

Recent Trials:

Kilpatrick, Newman, and Nosal

Ronald J. Nessim

Bird, Marella, Boxer, Wolpert, Nessim, Dooks & Lincenberg
Los Angeles, California

Michael G. Freedman

Bird, Marella, Boxer, Wolpert, Nessim, Dooks & Lincenberg
Los Angeles, California

United States v. Kilpatrick, Case No. 10-CR-20403 (E.D. Mich.)

Background

Kwame Kilpatrick's fall from grace in many ways mirrored that of Detroit, the city he once led as mayor. Kilpatrick was Detroit's youngest mayor when he was elected at the age of 31 in 2001. Toward the end of his second term of office, in 2008, local prosecutors charged Kilpatrick with a dozen offenses, including perjury and obstruction of justice.

The charges stemmed from an affair Kilpatrick had carried on with his former chief of staff, Christine Beatty, dating back to 2002. Kilpatrick and Beatty both denied having an affair when they were called to testify in a 2007 police officer whistleblower trial. After the Detroit Free Press uncovered hundreds of text messages attesting to the affair, it was revealed that Kilpatrick had approved a secret settlement of \$8.4 million to the police officers after they discovered the text messages. Kilpatrick pled guilty in 2008 and served 99 days in state prison. In May 2010 he was sentenced to another prison term of eighteen months to five years in state prison for violating his probation by hiding hundreds of thousands of dollars in assets in order to avoid paying restitution.

Indictment & Trial

While in state prison on the probation violation, Kilpatrick was indicted by federal prosecutors in June 2010 on thirty charges stemming from rigged contracts, millions in bribes, and defrauding taxpayers. The charges against Kilpatrick included RICO allegations centered on what prosecutors termed the Kilpatrick Enterprise. Although

Kilpatrick was initially the only defendant indicted, superseding indictments added as co-defendants his father Bernard Kilpatrick, local contractor Bobby Ferguson, and former Director of Detroit Water and Sewerage Department Victor Mercado.

According to the indictment, the objective of the Kilpatrick Enterprise was to financially enrich its members by using Kilpatrick's position as mayor. Municipal contractors were extorted to include Ferguson in their bids, as a result of which Ferguson gained tens of millions of dollars. The indictment numbered 100 pages and alleged dozens of examples where Mercado and Ferguson allegedly rigged the bidding process and forced contractors to give them outsize shares of the proceeds, all with the assistance of pressure from Kilpatrick and his father. Additionally, Kilpatrick was alleged to have illegally used nonprofit funds and state grants for personal expenses.

On the eve of trial, Kilpatrick filed a motion for change of counsel, contending that his attorney, panelist James Thomas, had certain conflicts of interest in representing Kilpatrick. The government, including panelist Mark Chutkow, opposed the motion, claiming it was merely a ruse to delay the trial. The government also agreed not to present certain evidence at trial and to appoint another attorney to represent Kilpatrick in certain aspects of the case. Judge Nancy Edmunds denied Kilpatrick's motion for a change of counsel, along with motions for a change of venue and to sever Kilpatrick's trial from Victor Mercado's.

Kilpatrick's trial lasted 5 months and featured over 100 witnesses. In total, the jury heard evidence that \$84 million worth of public funds were steered to Ferguson and in turn to the Kilpatrick Enterprise. The government's star witness was Kilpatrick's

former aide, Derrick Miller, who testified to handing Kilpatrick \$10,000 in cash in a public bathroom. The government's case lasted over four months; the defense spent two weeks putting on its case.

Conviction & Sentencing

After 23 days of deliberation, Kilpatrick was convicted in March 2013 on 24 of the 30 counts against him. One juror told the press, "there was no one piece of evidence that sealed the deal." "We weighed all the evidence as a whole."

Ferguson was convicted of nine of the eleven counts against him. Bernard Kilpatrick was convicted of a single tax charge and acquitted of another tax charge and attempted extortion. Victor Mercado pled guilty mid trial.

Following the trial, and prior to sentencing, new counsel was appointed to represent Kilpatrick. In October 2013, Kilpatrick was sentenced to 28 years in federal prison. Kilpatrick was also ordered to pay close to \$4.6 million in restitution to the Detroit Water & Sewerage Department, along with \$195,000 in restitution to the IRS.

