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# Why A 76-Year-Old Top Court Case Could Undo 'Varsity Blues'

By **Chris Villani**

Law360 (November 10, 2022, 7:10 PM EST) -- Chris Nasson recalled sitting in what he dubbed his "war room" in the U.S. attorney's office in the Eastern District of New York on the eve of presenting a huge securities fraud indictment to a grand jury. Before him and the other prosecutors and agents in the room was a list of 18 names. The task at hand was deciding who to indict.

"I made sure we went one-by-one, and I said to the team, 'I don't want to hear about any evidence that this person wasn't directly involved in,'" Nasson, now with K&L Gates LLP, told Law360.

After the final pass, Nasson and the others realized that some potential defendants were not connected to one another, so the list was narrowed to 13.

"When you're charging a massive case, you can often start to view your evidence in its totality," he said. "It's a natural thing to do."

Years later, Boston prosecutors in the "Varsity Blues" college admissions case unveiled their own sweeping indictment and lumped multiple parents accused of passing their children off as fake athletes together in the same case, two of whom eventually went to trial.

The strategy allowed the government to introduce evidence of other parents' alleged misdeeds during the trial of Gamal Abdelaziz and John Wilson. It resulted in a conviction on all counts, and likely leveraged dozens of guilty pleas from others who opted not to go to trial.

But a **skeptical First Circuit panel** has prosecutors' signature conviction in the college admissions case on the ropes, and experts say the government's risky strategy that resulted in the guilty verdicts and pleas may be undone by the U.S. Supreme Court's 1946 holding in **Kotteakos v. United States** .

In that case, the high court found that two people who do not know each other do not necessarily enter into a conspiracy just because they both are connected to the same person with criminal intent — in the "Varsity Blues" case, scheme ringleader William "Rick" Singer.

"The government looked at the schemes, and they said they all involved, for the most part, payments to college coaches and administrators or the university itself through Rick Singer in order to achieve the same end, which was getting someone's son or daughter into a school," Nasson said. "The problem is, Kotteakos stands for the proposition that to be a single conspiracy, there needs to be a shared objective among all the alleged co-conspirators, not just a series of crimes that look the same."

The end result, according to Nasson: "I think the convictions are in trouble."

## An Early Argument Lands Post-Trial

During oral arguments, attorneys for Wilson and Abdelaziz argued that their clients were the victims of spillover prejudice. Bruce Isackson, the government's leadoff witness, testified for a day and a half about his understanding of Singer's so-called "side-door" scheme to falsify his children's athletic credentials in exchange for six-figure payments.

Wilson and Abdelaziz claimed they were not in cahoots with Isackson or any of the parents and were, in fact, competitors since their children were theoretically competing for spots at some of the same universities. Singer is the hub of the conspiracy and the parents are allegedly the spokes, but there is no rim to connect them, the defense claimed.

It's an argument that seemed to land with the First Circuit. Chief U.S. Circuit Judge David J. Barron wondered whether the government made too many logical leaps in its argument when it told a Boston jury that Wilson and Abdelaziz must also have known they were **breaking the law**.

U.S. Circuit Judge Kermit V. Lipez at one point pushed back on a prosecutor's argument by saying, "You're not describing these defendants; you're describing other defendants."

"There was always a risk from the government's perspective," said Martin G. Weinberg of Martin Weinberg Law, who represented parents Robert Zangrillo and David Sidoo in the high-profile case.

"Prosecutors believed that this was a single, nationwide conspiracy and that they could satisfy the requirements of Kotteakos ... but there was simply no interdependence," Weinberg said. "Mr. Zangrillo didn't have an agreement with Mr. Wilson. Mr. Wilson didn't have one with Mr. Abdelaziz. Many of them didn't even know each other."

The sparring over the government's legal theory began just **days after the case was unveiled** in March 2019. A group of defense attorneys penned a letter to then-Chief U.S. District Judge Patti B. Saris asking that their cases be split off from one another because they were not connected.

The government pushed back, with then-U.S. Attorney Andrew Lelling countering that the defense did not want the cases before U.S. District Judge Nathaniel M. Gorton because he was seen as a good draw for prosecutors. Judge Gorton ended up keeping the cases of more than a dozen indicted parents.

The relatively low bar for the government to survive motions to dismiss meant that the only way to really test prosecutors' legal theories was to go to trial, Weinberg said.

"Thankfully, two of the defendants did go to trial and test those theories," he said. "And we will have the First Circuit weigh in with an opinion that could well be of national importance."

