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White Collar Roundup - June 2016

Broadening the Scope of Conspiracy

The U.S. Supreme Court in *Ocasio v. United States* nudged the breadth of conspiracy law even further out in the context of the Hobbs Act. That act makes it unlawful to commit extortion, which means the "obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Here, Samuel Ocasio, a former police officer, participated in a kickback scheme whereby he and other officers would send accident victims to a certain auto-body shop in exchange for payment of a few hundred dollars per customer. Ocasio was charged, along with the owners of the auto-body shop, with conspiracy to violate the Hobbs Act, under 18 U.S.C. 371. Ocasio argued he did not conspire to obtain property "from another" because the conspirators obtained property from one of their own, i.e., the owners of the shop. Ocasio was convicted, and the court of appeals rejected his argument. The Supreme Court affirmed the conviction, noting one can be guilty of conspiracy even if it was impossible to commit the underlying offense. The Court stated that the crux of any conspiracy is the "unlawful agreement," which here was the agreement that Ocasio would direct accident victims to the shop and the owners would pay Ocasio a kickback for doing so. It made no difference, reasoned the Court, that the payment was not coming from someone outside the conspiracy; payment coming from "another" to Ocasio sufficed. The dissent argued that the majority's ruling disregarded the language of the statute and stretched the "vague and elastic" nature of conspiracy too far.

No Harm Needed for Investment-Adviser Fraud Conviction

The U.S. Court of Appeals for the Second Circuit in *United States v. Tagliaferri* held that the government need not show the defendant had an intent to harm to convict him of investment-adviser fraud. In the case, defendant James Tagliaferri was convicted of investment-adviser fraud, securities fraud, wire fraud and violating the Travel Act. On appeal, the court focused only on one question: "whether a criminal conviction premised on a violation of the Investment Advisers Act of 1940 ('the Act'), 15 U.S.C. § 80b-6, requires proof of intent to harm." The underlying facts are these: Tagliaferri managed an investment-advisory firm. The government alleged that he unlawfully obtained kickbacks for making certain investments, made trades between clients to churn fees and created fake promissory notes as purported investments. At trial, Tagliaferri argued that the court should instruct the jury that the government had to prove not only that he had an "intent to deceive" his clients, but also an "intent to harm" them. The court disagreed and charged the jury accordingly. Tagliaferri was convicted. On appeal, the Second Circuit reasoned that because the act involved "a fiduciary relationship" and Congress intended the act "to reach more than common-law fraud between arms-length parties," there is no requirement that the government prove "intent to harm." As the court noted, "[b]ecause the wrongfulness of [§ 80b-6] violations derives from their deceptiveness, proof that the defendant intended to deceive his clients suffices to establish the requisite mens rea for guilt."

Historical Location Data Available by Subpoena

The en banc Fourth Circuit in *United States v. Graham* held that the Stored Communications Act authorizes the government to obtain historical cell-site location data from third-party cellphone providers with a subpoena rather than requiring a warrant. The case involved two defendants charged with a spate of armed robberies in Maryland. The police subpoenaed their cellphone carriers to obtain historical location data for more than 200 days. They used that information to place the defendants at the scenes of the crimes. The defendants claimed that obtaining the location data with a subpoena, rather than a warrant on probable cause, violated their Fourth Amendment rights. The district court rejected that claim, and the defendants appealed. A panel of the Fourth Circuit held that the government had violated the defendants' Fourth Amendment rights and "directed that henceforth the Government must secure a warrant supported by probable cause before obtaining

these records from cell phone providers." The government sought and received en banc rehearing. The en banc court split 12 to 3, affirming the district court's ruling, and holding that "the Government's acquisition of historical [cell-site location information] from Defendants' cell phone provider did not violate the Fourth Amendment."

Challenging the System from the Bench

Judge Richard A. Posner of the Seventh Circuit doesn't mince words. It is no surprise, then, that his concurrence in *United States v. Dessart* took the judiciary—including the Supreme Court—to task for using "stale, opaque, confusing jargon" to reach the results they reach. The case was an appeal from a conviction for violating a provision of the Food, Drug, and Cosmetic Act. On appeal, the defendant, Shontay Dessart, claimed that (1) the investigator lied in the search warrant application; (2) the evidence was insufficient to prove deceptive intent; and (3) the district court gave an erroneous jury instruction. The majority opinion dispatched with the defendant's arguments in familiar fashion. Judge Posner concurred in a separate opinion, which began, "I agree with the decision but have reservations about some of the verbal formulas in the majority opinion. I do not criticize the majority for reciting them, because they are common, orthodox, even canonical. But they are also inessential and in some respects erroneous, and on both grounds ripe for reexamination." His concurrence went on to engage in that reexamination, taking his own court as well as the Supreme Court to task. Judge Posner asserted that certain "passages from judicial opinions" used by the majority "invite judicial haste and carelessness." He also asked whether "the extraordinary burden placed on defendants" when challenging the sufficiency of the evidence could "be squared with the requirement (unchallenged) that a defendant must be proved guilty beyond a reasonable doubt in order to be convicted." While Judge Posner agreed the conviction should be affirmed, his concurrence raised interesting (if unique) questions.

Golfing and Insider Trading

The First Circuit in *United States v. Parigian* discussed the contours of the personal-benefit requirement of an insider-trading conviction. There, the defendant, Douglas Parigian, had a golfing buddy, Eric McPhail. An unindicted insider was an executive at American Superconductor Corp. (ASC), which was a publicly traded company. He was also friends with McPhail and would provide McPhail with inside information about ASC. McPhail would disseminate the information to his golfing friends, including Parigian. Parigian was aware of the relationship between McPhail and the insider and knew the insider was an executive at ASC. Parigian claimed the indictment failed to allege that he received a personal benefit from the tips. The district court denied his motion, and he pleaded guilty while reserving his right to appeal the denial of his motion. On appeal, the First Circuit outlined that McPhail is alleged to have misappropriated inside information and then tipped Parigian, who was alleged to have "traded with sufficient awareness of th[e] breach." Parigian argued the indictment was insufficient, in part, because it failed to allege that McPhail received a personal benefit from tipping Parigian. In addressing this issue, the court noted there is some uncertainty among the circuits regarding the need for a personal benefit. The court explained, "How this will all play out, we do not venture to say because, as a three-judge panel, we are bound to follow this circuit's currently controlling precedent." It therefore held "that the indictment's allegations of a friendship between McPhail and Parigian plus an expectation that the tippees would treat McPhail to a golf outing and assorted luxury entertainment is enough to allege a benefit if a benefit is required."

Felony Conviction Is Punishment Enough

Judge Frederic Block of the U.S. District Court for the Eastern District of New York in *United States v. Nesbeth*, a drug-trafficking case, forcefully asserted that the impact of a felony conviction was a sentence in itself and that no additional punishment was required. In that case, the defendant, Chevelle Nesbeth, faced an advisory-guidelines range of 33–41 months of incarceration. Judge Block instead imposed a sentence of one year of probation. In doing so, he explained, "I am writing this opinion because from my research and experience over two decades as a district judge, sufficient attention has not been paid at sentencing by me and lawyers—both prosecutors and defense counsel—as well as by the Probation Department in rendering its pre-sentence reports, to the collateral consequences facing a convicted defendant." He then said, "I believe that judges should consider such consequences in rendering a lawful sentence." Characterizing the collateral consequences of a felony conviction as "devastating," Judge Block then articulated his rationale for imposing a non-incarceratory sentence on Nesbeth. While this was not a white collar case, Judge Block's analysis is likely to be replicated in sentencing memorandums in those and other cases.

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