor was asking for a large monthly flat fee, rather than itemized billing. The matter later led to Congressional hearings.[53]

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[52] Brooke A. Masters, *Bristol-Myers Outs Its Chief at Monitor's Urging*, WASHINGTON POST, September 13, 2006.

[53] Hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, "Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements," June 25, 2009, http://judiciary.house.gov/hearings/printers/111th/111-52 _50593.PDF.

Judicial involvement in monitorships helps to assure fair treatment for corporate defendants. Concerns regarding monitorship costs and scope are not uncommon. The Government Accountability Office reported companies commonly "identified concerns about the monitor's cost, scope, and amount of work completed. . . ."[54] Ongoing judicial supervision provides the opportunity to raise such concerns.

Moreover, monitor reports can implicate the functions of a judge. If a company is not complying with the terms of a DPA, the judge need not continue to toll time under the Speedy Trial Act. As Judge Gleeson noted below, the court must also "ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court." (JA 155). A judge cannot do so if kept entirely in the dark. If a company needs more time to comply with the terms of a DPA, a judge might decide to permit additional time.

The public interest in disclosure of a monitor's reports is only heightened for firms like HSBC, where it appears the monitor continues to uncover problems. There is a significant public interest in information about whether corporate monitorships are effective. Indeed, recidivism concerns have been particularly

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[54] U.S. Government Accountability Office, GAO-10-110, *DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness,* 4 (2009).

apparent regarding banks. Banks settling repeated criminal prosecutions in recent years include:

- AIG (deferred and non-prosecution agreements entered by two subsidiaries in 2004 and a non-prosecution agreement in 2006),
- Barclays (a deferred prosecution agreement in 2010, a non-prosecution agreement in 2012, and a guilty plea pending),
- Crédit Suisse (a deferred prosecution agreement in 2009 and a plea agreement in 2014),
- HSBC (a non-prosecution agreement in 2001 and a deferred prosecution agreement in 2012),
- JP Morgan (a non-prosecution agreement in 2011, a deferred prosecution agreement in 2014, and a plea agreement pending currently),
- Lloyds (a deferred prosecution agreement in 2009 and a deferred prosecution agreement in 2014),
- the Royal Bank of Scotland (a deferred prosecution agreement in 2013, a guilty plea by a subsidiary in 2013, and a guilty plea currently pending),
- UBS (a deferred prosecution agreement in 2009, a non-prosecution agreement in 2011, a nonprosecution agreement in 2012, a guilty plea by a subsidiary in 2013, and a guilty plea currently pending); and
- Wachovia (a deferred prosecution agreement in 2010 and a non-prosecution agreement in 2011).

Barclays, JP Morgan, UBS and five more banks also agreed to plead guilty in cases relating to foreign exchange (FOREX) currency manipulation. *See generally* Brandon L. Garrett, *The Rise of Bank Prosecutions, supra.* Still more banks are currently under investigation, and major banks have paid still larger penalties in

civil enforcement actions. These cases raise large public concerns about compliance at our most important financial institutions, and about the approach of prosecutors in enforcing federal laws.

There is an equally strong public interest in learning about monitorships when they are successful. If a company develops, with the help of a monitor, better compliance techniques, then there is both a law enforcement interest and a public interest in other companies emulating that model. The DOJ and regulators should want industry to adopt best practices that can detect and prevent crimes. Secrecy in monitoring both disguises potential recidivism and poor compliance, but it also harms the enterprise of promoting good compliance.

IV.

PRACTICAL OBJECTIONS TO DISCLOSURE OF MONITORS' REPORTS ARE EXAGGERATED AND EASILY ADDRESSED THROUGH REDACTION

One concern raised about disclosure of monitors' reports is that doing so would impede the trust and cooperation between the monitor and the corporations. If reports are carefully redacted, that concern is entirely misplaced. Some who have voiced concerns with disclosing complete monitors' reports have acknowledged that redaction can indeed address their concerns, and recognize that

other agencies follow such an approach.[55] As noted, public disclosure of monitors' reports is common in cases resolved with pleas, as well as in a range of other types of enforcement actions brought by DOJ. Partial redaction is routine in Federal Trade Commission reports.[56] Indeed, as HSBC notes, the monitor in this case agrees that providing a redacted version of his report would not negatively affect his work. It might lack the detailed factual support of a lengthier document, but for all the reasons discussed a redacted report would still serve the public interest enormously, even in that more limited form. Judge Gleeson explained as much in his ruling below, stating that the report will not be "either useless or incomprehensible" with redactions. SPA 13 (Memorandum and Opinion at 13).

V.

