

## Justices Should Revisit 2nd Circ. Theory In NCAA Bribe Case

By **Harry Sandick and Jared Buszin** (February 3, 2021, 5:18 PM EST)

In *U.S. v. Gatto*, the U.S. Court of Appeals for the Second Circuit, with U.S. Circuit Judges Gerard Lynch, Denny Chin and Paul Engelmayer, sitting by designation, issued a decision on Jan. 15, affirming the wire-fraud convictions of James Gatto, Merl Code and Christian Dawkins in the high-profile college basketball corruption prosecution that was tried in the U.S. District Court for the Southern District of New York in October 2018.

Judge Lynch wrote a separate opinion concurring in part and dissenting in part, which addressed his disagreement with the majority concerning certain evidentiary rulings.

The court unanimously affirmed the convictions based on the "right to control" theory of wire fraud, which has been the subject of recent commentary and petitions for certiorari based on an arguable divergence between the decisions of the U.S. Supreme Court and the Second Circuit on the question of what conduct is sufficient to commit wire fraud.

Since at least the early 1990s, the Second Circuit has held that the intangible right to control one's property is a type of money or property that can be obtained by someone who violates the mail fraud or wire fraud statutes. Even if the victim of the fraud receives the full benefit of the bargain, if the defendant withheld information that might have impacted the victim's economic decision, the defendant can be found guilty of mail or wire fraud.[1]

In this article, we suggest that the right to control theory of wire fraud is ripe for review by the Supreme Court, either in this case or another case in which prosecutors in the Second Circuit obtain a conviction for wire fraud or mail fraud based on this doctrine.

### Background

The Gatto case took the public inside the controversial world of collegiate athletics. Defendant James Gatto is a former director of global sports marketing for basketball at Adidas AG. In that role, he was responsible for ensuring the success of sponsorship agreements that Adidas had signed with certain universities.



Harry Sandick



Jared Buszin

During the relevant time period, Gatto worked with defendant Merl Code, an Adidas consultant, and defendant Christian Dawkins, an aspiring sports agent. These individuals worked together to pay the families of three former elite high school basketball prospects — Dennis Smith Jr., Billy Preston and Brian Bowen Jr. — in an effort to get the recruits to enroll at North Carolina State University, the University of Kansas and the University of Louisville, respectively.

The defendants made these payments surreptitiously, using falsified Adidas invoices to make it appear that the payments were going to Amateur Athletic Union basketball teams when, in reality, the money was being funneled to the recruits' families through the AAU teams. The defendants employed a variety of tactics to conceal the true nature of the payments that were made to the recruits' families.

The defendants sought to conceal these payments because they violated NCAA rules and, if discovered, would have prevented the recruits from playing competitively at the collegiate level and subjected the universities to penalties. The NCAA guards against this sort of rules violation by requiring every member institution to certify that its prospective student athletes are amateurs and thus eligible to compete.

As a result, member universities require recruits to sign paperwork attesting that they are aware of and in compliance with NCAA rules, and any recruit's athletic scholarship is contingent upon certifying to this eligibility. The recruits all falsely certified that they were in compliance with NCAA rules even though their families had received payments coordinated by the defendants.

The defendants were charged in an August 2018 superseding indictment with wire fraud and conspiracy to commit wire fraud in connection with the payments made to the families of the recruits.

At trial, the government's theory was that the defendants had defrauded the universities by making and concealing the payments to the recruits' families, which resulted in the recruits' falsely certifying to the universities that they were in compliance with NCAA rules, and thereby led to their receiving athletic scholarships. The defendants were convicted after trial of wire fraud and wire fraud conspiracy.

## **The Court's Decision**

The court resolved many arguments presented by the defendants in a 57-page decision that drew a strong dissent of nearly the same length. In this article, we will address only one of those issues: the court's affirmance of the convictions based on the right to control theory of wire fraud. The court addressed the issue in two different ways, both with respect to the sufficiency of the evidence and the district court's jury instructions.

### ***Sufficiency of the Evidence***

As to their sufficiency-of-the-evidence argument, the defendants contended that the government had failed to prove that the universities' athletic-based aid was an object of the scheme to defraud, to the extent such a scheme existed.

The court rejected that argument. In doing so, it first distinguished the Supreme Court's 2020 decision in *Kelly v. U.S.*,<sup>[2]</sup> which had held that a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme. In *Kelly*, the well-known "Bridgegate" decision, the Supreme Court had held that the object of the defendants' scheme had been political retaliation, not the financial costs incurred by the state when the scheme was carried out, which were merely an

incidental byproduct of the scheme.

By contrast, the court in *Gatto* held that the loss of property — funds set aside for financial aid — was at the heart of the defendants' scheme because the universities would not have awarded aid to ineligible recruits, and, without aid from the universities, the recruits would have signed to play elsewhere.

