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'Varsity Blues' Enters New Phase With High-Stakes Appeals

By **Brian Dowling**

Law360 (January 3, 2022, 12:03 PM EST) -- Nearly all cases in the sweeping "Varsity Blues" college admissions scandal have now been resolved, but thorny appellate issues could keep the scandal in headlines in 2022 — and may even portend a trip up to the U.S. Supreme Court.

The appeals, including one by former private equity executive William G. McGlashan, attack federal prosecutors' expansive legal theory that intangibles like standardized test scores and college admissions slots count as property under the federal wire fraud statute.

Experts told Law360 that the dispute aligns with the type of hard-fought, high-profile criminal cases the high court has accepted. It also comes as the justices have taken steps to narrow the government's use of the bread-and-butter fraud law.

"The trend in the Supreme Court case law is to get the wire fraud statute, both the property fraud issue and honest services, and to narrow it," said Ropes & Gray LLP partner Aaron Katz, whose team represented California parent Elizabeth Henriquez in the sprawling Varsity Blues case. "I'm looking at this, not just at the First Circuit, but where it goes next."

McGlashan, who has completed his three months in prison for admitting to boosting his son's college entrance exam score with bribes, told the First Circuit that the crime to which he pled guilty wasn't a crime at all. Test scores don't fit the high court's requirement that the object of the wire fraud be something that's "long been recognized as property," he argued in a recent brief.

In his appeal launched June 1, the former executive also argued on a related theory that the bribed test proctor didn't have a fiduciary duty to the testing company because he was an independent contractor, rather than an employee.

The First Circuit set oral arguments in the case for Feb. 9.

Three other parents who also admitted to the test cheating charges — Amy Colburn, Gregory Colburn and I-Hsin Chen — preserved their ability to appeal on the same narrow issues. Parents John B. Wilson and Gamal Abdelaziz, who were convicted in October by a federal jury, are also planning appeals.

The government panned McGlashan's arguments as "an exercise in misdirection" in a brief last week.

Prosecutors said the lower court was right to rest on the Third Circuit's 2004 opinion in [United States v. Hedaithy](#), which held that a similar test-cheating scheme involving English-as-a-foreign-language tests counted as property under the fraud law. McGlashan also failed to raise the fiduciary argument at trial and can't start now on appeal, the government said.

A spokesperson for the U.S. Attorney's office declined to offer further comment. McGlashan's counsel Carter G. Phillips of Sidley Austin LLP declined to comment, saying in a statement, "Our reaction to the government's brief will be in our reply."

The question of whether test scores and college admissions slots count as property has split judges in the Boston federal court, with U.S. District Judge Nathaniel Gorton and U.S. District Judge Denise L. Casper agreeing with prosecutors' theory and U.S. District Judge Indira Talwani siding with the defense.

That disagreement "raises the stakes for the First Circuit," Katz said, and increases the likelihood that the issue comes before all the judges in the court through an en banc review.

Katz said one way for the appeals courts to address the issue is to consider how property is treated under another major federal statute: the Hobbs Act's prohibition on extortion. Under that line of cases, Katz said, test scores and admissions slots would not be considered property because they do not have a market.

"No one is selling test scores," he said.

The differing opinions also highlight the complexity of the legal question, according to Andrey Spektor of Bryan Cave Leighton Paisner LLP.

He pointed to the Supreme Court's unanimous 2020 decision in [Kelly v. United States](#) overturning the convictions in the Bridgegate saga on the grounds that a plot to close lanes on the George Washington Bridge was not intended to obtain money or property. The high court, which wiped out the unanimous opinion of a Third Circuit panel, warned the government not to use the fraud statute to prosecute every alleged lie a state official tells, or else the law would enable "a sweeping expansion of federal criminal jurisdiction."

Katz offered a hypothetical of how far prosecutors could go if the Varsity Blues theory stands.

"As long as you sent it over email, you could be prosecuted for lying to a preschool about your kid being potty-trained," Katz said. "Prosecutors could say, 'We would never bring that case,' but it's not the argument that the Supreme Court has ever accepted."

Civil rights attorney Harvey A. Silverglate of Zalkind Duncan & Bernstein LLP said the property fraud fight is at the center of a "betrayal of the federal system" that transforms traditional state concerns into federal crimes "because you lift up a phone or mail a postcard." He jokingly anticipated the day when it will be a federal crime for "being ugly in interstate commerce."

"The courts are starting to get sensitive to it," Silverglate said. "Incremental skepticism is useful."

White collar defense attorney Martin G. Weinberg said the Varsity Blues appeals could lead to courts reining in federal prosecutors.

"A pivotal dynamic can be construed from recent Supreme Court decisions in the criminal law area where the court is looking to narrow the expansive federal criminal statutes down to their heartland, their core," Weinberg said.

The government is represented in the McGlashan case by Alexia R. De Vincentis of the U.S. Attorney's Office for the District of Massachusetts.

McGlashan is represented by Jack W. Pirozzolo, Carter G. Phillips, Daniel J. Feith, and John L. Gibbons of Sidley Austin LLP and John C. Hueston of Hueston Hennigan LLP.

The case is U.S. v. McGlashan, case number 21-1421, in the U.S. Court of Appeals for the First Circuit.

--Editing by Alanna Weissman.