American Board of Criminal Lawyers

THE ROUNDTABLE

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HAPPY everything

TELL ME WHAT YOU EAT AND I WILL TELL YOU WHAT YOU ARE—JEAN ANTHELME BRILLAT-SAVARIN ✖ **ALL LIFE IS A DISPUTE OVER TASTE AND TASTING**—FRIEDRICH NIETZSCHE ✖ **CUISINE IS WHEN THINGS TASTE LIKE THEMSELVES**—CURNONSKY ✖ **GIVE ME YESTERDAY'S BREAD, THIS DAY'S FLESH AND LAST YEAR'S CIDER**—BEN FRANKLIN ✖ **HOW CAN A NATION BE GREAT IF IT'S BREAD TASTES LIKE KLEENEX?**—JULIA CHILD ✖ **TASTES ARE MADE, NOT BORN**—MARK TWAIN ✖ **WHEN BIRDS BURP, IT MUST TASTE LIKE BUGS**—BILL WATTERSON ✖ **I HAVE DRUNKEN DEEP OF JOY, AND I WILL TASTE NO OTHER WINE TONIGHT**—PERCY BYSSHE SHELLEY

Jury finds Donnan not guilty on fraud charges

By Lee Shearer - May 17, 2014

Former University of Georgia football coach Jim Donnan is not guilty of fraud and related charges, an Athens jury decided Friday after two days of deliberations.

Family members and Donnan himself teared up as U.S. District Court Judge Ashley Royal announced the verdict to conclude the two-week trial.

"Certainly I was relieved," a more composed Donnan said later as reporters gathered outside his lawyers' offices on Washington Street in Athens. "I feel like when I did find out what was going on, I tried to rectify a terrible situation for everyone. All of us that made money have tried our best to pay the money back."

Jurors weren't convinced by the government's evidence and heard testimony that said Donnan had been a man of good character all his life, according to jury foreman Artis Ricks of Hartwell.

"The government didn't have enough evidence to support the charges," said Ricks, who stopped to talk to reporters afterward.

"I never did see that smoking gun that proved guilt," added Ricks, 55, who works in the meat department of a Hartwell grocery store. "I just kept thinking day after day the government was going to produce a smoking gun, but I never saw one."

And it was Donnan himself who recruited smart businessmen to investigate what was going on at GLC when he found out something wasn't right, Ricks said.

"That didn't sound to me like something a guilty person would do," he said.

Donnan was charged with 41 counts of mail fraud, wire fraud and related charges in connection with a West Virginia company called Global Liquidation Center, or GLC Ltd.

After meeting Greg Crabtree, the West Virginia man who founded GLC, Donnan began to invest in the company in 2007 and later recruited others into it, promising big returns on deals Crabtree made buying and selling overstock and unwanted goods.

Donnan recruited family and friends to invest in the company. At first they got the big returns he told them they would.

In reality, the company wasn't selling nearly enough to justify those big returns, federal investigators found.

The money later investors paid in was going to pay earlier ones, which made it a Ponzi scheme, prosecutors said.

Crabtree pleaded guilty last month, getting a promise for a light sentence in exchange for testifying in Donnan's trial.

Federal prosecutors told the jury Crabtree, a small businessman all his life, could never have pulled off the Ponzi scheme. They said Donnan, who had come to know many wealthy people during his football career, was behind it.

By the time GLC collapsed in late 2010, 94 investors had put $81 million into it.

Most investors had been recruited by Donnan.

When the company filed for bankruptcy in 2011, GLC owed investors about $23 million.

But Donnan lawyers **Ed Tolley**, **Jerome Froelich** and Devin Smith built a case that Donnan was as much a victim of Crabtree as other investors.

Donnan believed the deals he touted were legitimate, his lawyers said.

"He thought he was doing these people a favor," Tolley told the jury on Wednesday in his closing argument. "He thought he was benevolent. He thought this was going to be a great thing for everyone."

Unlike most other investors, Donnan made big money off GLC, but now is bankrupt. Worth about $3 million when he met Crabtree, Donnan made about $8.4 million from investing in GLC, evidence in the trial showed.

About $4.3 million of that was returned to GLC investors either by a bankruptcy trustee or Donnan himself. He also paid a steep tax bill on his investment gains, he said.

To compensate for the financial losses, Donnan had to auction off cars, his wife's jewelry and buy back his house at a bankruptcy auction, Tolley told jurors.

Donnan was brilliant as a football coach, but not as a businessman, his lawyers said.

"It is not a crime to be not very smart," Tolley said to the jury. "It is not a crime to be grossly negligent."

"Amazing. I never expected to see this. **Monroe Freedman**

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DOJ's Quiet Concession

U.S. gives up a widely decried charging theory.

Tony Mauro, The National Law Journal

May 12, 2014

The U.S. Department of Justice has quietly given a defendant-friendly makeover to the federal law that helped send Martha Stewart, Bernard Madoff and Rod Blagojevich to jail.