The court went on to explain that, setting *Kelly* aside, the government had presented sufficient evidence for the jury to convict under the Second Circuit's right to control theory of wire fraud. In short, the defendants' concealment of payments "deprived the Universities of information that would have helped them decide whether to award the Recruits athletic-based aid." And under Second Circuit precedent, "[t]his deprivation was enough to support a wire fraud conviction."

### ***Jury Instructions***

The defendants also made two related arguments that challenged the district court's jury instructions applying the wire fraud statute to this case. The first argument was that the wire fraud statute — which prohibits a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" — requires that the property or money be obtained by the defendant from the victim.

The court disagreed, holding again that wire fraud can be committed merely by "prevent[ing] the victim from making an informed economic decision about the victim's property." The Second Circuit cited its 2019 right to control decisions in *U.S. v. Johnson*[3] and *U.S. v. Calderon*.[4] The court also rejected the argument that the victim's property flow directly to the defendant, reasoning that it would be sufficient if the property had been provided to the defendant's friend or family.

The second argument directly challenged the right to control instruction. The instruction tracked prior Second Circuit law, and the court described this case as "a quintessential example of depriving a victim of its right control its assets," affirming on this issue based on the Second Circuit's prior decisions.

### **Commentary**

The NCAA prosecutions were well-publicized and attracted much media attention because they essentially criminalized the violation of often-criticized NCAA rules. One expects that the Second Circuit's decision will be studied closely by many observers, including those who follow college athletics and those who follow the development of criminal law.

The panel's unanimous application of the right to control theory merits special attention. The application of this theory is not surprising, as the Second Circuit has recognized this doctrine for many years and does not change its prior precedent in a panel decision. Aware of this, prosecutors have increasingly charged wire fraud cases on this theory, and the Second Circuit has affirmed those convictions, as in *Johnson* and *Calderon*. In *Gatto*, it is hard to argue that the panel did not faithfully follow the law of the circuit.

However, the Supreme Court should examine the right to control theory in light of *Kelly* and several other recent Supreme Court decisions.

In *Kelly*, a unanimous Supreme Court held that "intangible rights of allocation, exclusion, and control ... do not create a property interest" cognizable under the property fraud statutes. The right to control

one's property is an intangible right. Kelly requires that the object of the fraud be to cause loss to the victim. The right to control theory does not pass this test, as it does not require that the jury conclude that the defendant has tried to cause the defendant to lose a tangible and transferrable property right.[5]

In the related context of Hobbs Act extortion, in 2017, the Supreme Court held in *Sekhar v. U.S.* that "obtaining property requires not only the deprivation but also the acquisition of property ... property extorted must be . . . transferable—that is, capable of passing from one person to another." [6] Under these cases, it should not be sufficient to convict a defendant of property fraud based only on evidence that the objective of a scheme was to deprive victims of information that could affect their economic decisions.

The right to control theory also is hard to defend under a purely textualist analysis of the wire fraud statute. The statute is quite explicit that it only applies to schemes aimed at obtaining money or property. It does not say schemes aimed at "obtaining money or property or the right to control property."

The Supreme Court should take up this question, either in *Gatto* or in another case. On Jan. 11, the Supreme Court remanded the wire fraud case of *U.S. v. Blaszcak* based on a potential inconsistency with *Kelly*, over the meaning of obtainable property, thereby giving hope to some in the defense bar that the court may be starting to scrutinize how wire fraud law has developed in the Second Circuit.

Whatever one thinks of the conduct of the *Gatto* defendants or the wisdom of the prosecution — which Judge Lynch questioned in a dissenting opinion addressing certain close evidentiary calls by the district court — the question is whether Congress prohibited the conduct at issue in this case. As Justice Elena Kagan explained in *Kelly*, even when defendants engage in "deception, corruption, [or] abuse of power ... the federal fraud statutes at issue do not criminalize all such conduct."

Congress retains the power to amend the property fraud statutes, or to pass new statutes, if it believes that the conduct here should be subject to the criminal law rather than to only be subject to private NCAA regulations. This is the better course than to stretch the property fraud statutes to apply to conduct that is outside of its reach.

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*Harry Sandick is a partner and Jared Buszin is an associate at Patterson Belknap Webb & Tyler LLP.*

***Disclosure: Sandick was a co-author of the New York Council of Defense Lawyers' amicus brief in support of the petitioner in Johnson v. United States.***

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[1] *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

[2] 140 S. Ct. 1565 (2020).

[3] 945 F.3d 606 (2d Cir. 2019).

[4] 944 F.3d 72 (2d Cir. 2019).

[5] See also *Cleveland v. United States*, 531 U.S. 12, 23 (2000) (holding that "intangible rights of allocation, exclusion, and control" are not property interests protected by the mail and wire fraud statutes).

[6] 570 U.S. 729 (2013).