LEV PARNAS' CO-DEFENDANT DAVID CORREIA TESTS THE SEND-YOUR-PHONE BORDER EXCEPTION WORK-AROUND

As much of a splash as Lev Parnas made during the Trump impeachment, his co-defendants are each mounting more intriguing defenses.

In the case of David Correia — who was charged in the marijuana side of the indictment — that includes an attempt to bypass the border exception (which allows authorities to search anything carried on your person through customs) by sending his attorney an iPhone, a Microsoft Surface Pro, a hard drive, and two notebooks he had with him before he returned to the United States to be arrested in October.

Are devices sent from overseas to an attorney covered by attorney-client privilege?

The issue first became public in March, when the government asked Judge Paul Oetken to order Correia's lawyers, William Harrington and Jeff Marcus, to file a privilege claim over the package by March 23 (the government has been holding off accessing the evidence from the devices awaiting such claims). In a letter claiming that March 23 deadline was unrealistic given the COVID crisis, Correia's lawyers claimed the government had totally misrepresented the attorney-client claim (and complained that the government had neither informed Correia right away about the seizure in October nor raised this issue at a status

conference in February). With the government's consent, Oetken gave Correia an extension.

Ultimately, Correia argued that he had sent the materials, "for the purpose of seeking legal advice," The filing argued that because the FBI had ample notice that Marcus represented Correia (Correia lawyered up by August), and because Marcus negotiated a self-surrender upon Correia's return from abroad, the government had to recognize that the DHL package was privileged when they obtained it. Correia further argued that because the *notebooks* include information that was clearly intended to solicit advice, the entire package must be privileged (that argument, however, was utterly silent about the devices). The lawyers also note that Correia did not send all the papers he had with him, which they point to as proof that the documents — to include the devices — that he did send were a selection specifically intended to get advice.

The government just submitted its response (note that one of the lawyers on this case, Nicholas Roos, also took part in the privilege fight over Michael Cohen's devices). In it, they reveal that a privilege team reviewed the notebooks, after which prosecutors sent scanned copies of the notebooks and asked Correia's lawyers to assert any privilege claims by January 20.

> In the course of reviewing these materials for privileged information, the Government's filter team identified items that potentially could be privileged. Accordingly, those items were withheld from the prosecution team and were redacted from the materials that are being produced in discovery. Since the filter team identified those items as only potentially privileged because the records do not contain adequate information to make a definitive assessment, the filter team will be providing the unredacted materials to you. If you believe any of the items that were redacted, or any

> other items, are privileged, please so indicate by January 20, 2020, and provide the factual basis for such a privilege assertion to the filter team. After that date, the materials in their unredacted form will be released to the prosecution team and produced in discovery.

After receiving that, Correia first claimed that everything in the package, including the devices, was privileged.

The government, however, cites Second Circuit and SDNY precedent holding that materials pre-existing attorney-client communications are not privileged.

> Indeed, as the Second Circuit held nearly sixty years ago—rejecting a claim that the attorney-client privilege applied to various documents provided by a client to his counsel—"the attorney-client privilege protects only those papers prepared by the client for the purpose of confidential communication to the attorney or by the attorney to record confidential communications," but "pre-existing documents and . . . records not prepared by the [client] for the purpose of communicating with their lawyers in confidence . . . acquired no special protection from the simple fact of being turned over to an attorney." Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962); see also United States v. Walker, 243 F. App'x 261, 623-24 (2d Cir. 2007) ("putting otherwise non-privileged business records . . . in the hands of an attorney . . . does not render the documents privileged or work product (citing Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 170-71 (2d Cir. 2004))).

And it argues that they should be able to access anything pre-existing that is not privileged (the filter team continues to review the content of the devices).

> The FBI's preliminary analysis indicates that Correia's hard drive contains tens of thousands of documents, images, and audio and video files; his iPhone contains tens of thousands of documents, images, and audio and video files, as well as other data such as internet browsing history and location information; and his Suface Pro computer contains hundreds of thousands of documents, images, and audio and video files. It is undisputed that these materials, as well as his notebooks, existed prior to Correia's communications with counsel on this case. They were not, in toto, created at the direction or advice of counsel, and did not become privileged merely because Correia sought to send them to his counsel.

The government rejects Correia's argument that by accessing the files, the government learned about what selection of materials Correia was seeking counsel. It argues that nothing in the package reflected instructions from Marcus to Correia (there was no note included at all), and the government first learned that the selection of items in the package ended up there based on Marcus' advice from Correia's own filing.

> Correia erroneously claims that by intercepting the DHL package, the Government learned what materials counsel had advised Correia to collect. On the contrary, the DHL package contained no such communication. The Government "learned" that fact—assuming it is true— only through counsel's briefing on this motion. In any event, it is simply false to suggest that the DHL package contained a carefully

> curated selection of relevant documents. It contained the opposite: the entirety of Correia's multiple devices and notebooks, with no indication as to what particular documents or portions of documents may be relevant. The seizure of those materials revealed nothing about counsel's "defense planning" (Mot. 13)
>
> [snip]
>
> As counsel is well aware, the Government's assumption had been that Correia simply sent his devices and notebooks to counsel so that they would not be in his possession and subject to seizure when he was arrested.

While the government doesn't address the documents Correia had on his person on his arrest, they describe that he had no devices at all, just the charging cords for them.