The law makes it a crime to "knowingly and willfully" give false statements in any matter under federal jurisdiction. Judges and commentators have attacked this "catch-all" provision, known familiarly as "Section 1001" charges, for years as an easy trap prosecutors set for suspects when their case is otherwise weak.

Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit said in 2010 that the "ever metastasizing" provision poses "a risk of abuse and injustice." U.S. Supreme Court Justice Ruth Bader Ginsburg said in 1998 that the law gives government "extraordinary authority" to "manufacture crimes."

The Justice Department has gotten the message, now clarifying that to make the case that a defendant acted "willfully," the government must prove that he or she knew the statement was unlawful — not just that it was false. That requires a state-of-mind element that can be hard to nail down. Defendants often claim they were unaware that lying to the government was illegal, especially in casual conversations or when not under oath.

"This is a very significant change that will assure that prosecutors use the statute consistently," said Bryan Cave partner Mary Beth Buchanan, a white-collar defense lawyer and former U.S. attorney in Pennsylvania. "It's a correction that should have been made a long time ago." Paul Mogin of Williams & Connolly, who was among the first to spot the change, said, "It is the first signal we've seen that the government is reining in the law."

In making such an important shift in the interpretation of a law invoked hundreds of times a year, the department did not shout it from the rooftops. Solicitor General Donald Verrilli Jr. sprinkled mentions of the change into several largely unnoticed briefs filed in March in routine cases before the Supreme Court. Only one reference appears to be available online, on pages 11 and 12 of the government's brief opposing certiorari in *Natale v. United States*, in which a surgeon was convicted of making false statements in a matter that involved a health care benefits program.

What's more, none of the cases in which Verrilli confessed error actually involved Section 1001, instead arising under Section 1035, a health care fraud provision that mimics the "knowingly and willfully" language of the false-statements law.

The Justice Department's change of mind is slowly being felt. On April 21, the Supreme Court sent two cases back to lower courts "for further consideration in light of the confession of error by the solicitor general." The court's orders will likely set in motion a lengthy reassessment of false-statement precedents in most circuit courts.

One of the cases the high court remanded was *Ajoku v. United States*. A California federal jury convicted Kelechi Ajoku on four counts of making false statements as part of a scheme to defraud the Medicare program. On appeal, Ajoku's lawyer said the government should have had to prove he knew his statements were unlawful as well as false. Relying on circuit precedents, the U.S. Court of Appeals for the Ninth Circuit rejected the argument.

Ajoku appealed to the Supreme Court, and it was then that the government dropped its bombshell: "Upon further consideration … the government now agrees" that under either Section 1035 or 1001, "a jury must conclude that he acted with knowledge that his conduct was unlawful," the government's brief said.

"We were pleasantly surprised," said Ajoku's lawyer, Ethan Balogh of Coleman, Balogh & Scott in San Francisco. The government's shift may help his client on review, and other defendants as well. "Not every false statement is a crime," Balogh said.

Steven Fagell of Covington & Burling, a former top official in the Justice Department's Criminal Division, said the policy shift is likely to prompt "front end" changes in how government representatives interview individuals, to make it clear beforehand that lying is illegal.

The false-statements law and its precursors date to the Civil War. As early as the 1950s, according to Mogin, courts tried to narrow the law's broad sweep. The "exculpatory no" doctrine was one work-around, allowing people to falsely deny wrongdoing without running afoul of the law — a doctrine that gives a nod to the Fifth Amendment's prohibition against forced self-incrimination.

But the Supreme Court killed off that doctrine in *Brogan v. United States*, a 1998 decision upholding a broad reading of Section 1001. The high court touched on the willfulness issue in an unrelated 1998 case, *Bryan v. United States*. Justice John Paul Stevens wrote that to show willfulness, prosecutors generally should have to prove the defendant knew the statement violated the law.

Ever since that 1998 decision, defense lawyers have tried mightily to get courts and the Justice Department to apply the higher standard to 1001 — without success until now. The challenge now will be to change circuit court precedents and inform federal prosecutors. "Nothing in the law happens overnight," Balogh said.

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Pittsburgh jeweler Kashi atones for tax-evasion crime with YouTube videos

May 14, 2014 By Rich Lord / Pittsburgh Post-Gazette

Busted for errors made in the ancient trade in jewels, Alan Kashi turned to YouTube to show that he deserved forgiveness. As a result, a search on the video website for "File Form 8300" yields a series of highly professional, sometimes humorous videos urging jewelers to comply with the IRS requirement to report all five-figure cash transactions.

The videos became an element of Kashi's successful effort to avoid prison time following a federal raid of Kashi Jewelry that included the seizure of nearly $1 million in cash. "No paperwork filled out, and you have just committed a crime," a cartoon jeweler warns in one of the videos. "You will be begging for [law enforcement] to let you go, and in less time than you can imagine, you will be here in jail," he says, as rats and a spider lurk around him.

