Published on *The National Law Review* https://natlawreview.com

Ringing out 2019

Article By:

Litigation Practice at Pierce Atwood

As our last entry this year before heading off for the holidays, let's take a look at a recent First Circuit decision in a Maine criminal case with a rare holding that the trial court abused its discretion in an evidentiary ruling, and the error wasn't harmless. *US v. Kilmartin*, No. 18-1513 (Dec. 6, 2019). Judge Selya wrote the decision, with Judges Barron and Boudin on the panel. Jamesa Drake represented the defendant on appeal.

As described in the opinion, the defendant's crimes would land him in the lowest circles of Hell in Dante's Inferno. He falsely posed as a goldsmith to obtain cyanide, created a Gmail account, and searched out vulnerable people, agreeing to sell them the poison, but really sending them Epsom salts. When one victim tried to kill himself with the substance and failed, the defendant sent him a parcel with the real thing, and he died of suicide. The causes of action were largely fraud-related, with the defendant pleading guilty to some counts and going to trial on the counts relating to the victim to whom he sold the actual cyanide. The trial resulted in an acquittal on one count and jury findings of guilt on the remaining five counts.

On appeal, the panel vacated one count of the multiple counts on which he was convicted on the basis of the admission by the trial court of many email exchanges between the defendant and the victims other than the one who died, ruling that the trial court abused its discretion in concluding that the prejudice from these materials did not outweigh their relevance under Rule 403. The error was deemed harmless as to the remaining counts on which the defendant was convicted, but not this one.

Why, you may ask, am I choosing this as the subject of my last entry for 2019? It's not exactly festive. And as practical matter, while the conviction on the one count was vacated, this ruling will probably have little, if any, effect on the time the defendant's sentence. (The sentence imposed runs concurrently on each count.) So what really was the point then? Is the judicial system some sort of stultified Kabuki theater, spending time and money on processing appeals with little bottom line impact?

Well, no. Quite the opposite.

This decision reminds us (or at least me) of the importance of appellate review and the rule of law in general. Our legal institutions are designed by fallible humans. Each individual's situation must be addressed individually, but within a framework that, through checks and balances among the branches of government, and appellate review by multiple judges within the judicial branch,

establishes an institutional approach, with equal justice under law. Practically every ruling needs some off-ramp for review, to protect the institution. Evidentiary rulings are properly reviewed with great deference, given that the trial judge is almost always in the best position to make a judgment in this area. But even those decisions remain reviewable, because we want to protect the system within which individual decisions must be made. Even with no ultimate change in the bottom line result, almost every ruling is theoretically subject to some sort of review, because we practice in a system where no one decision-maker's view is absolute gospel. Our adversarial system is built on this general premise – no one person decides who wins. One side takes one position, and the other the opposite, with the idea that with this approach, and sometimes with 12 jurors assessing their efforts, and almost always with appellate review, the most accurate result can be obtained.

So good for this panel in taking its role seriously. Let's all, in the Bill Belichik School of Law tradition, vow in 2020 to Do Our Job the best we can.

National Law Review, Volume IX, Number 354