THE SPEEDY TRIAL ACT PROVIDES THE COURT WITH AUTHORITY TO DISCLOSE MONITORS' REPORTS

The Speedy Trial Act calls for a close judicial role in prosecutions with DPAs. Its provisions were modeled on early efforts to supervise alternatives to a conviction for low-level offenders like first-time drug possession arrestees or juveniles. The model was one of rehabilitative supervision, with the judge playing

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[55] Veronica Root, *The Monitor-Client Relationship*, 100 VA. L. REV. 523, 575 (2014).

[56] *Id.* at 576–577. *See also* Khanna, *supra,* at 244.

a central role. Supervision of a DPA and of a corporate monitor is nothing like reviewing a decision whether to prosecute. Of course prosecutors have enormous discretion to decline to prosecute or to voluntarily dismiss a case. Case law to that effect is much-cited by the Government, but Amicus believes that case law is not at all on point. The Government did not decline to prosecute HSBC—one can only imagine the public reaction if it had done that.

Instead, the Government chose to prosecute and to seek the benefit of placing the case on a District Judge's docket for an extended period of time. The Speedy Trial Act requires trials to commence within seventy days of charges being filed, and in order to extend that time period an agreement between the parties must be entered "with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. 3161§ (h)(2). The Government asked a corporate defendant to waive its Speedy Trial Act rights. A judge must ensure such a waiver is appropriately demanded and obtained. Further, a judge must ensure that a case remaining on the docket is being properly handled—in light of the very specific language of the Speedy Trial Act stating that the purpose is to allow the defendant "to demonstrate his good conduct."

The applicable section of the Speedy Trial Act, Section 3161(h)(2), refers in its complete text to tolling time for: "Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with

the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." The requirement that a prosecution can be deferred only upon "the approval of the court," makes the discretion of the court clear. Other provisions of the Act do not require court approval, while still others limit discretion, for example, by providing factors to be considered when deciding whether to grant a continuance, or by supplying standards for whether a type of delay is reasonable. Any doubt over the meaning of such provisions should be read in favor of judicial discretion because Act was intended to "strengthen[] the supervision over persons released pending trial."[57] Thus, the initial exercise of discretion whether to approve a DPA is necessarily combined with substantive review of that agreement and is joined with ongoing supervision of the case. Second, the discretion is limited, since a judge is only to approve tolling of time for the defendant to "demonstrate his good conduct." An agreement entered for purposes other than allowing a defendant to show good conduct would be contrary to the text.

The Report of the Senate Judiciary Committee on the Speedy Trial Act briefly discussed how several U.S. Attorney's offices had been experimenting with diversion programs, noting a Congressional desire to "encourage" that "current

[57] *See* H.R. Rep. No. 93-1508, at 1 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401, 7401.

trend," and concluding that the diversion provision "assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits."[58] This clear expression of the need for the court to be "involved in the decision to divert," together with the Act's explicit requirement that a judge approve a deferral, leaves no doubt about the judge's authority to review and approve such an agreement.

To be sure, the drafters of the Speedy Trial Act were familiar with the use of diversion programs for non-violent or juvenile offenders; corporate DPAs are far more complex and call for far more judicial supervision.

Recently, Congress spoke to the issue of DPAs by further buttressing the role of judicial supervision and approval of DPAs. Part of the public interest served by judicial review is the interest of victims. Congress has made clear that victim rights are implicated by DPAs. In the Justice for Victims of Trafficking Act of 2015, Congress included a provision that victims have a statutory right to be notified of DPAs. The Crime Victims Rights Act (18 U.S.C. §§ 3771) was amended to establish for each "crime victim" "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement," thus

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[58] S. REP. NO. 93–1021, at 37 (1974); *see also* A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Fed. Judicial Center 1980), at http://www.fjc.gov/public/pdf.nsf/lookup/lhiststa.pdf/$file/lhiststa.pdf.

facilitating any "crime victim's" "right to full and timely restitution as provided in law," providing, in addition, for appellate review of any denial of restitution. 18 U.S.C. §§ 3771(a)(9). Those provisions assure that when a DPA is filed in court, it cannot be approved without involving of relevant victims. Those provisions highlight how approval and supervision of a DPA implicates judicial review, public interests, and victim rights. In contrast to the DPA in this case, a non-prosecution agreement is not filed with a court. While distinct from a declination, such an agreement does not implicate supervisory authority of a court like a DPA, since the court is not asked to approve it.[59]

In the most detailed opinion to address these matters to date, Judge Gleeson in this case correctly concluded that a judge's role under Section 3161(h)(2) is not simply to assure that the parties have not colluded to toll the speedy trial clock: "approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself." JA 156. [Memorandum and Order, *United States v. HSBC Bank USA,* 2013 WL 3306161 *3, No. 1:12-cr-00763-JG (E.D.N.Y. July 1, 2013)] ("HSBC Order"). Judge Gleeson noted the Speedy Trial Act is "silent" as to the standard for deciding

[59] The GAO has criticized the lack of criteria for deciding whether a company receives a deferred or a non-prosecution agreement. Government Accountability Office, *Preliminary Observations on the DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements,* June 25, 2009, at 41.

whether to approve a deferred prosecution agreement. In doing so, Judge Gleeson proceeded to examine the terms of the HSBC agreement, and in the process, found the fines, compliance provisions, and other terms to be appropriate. However, Judge Gleeson found one feature lacking: the court was not to be kept apprised of the agreement's implementation as he would have been in a probation mandated compliance program. He, therefore, ordered the parties to file quarterly reports describing "all significant developments," resolving any "doubts about whether a development is significant ... in favor of inclusion." *Id*.