United States v. Newman, Case No. 12-CR-00121 (S.D.N.Y.)

Background

Todd Newman was one of many financial traders caught up in the Southern District's recent string of insider trading prosecutions. Newman had been a portfolio manager at Diamondback Capital Management LLC. Newman was tried along with another trader, Anthony Chiasson, a founder of Level Global Investors. Chiasson founded Level Global in 2003 with a fellow-SAC alum.

Newman, Chiasson, and several other traders were charged in January 2012 with insider trading stemming from gains made trading in Dell and NVIDIA stock. Along with Newman and Chiasson, the others charged included Daniel Kuo of Whittier Trust Company, Jon Horvath of Sigma Capital, a unit of SAC, and Sanjay Goyal, of Neuberger Berman.

The charges alleged that Newman and Chiasson received material non-public information from a "circle of friends," lower-level analysts who illegally obtained and then shared inside information from company insiders. In total, the traders were alleged

to have earned approximately \$62 million from illegally trading on the information shared. The lion's share, approximately \$53 million, was earned by Chiasson's Level Global.

Indictment & Trial

Level Global and Diamondback were initially raided by the FBI in November 2010. Level Global went out of business shortly thereafter. In 2012, before Newman's trial, Diamondback paid a \$9 million settlement to the SEC and signed a non-prosecution agreement with the Department of Justice. Level Global agreed in April 2013 to pay more than \$21.5 million to the SEC.

A criminal complaint was first filed in January 2012. The later Indictment charged Newman, Chiasson, and Horvath with one count of conspiracy to commit securities fraud, and eleven counts of securities fraud. The charges against Newman revolved around Diamondback analyst Jesse Tortora and the charges against Chiasson around Level Global analyst Spyridon "Sam" Adonakis. Tortora and Adonakis were allegedly members of the "analysts conspiracy" and "circle of friends." According to the indictment, the analysts received the inside information and passed that information along to their respective traders—Newman and Chiasson.

Along with Goyal, Tortora and Adonakis pled guilty and agreed to testify against Newman and Chiasson. Unlike in the prosecutions of Raj Rajaratnam and Rajat Gupta, each featured in previous years' panels, no wiretap recordings were used against Chiasson and Newman. Ultimately, all the defendants except Newman and Chiasson pled guilty and agreed to cooperate with the government. Horvath pled guilty just a month before trial, stating in court that he obtained confidential information about Dell and provided it to the trader for whom he worked. That trader was Matthew Steinberg, a former SAC trader who was tried in the fall of 2013 and was recently convicted.

Newman filed a motion to sever his trial from Chiasson's. Newman and Chiasson were charged in the same indictment as members of the same conspiracy, but they were alleged to have received the information from different sources—Newman from Tortora and Chiasson from Adonakis. Chiasson's lawyers indicated that they would seek to

introduce hundreds of emails sent by Adonakis and containing potentially confidential material in order to show that Chiasson received very few of these emails. Newman, however, was listed as a recipient on several hundred of these same emails. Newman thus argued that allowing the emails into evidence as part of Chiasson's defense would prejudice his own defense. Judge Sullivan denied the motion, ruling that Newman and Chiasson were part of the same conspiracy, and they were tried together.

Their trial began in November 2012. Chiasson was represented by Reid H. Weingarten, a panelist in prior years, and Gregory Morvillo. Newman was represented by John A. Nathanson and Stephen Fishbein, a participant on this year's panel. The prosecutors were Richard C. Tarlowe and Antonia M. Apps, also a participant on this year's panel.

From the outset, Newman and Chiasson focused their respective defenses on attacking the credibility of the analysts who testified against them. The defense also argued that each trader reviewed so much data each day that it would have been impossible for the traders to determine that particular information they received was improperly obtained.

Tortora spent two days on the stand as a witness for the government. He explained that Newman knew the information Tortora passed along to him from Goyal was confidential. Indeed, Tortora testified that Newman arranged to pay Goyal's wife \$175,000 as payment for consulting services. On cross, Fishbein elicited testimony regarding Tortora's acrimonious relationship with Newman and eventual resignation from Diamondback.

