Analyzing the Varsity Blues verdict

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Analyzing the Varsity Blues verdict

(October 18, 2021) - Kevin J. O'Brien of Ford O'Brien LLP dissects the Oct. 8 guilty verdicts in the first prosecution of parents involved in the "Varsity Blues" college admissions scandal.

On October 8, in the first of the so-called "Varsity Blues" cases to go to trial, a jury found hedge fund founder John Wilson and former casino executive Gamal Abdelaziz guilty of all counts. [1] The charges included two conspiracy counts and multiple counts of wire fraud and mail fraud. After hearing evidence for nearly three weeks, the jury needed less than two days to reach its verdict.

As a former Assistant U.S. Attorney for the Department of Justice and current partner at Ford O'Brien, LLP in New York City, my specialty is white-collar criminal defense. From my perspective, the prosecution was notable for an aggressive use of the wire and mail fraud statutes and a strategic distinction that raised legitimate questions the defense was unable to pursue.

Summarizing the case

Wilson and Abdelaziz were charged with bribing athletic coaches and university administrators at prestigious universities, principally the University of Southern California (USC), to help falsify the athletic credentials of their children, who on occasion did not even play the sport at which they supposedly excelled, in order to obtain their admission as athletic recruits.

The parents went so far as to create fake honors, stage photographs, and invent careers for this purpose, with the help of an accomplished fraudster, Rick Singer, who ran a business devoted to winning choice admission spots for the children of those who could pay.

Singer, who cooperated with the government and recorded damning conversations with Wilson and Abdelaziz, did not testify at the trial, allowing the defense to "try the empty chair." A number of USC coaches and administrators were allegedly in on the scheme and shared in the illicit proceeds, including soccer coach Laura Janke, who testified memorably for the prosecution, a box of tissues at her side. None of the students who benefited from the scheme was charged.

Abdelaziz paid $300,000 to Singer to facilitate his daughter's admission to USC as a supposed basketball recruit. Ms. Abdelaziz had been cut from her high school varsity basketball team. After she was admitted, Donna Heinel, USC's senior associate athletic director, explained Ms. Abdelaziz's absence from the team by claiming falsely that she had been injured. Abdelaziz agreed to the same cover story.

Wilson paid $220,000 to secure his son's admission to USC as a supposed water polo recruit. From this total, $100,000 was sent to the USC water polo team, care of Jovan Vavic, the head coach of the team, who helped falsify the son's water polo credentials to win admissions approval by the appropriate USC committee.

Wilson later received an official acknowledgment of his gift from the university. Wilson also agreed to pay $1.5 million to Singer to facilitate his twin daughters' admission to Harvard and Stanford University as purported athletic recruits. Wilson paid $1 million of this amount, of which $500,000 was earmarked for the Stanford sailing coach and subsequently distributed, and $500,000 earmarked for a fictitious Harvard administrator.

In a recorded conversation, Wilson asked Singer which sports his daughters should claim proficiency in: "What sports would be the best for them? Or is that not going to even matter?" Singer told the Cape Cod resident: "For me, it doesn't matter. I'll make them a sailor or something because of where you live."

A critical distinction

At trial the government took pains to distinguish the parents' participation in a fraud scheme from the sway that their school donations, by themselves, would give the parents in admissions decisions. "This is not a case about wealthy people donating money to universities with the hope that their children get preferential treatment in the admissions process," the government said in its opening statement. Rather, the case was about "lies — lies to obtain admissions spots that were bought and paid for."

The government was right to insist on this watertight distinction. If jurors had been receptive to the defense line that Singer's scheme differed not at all, or only in degree, from the mutual back-scratching that universities and their wealthy donors engage in regularly, the case would have lost the moral clarity a major prosecution requires, and jurors might well have declined to convict, whether out of general cynicism or disapproval of the seeming selective prosecution of the two fathers.

To focus the jury's attention on the lies, the government made wire fraud and mail fraud charges (including conspiracy to commit these crimes) the heart of its case. All require proof of a "scheme or artifice to defraud," which is basically conduct calculated to deceive.

Wire and mail fraud also require an intended victim of the deception. In this case, the government claimed USC and the other universities were the intended victims of the defendants' lies, meant to deprive the schools of "money and property" (the trial court having determined as a matter of law that admission slots are "property" of the universities), as well as deprive them of their "intangible right of honest services" from coaches and administrators.

The distinction between criminal fraud and the power of money could not have been clearer. When rich alumni rely on donations to win preferential treatment in admissions, the compliant universities are beneficiaries; here, according to the prosecution, they were victims.

Unanswered questions

Still, the idea that USC was a victim raises questions. Were admissions committee members and athletics department administrators really in the dark about the fact that Ms. Abdelaziz and other recruits with glowing resumes or paper trails did not come close to measuring up? One would have thought that, if nothing else, they would have been alert to any possibility that valuable university admission slots were being squandered by coaches and athletics programs.