> Although Correia still had a phone case, multiple phone chargers, and charging cords with him, he did not have a single electronic device on his person.

Given how often InfoSec people have argued that this method — sending your lawyer sensitive devices before crossing a border — is the best way to protect them, the resolution of this issue has some wider legal interest.

But in this case, the resolution likely comes down to the fact that prosecutors told Judge Oetken, when getting a warrant for the DHL package, that it was sent from Correia to his lawyer.

> This Court, based upon an affidavit that made clear the DHL package was sent by Correia to his counsel, found probable cause to believe that the package and its contents contained evidence, fruits, and instrumentalities of federal crimes.

> [snip]
>
> On or about October 21, 2019, the Court signed a search warrant authorizing the Government to search a package sent via DHL from Correia to his counsel (the "DHL Package Warrant"). The supporting affidavit explained the following, among other things: On October 9, 2019—the same day that Lev Parnas and Igor Fruman were arrested—agents with the Federal Bureau of Investigation ("FBI") attempted to arrest Correia at his home, but learned from his wife that Correia was out of the country. Shortly thereafter, Jeff Marcus, Esq., contacted the FBI, identifying himself as Correia's counsel. Counsel arranged for Correia to fly into New York on October 14, 2019, arriving on October 15, 2019, in order to surrender. Counsel confirmed that Correia was aware that he would be arrested by the FBI upon landing in the United States.1 On October 14, 2019, however, counsel advised the FBI that Correia had left his passport at a DHL store, where he was mailing something before flying back to the United States, and could not board the plane without his passport.
>
> [snip]
>
> The affidavit in support of the DHL Package Warrant further stated that "materials obtained from DHL" reflected that Correia had mailed the DHL package to his counsel. The affidavit noted that the package's listed contents—provided by the sender, Correia—apparently included a phone, tablet, and hard drive, which "do not appear to be items that were created for the purpose of legal advice but rather appear to have been sent by mail so that they would not be on Correia's person when he arrived in the United States to be arrested."

> The affidavit stated that the Government would nonetheless "utilize a filter review process, including through the use of a filter team comprised of agents and prosecutors who are not part of the prosecution team, for review of the [DHL package and its contents]."

That is, Oetken has already weighed in on this matter, and the government has provided a good deal of Second Circuit and SDNY precedent far more on point than a single Fifth Circuit case, United States v. Hankins, that Correia relies on. One key detail seems to distinguish this seizure and search from any garden variety attempt to bypass the border exception: Correia knew he was going to be arrested when he landed, meaning he knew he was trying to defeat not just the border exception, but a search warrant for anything on his person.

Where did the seizure happen and under what legal authority?

All that said, there's a detail that, while it probably doesn't affect the legal argument, raises questions about *how* and *when* the government seized the package. As noted, Correia sent the package from a DHL office in whatever country he was in (he was somewhere in the Middle East, and wherever it is, flights to JFK all seem to involve red eyes). He left his passport at that office, so he was unable to board his scheduled flight on October 14. In explaining the one day delay in Correia's self-surrender, Marcus unwisely told prosecutors that DHL was involved and only in later communications revised his explanation to say Correia had left his passport in a "local" store. It's unclear whether the government seized the package in that foreign country or as it entered the US. Nor is it clear — from the scant details of the affidavit included in the

government filing — whether the government had, or needed, a warrant to make that seizure. However they seized it, Correia is *not* challenging the legal sufficiency of the seizure itself on any but privilege grounds (though he may file suppression motions in May).

As Correia described it, when the package never arrived at Marcus' office, they asked DHL where it had gone, and DHL ultimately claimed to have lost it.

> In the following days, Mr. Marcus's law firm never received the communication sent by Mr. Correia via DHL. Id., at ¶ 20. Mr. Correia made repeated inquiries to DHL about its status but was told several times that it was "lost" in transit and DHL was taking steps to locate the sent package. Id. Finally, on October 29, 2019, DHL informed Mr. Correia that "[a]fter conducting extensive searches of our Service Centers, including warehouses, docks, vehicles and lost and found facilities, we have not been able to locate your shipment." Id. They also said they were ending their search.

DHL was either obeying a gag, or seem not to have received process from the government that would show up in their files.

So unbeknownst to Correia, the government somehow seized the package, and on October 21 (a week after Correia sent it), got Judge Oetken to approve a warrant to search the package and the devices in it.

Correia only learned details of what happened, serially, between December and January.

> After a December 2019 court conference, the defense team learned that the Government said it was in possession of the telephone that Mr. Correia had sent to his lawyers via DHL. Id., at ¶ 21. The defense team also subsequently

> received a search warrant which indicated that the Government had intercepted and searched Mr. Correia's communication to Mr. Marcus. Id., at ¶ 22. In a production letter dated January 10, 2020, the Government produced an agent's inventory of Mr. Correia's communication to Mr. Marcus which included two notebooks, a hard drive, a computer and a telephone.

The most likely answer, however, is that the government obtained the package with DHL's assistance, which is not legally surprising, but something worth noting for those attempting to use this method to bypass border exceptions.

The pending superseding indictment

The government has said in past hearings that it plans to obtain a superseding indictment before May. Given how COVID has affected all legal proceedings, including grand juries, that likely will be delayed. But it seems clear that the government wants to obtain this information before that happens.