Kashi, 32, of Squirrel Hill, is instead getting three years probation, including six months of home confinement. U.S. District Judge Gustave Diamond said he had not watched the videos, but ruled that a punishment short of prison — including 100 hours community service and a $12,000 fine — would be sufficient. "I believe that the defendant has been punished in this case and has paid a price," Judge Diamond said.

In 2012, a cooperating witness introduced Kashi to an undercover agent, according to court papers. The agent bought a Breitling watch for $12,500, and asked Kashi to skip the paperwork because he "sell[s] a little cocaine or whatever," Judge Diamond wrote in a pre-sentencing ruling. Kashi took the agent to a back room where he counted out the cash, the judge wrote. Later that year, the agent ordered a customized Breitling for $14,000. That time, Judge Diamond wrote, the agent again mentioned cocaine and suggested that if Kashi wanted to launder some money he could invest in a house-flipping business. Last year a search of the jewelry store involving IRS Criminal Investigations revealed safes containing $933,075, which the government seized. Kashi described that in the YouTube videos as "cash that I had laid aside for deposit."

Assistant U.S. attorney Carolyn Bloch said the money was "tied … to the defendant's conduct with regard to the sale of his merchandise to drug traffickers knowing there would be no paperwork filled out and no consequences after." As part of his guilty plea, Kashi consented to the government's seizure of the money from the safes. Kashi's videos describe the slippery slope from eager jeweler to tool of dealers. "Somehow I became a jeweler with a reputation to collect cash with no questions asked," Kashi says in one of the videos. "I was being used by criminals to dispose of their dirty money." Unwittingly, he said, he "was part of a money laundering process."

His attorney, Stanton Levenson, said the videos have been viewed more than 140,000 times. Mr. Levenson said that Kashi now calls him any time he has questions about whether to make a sale or how to report receipts. Kashi said at his sentencing hearing that he has been "shunned … making me feel like I'm an exile," since the accusations against him emerged. He said his wife had a miscarriage because of the stress, but is now pregnant again, and he begged for the opportunity to be there for the mother and child.

Juror's Mid-Deliberation Consult With Pastor Required Post-Conviction Hearing on Contact

A state court's failure to investigate allegations that a juror in a death-penalty case discussed a biblical passage with her pastor and then shared that conversation with the other jurors was an unreasonable application of federal law that opened the door to federal habeas corpus review, the U.S. Court of Appeals for the Fourth Circuit ruled May 5. (*Barnes v. Joyner*, 2014 BL 125137, 4th Cir., No. 13-5, 5/5/14)

The state court erred by not holding a special hearing to explore these allegations because the purported misconduct involved an improper external influence that triggered a presumption of prejudice under *Remmer v. United States*, 347 U.S. 227 (1954), the court said in an opinion by Judge Stephanie D. Thacker.

Bible Stories. The court rebuffed the government's argument that this was just another Bible-in-the-jury-room case governed by *Robinson v. Polk*, 438 F.3d 350, 78 CrL 599 (4th Cir. 2006). There, the court held that consulting a Bible in the jury room is not the sort of extraneous influence on jury deliberations into which a reviewing court may probe.

The only similarity between this case and the scenario described in *Robinson* is the fact that a Bible was involved, the court said.

In *Robinson*, the juror read a Bible in the jury room. By contrast, the allegation in this case is that the juror in question spoke with her pastor about defense counsel's closing argument that the jurors would "face God's judgment" if they imposed the death penalty and that the pastor directed her to a specific biblical passage that countered that argument.

The juror then shared her pastor's response with one or more of her fellow jurors, the habeas petitioner claims.

Federal Law Misapplied. Under *Remmer*, this allegation of external influence created a presumption of prejudice that in turn triggered the right to an evidentiary hearing to look into whether the improper contact reasonably drew into question the integrity of the verdict, the court said.

The failure of the state post-conviction relief court to hold that hearing meant that the deferential review ordinarily required by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 , does not apply because the state court misapplied established federal law, the court said.

Therefore, the federal district court's denial of the habeas petition can't stand because the state court's complete failure to investigate the claim meant the district court had no basis to conclude, as it did, that the communications with the pastor were harmless, it said.

On remand, the petitioner will have to demonstrate that the communication caused actual prejudice, the court said.

Dissent Finds Communication Innocuous. In dissent, Judge G. Steven Agee said the state court could reasonably have concluded that the communication here did not constitute contact about the matter pending before the jury because it was not directed to the choice of sentence but instead addressed the religious implications of serving on a jury.

Judge Henry F. Floyd joined the majority opinion.

The petitioner was represented by Rudolf Widenhouse & Fialko, Chapel Hill, N.C. The state was represented by the North Carolina Department of Justice, Raleigh.

The RoundTable
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Future Meetings

June 12-15, 2014: Aspen, CO
October 10-12, 2014: San Francisco, CA

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