### **A Winning Strategy ... For Now**

Charging the different parents in the "Varsity Blues" cases and lumping the likes of Lori Loughlin, Isackson and others with Wilson and Abdelaziz paid off for the government in multiple ways until the First Circuit arguments, said Mintz Levin Cohn Ferris Glovsky and Popeo PC's Eóin Beirne. The attorney represented parent Elisabeth Kimmel as well as Amin Khoury, who faced similar charges before Judge Saris but did not work with Singer.

"Not only did the big Kotteakos conspiracy survive the motion to dismiss that we filed, but Judge Gorton proved to be a very favorable judge for the government," Beirne said.

Beirne noted another issue flagged by the First Circuit. Judge Lipez seemed surprised that Judge Gorton excluded evidence that the University of Southern California — which both Wilson and Abdelaziz were accused of bribing their children's ways into — routinely accepted subpar students with parents willing to open their deep pockets.

By contrast, Judge Saris allowed Beirne and his co-counsel to introduce documents and other evidence in the Khoury case that refuted the notion that the school in that instance, Georgetown University, did not bend its rigorous admissions criteria for money from time to time.

"The judge made all the difference in how the evidence played out and in allowing the Kotteakos conspiracy," Beirne said.

The parents argued that the university's practices supported their claim that they acted in good faith and always thought they were making legitimate donations to give their kids a leg up. Judge Lipez

said during oral arguments that the excluded evidence seemed to be "critical" to the parents' defense and that he did not understand how prosecutors could say it was not relevant.

"If I give \$100,000 to the University of Tennessee to help my son get into college there, is that a bribe? My gosh, that goes on every minute of every day at every university in the country," said Bill Killian, a former U.S. attorney for the Eastern District of Tennessee who is now with Cavett Abbott & Weiss PLLC.

The court struggled with that concept, said Killian, who wrote an amicus brief backing Wilson's appeal along with a number of other former U.S. attorneys, and also seemed to question a legally unprecedented aspect of the government's case. Money paid through Singer often ended up going to a school program and the parents say this is the first case in history in which the alleged victim of a bribe is also the recipient of the payment.

"I think the court had a problem with the concept of this being a bribe," Killian said. "How can the beneficiary of the gift also be the victim of a bribe?"

### **Clarity Moving Forward**

If the First Circuit wipes away the Wilson and Abdelaziz convictions because the government was too broad in its conspiracy charge, K&L Gates' Nasson said it could lead other parents charged in the case to argue that their convictions should be set aside.

"You can't plead guilty and be convicted of a crime that doesn't exist," he said.

A ruling in Wilson and Abdelaziz's favor would also be significant because it would undercut an advantage that prosecutors have by allowing them to introduce elements of proof they otherwise would not be able to get in front of a jury, Killian said. He added that the ability for prosecutors to introduce bad acts by other defendants in the case probably motivated many parents to plead guilty.

"Absent that proof, as a defense attorney, it would be a completely different analysis of whether your client should plead guilty or not," he said.

Mintz's Beirne said the ruling could provide more clarity on what it means for defendants to be interdependent in the white collar space and help defense attorneys determine whether a conspiracy has been properly charged.

Absent that clarity, Nasson, who did not have a client in the sprawling case, said he understood why most chose not to fight the government's case, especially as they faced the possibility of a seven-figure legal tab.

"There is just too much risk and all of us in the defense bar have had these challenging conversations," Nasson said. "You say, 'Look, I think I can win this case. Here is what it's going to cost, here is how long it's going to take, and I can never give you any degree of certainty.'"

A government representative declined to comment. Representatives for Wilson did not return comment requests and Abdelaziz's lawyer, Joshua Sharp of Nixon Peabody LLP, referred Law360 to an earlier statement in which he said "this trial was riddled with legal and evidentiary error, and we are hopeful the appeals court will overturn the verdict."

The government is represented by Alexia R. De Vincentis, Stephen E. Frank, Carol E. Head, Raquelle L. Kaye, Kristen A. Kearney, Donald C. Lockhart, Justin D. O'Connell, Ian J. Stearns and Leslie Wright of the U.S. Attorney's Office for the District of Massachusetts.

Wilson is represented by Noel J. Francisco, Yaakov M. Roth, Marco P. Basile and Harry S. Graver of Jones Day, Michael Kendall and Lauren M. Papenhausen of White & Case LLP, and Andrew E. Tomback of McLaughlin & Stern LLP.

Abdelaziz is represented by Brian T. Kelly, Joshua C. Sharp and Lauren A. Maynard of Nixon Peabody LLP.

The cases are U.S. v. Wilson, case number 22-1138, and U.S. v. Abdelaziz, case number 22-1129, in the U.S. Court of Appeals for the First Circuit.

--Editing by Kelly Duncan.

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