There was some evidence in the trial that administrators may have kept track of donations received from the families of athletic recruits. If so, did no one at USC connect the dots between the donations and the failure of some recruits to make the relevant team or even show up for the first practice?

It is also curious that at trial both USC's Chief Financial Officer and a top university fundraiser invoked the Fifth Amendment when asked whether USC ever admitted walk-on athletes in cases in which parents had donated money.

The defense was unable to successfully pursue any of these questions. One of the frustrations of defending criminal trials is the inability to engage freely in pretrial discovery – to depose potential witnesses or to obtain potentially relevant documents outside of what the government possesses and is obligated to produce.

To make matters worse, Fifth Amendment concerns, which can be acute when a grand jury investigation remains open (as the Varsity Blues matter is) invariably chill the cooperation of the most knowledgeable potential witnesses. Wilson and Abdelaziz's trial is an illustration of these limitations.

Defendants' chances on appeal, at first blush, are not auspicious. The trial court's holding that admission places are "property" for purposes of the wire and mail fraud statutes is at odds with another district court ruling in the same judicial district, which relies on Supreme Court precedent.

However, even if the competing view prevails on appeal, it would mean reversal of only a minority of the counts in the indictment: those wire and mail fraud counts requiring an intent to deprive another of "money and property," but not those requiring an intent to deprive another of their "intangible right of honest services," and not the counts that do not rest on wire or mail fraud at all.

Looking toward the future

Of the 57 defendants indicted in the Varsity Blues scandal, a handful have not been convicted or agreed to plead guilty. Three parents had been scheduled to go to trial in January; this week one of them entered into a deferred prosecution agreement with the prosecution, requiring good behavior for 24 months and payment of a $50,000 fine in exchange for ultimate dismissal of the charges against him.

The government's leniency is a signal that, having made its point in the first trial, the government is prepared to show mercy to those who would spare it the need for future trials.

Notes

1 *United States v. Colburn, et al.*, No. 19-CR-10080-NMG (D. Mass.) Dkt. No. 2376

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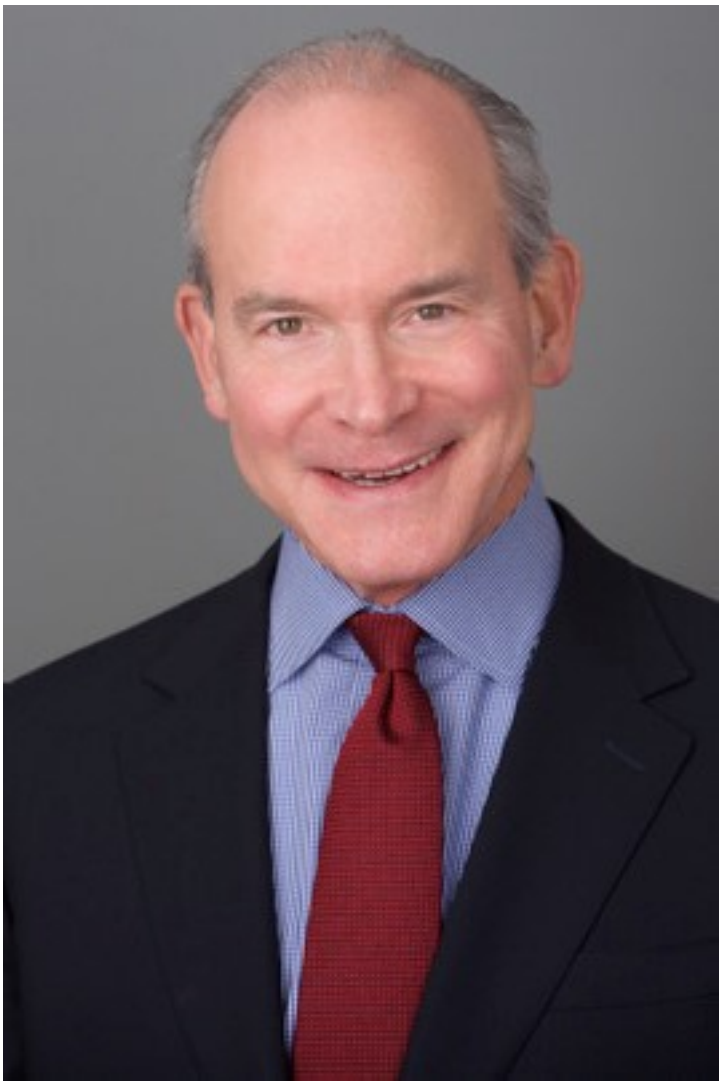

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