This case is not like *Fokker Services*, much relied on by HSBC and the Government, in which the corporation appealed the judge's decision to deny approval of a DPA. *United States v. Fokker Services, B.V.*, 79 F. Supp. 3d 160, 164 (D.D.C. 2015). In this matter, the DPA was approved. In addition, the decision to exercise supervisory authority in the form of ongoing reporting was not appealed. All that is appealed is the disclosure of the redacted monitor's report. There is a vanishingly small difference between filing quarterly reports with the court—which HSBC does not dispute, and which were periodically publicly summarized by the court—and the disclosure of the complete report, carefully redacted.

Indeed, ultimately, while finding that the district judge improperly rejected the Fokker Services DPA, the D.C. Circuit adopted the standard suggested here, noting that the purpose of Section 3161(h)(2) was to "assure that the DPA in fact is

geared to enabling the defendant to demonstrate compliance with the law…." *Id.* at 744. Judge Gleeson concluded the HSBC DPA would permit the bank to demonstrate its good conduct—and merely sought ongoing information regarding whether the company was in fact demonstrating requisite good conduct. Such supervision is fully consistent with the D.C. Circuit's opinion in *Fokker Services*. Such supervision does not involve review of a decision regarding charging, which was the entirety of the concern of the *Fokker Services* panel.

To be sure, much of underlying reasoning in the *Fokker Services* opinion is deeply flawed. The D.C. Circuit reasoned that the Government's decision to seek a DPA is like a dismissal under Rule 48—rather than a decision governed by the text of the Speedy Trial Act, in which the placement of a case on a judge's docket for an extended period of time, is subject to its "good conduct," and the approval of a judge. *United States v. Fokker Servs., B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016). The D.C. Circuit emphasized throughout that entering a DPA is like a decision to dismiss charges entirely, citing to inapposite authority that the Executive has "long-settled primacy over charging" and that a judge may not second-guess "charging decisions." *Id*. at 743, 745, 747. However, the Speedy Trial Act quite specifically treats entering a DPA differently than a charging or dismissal decision, because it is a settlement waiving rights and entered in court—one which implicates the judge in many of the same ways as a plea bargain. A judge could not

fail to ensure that a party has voluntarily waived its Speedy Trial Act rights before approving a DPA. In addition, the Crime Victims Rights Act, as amended, makes clear that in a DPA a judge must assure any victims are notified and proper restitution is provided. 18 U.S.C. §§ 3771(a)(9). The *Fokker Services* Court did not address such situations in its opinion. In contrast, a judge would have no role or reason to object if a prosecutor decided to dismiss charges entirely under Rule 48. The defendant is not waiving rights if charges are dismissed entirely. Id. at 742.).

It is surprising to see HSBC cite to the scholarship of Amicus for the proposition that Congress could, if it "intended to provide for supervision over" DPAs, it could "pass a statute to that effect." Amicus agrees Congress could clarify and strengthen the supervisory power of judges under the Speedy Trial Act. However, as Amicus has previously written and describes in this brief, the role of the court in both approving and supervising deferred prosecution agreements is consistent with the clear text and purpose of the Speedy Trial Act.

CONCLUSION

The HSBC monitorship is a perfect illustration of the enormous public interest in what corporate monitors do when they supervise DPAs. It is standard practice to release monitor reports in a wide range of civil monitorships and in

cases resolved with guilty pleas. The monitor is not an agent of the corporation or of the prosecutor, but rather an independent entity, serving in the public interest, and providing information to the parties as well as the judge. The reports by that monitor, properly redacted, should inform the judge's decision whether to permit ongoing tolling of the Speedy Trial clock. Moreover, victims have special interests, buttressed by recent legislation, in DPAs. Among the public, other corporations can benefit from best practices and success stories described in monitor reports, as well as from the difficulties monitors encounter. Such lessons ultimately help to prevent corporate crimes in the first instance, which serves perhaps the largest public interest of all. The HSBC case provides an important opportunity to emphasize the public interest served by corporate monitors retained as part of DPAs, and for that reason, the redacted report of this monitor should be made public, as the Judge wisely ordered. His Order should be affirmed.

Dated: October 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,964 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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