The prosecution's case ran over three weeks. Newman's only witnesses were an FBI agent and an expert on financial trading.

Conviction, Sentencing, and Appeal

The jury deliberated for two days before returning convictions of both Newman and Chiasson. One of the jurors explained to the press, "there was a lot of evidence. We took into account pretty much everything." Both defendants were released on bail pending sentencing.

In May 2013, Newman was sentenced to four and half years in prison and ordered to pay \$1.75

million in fines and forfeiture. The government had sought a sentence of six and a half years. Judge Sullivan stated at sentencing that "This is a crime that has an impact across an economy and across a society. This was a stark crossing of the line, engaging in criminal conduct, and that's just wrong." A few weeks later, Chiasson was sentenced to six and a half years and ordered to pay a \$5 million fine and forfeit up to \$2 million.

In June 2013, the Second Circuit reversed the trial court and ruled that both defendants could remain free pending their appeal. In seeking to remain free, both defendants argued that Judge Sullivan erred in instructing the jury on the issue of whether they were required to know that the company insiders leaked the confidential information not only in breach of their duty but also for personal gain. At the initial hearing, Circuit Judge Barrington D. Parker reportedly told the government, "we are going to have a lively appeal here."

United States v. Nosal, Case No. 08-CR-00237 (N.D. Cal.)

Background

The prosecution of David Nosal lasted over half a decade, yielding a seminal appellate decision in the process. After leaving his job as a managing director of Korn/Ferry in 2004, Nosal established his own executive recruiting firm in the San Francisco Bay Area. Nosal had been a highly successful recruiter for his former employer, and he continued working with Korn/Ferry as an independent contractor for a period of time after he left.

In 2005, federal authorities were notified that Nosal was allegedly improperly accessing critical source information about executive candidates within Korn/Ferry's computer databases. Nosal was indicted in April 2008 on charges that he stole Korn/Ferry's trade secrets. Along with Nosal, his former girlfriend Vicky Christian was also indicted. Christian had left Korn/Ferry with Nosal and continued working for him at his new firm.

Indictment and Appellate Review

According to the indictment, in order to access information about executive candidates, Nosal had Christian email Nosal's former executive assistant at

Korn/Ferry and ask to use her account. Nosal was then able to access Korn/Ferry's recruiting database. Nosal's former executive assistant pled guilty to conspiracy. Although Christian initially denied the charges along with Nosal, she too eventually pled guilty and testified against Nosal.

Nosal was indicted on twenty counts, including conspiracy to misappropriate, receive, possess, and transmit trade secrets; gaining unauthorized access to a protected computer; theft of trade secrets; mail fraud; and conspiracy to commit mail fraud.

Nosal moved to dismiss the counts brought under the Computer Fraud and Abuse Act, arguing that using information to which he had access was not actually a crime under the CFAA. Nosal contended that he was not charged with accessing computers he was not entitled to access, merely with using information he obtained from that access for improper purposes. The district court denied Nosal's motion in 2009.

In 2010, the district court reversed course and granted Nosal's motion for reconsideration. The district court dismissed five CFAA counts in light of a recent Ninth Circuit opinion that narrowed the scope of the CFAA. Following the district court's dismissal of the CFAA counts, the government appealed to the Ninth Circuit.

In April 2011, a three-judge panel of the Ninth Circuit reversed the district court and reinstated the CFAA counts against Nosal. According to the three-judge panel, "under the CFAA, an employee accesses a computer in excess of his or her authorization when that access violates the employer's access restrictions, which may include restrictions on the employee's use of the computer or of the information contained in that computer." Led by appellate specialist Dennis P. Riordan, Nosal sought en banc review, arguing that such a ruling would criminalize any employee's ordinary violation of his or her company's computer use policy. In October 2011, the Ninth Circuit announced that the case would be reheard en banc.

The Ninth Circuit narrowed the scope of the CFAA in a 9-2 en banc ruling in April 2012. Chief Judge Kozinski, writing for the majority, adopted Nosal's argument, writing that under the government's reading of the CFAA, "millions of unsuspecting individuals would find that they are

engaging in criminal conduct" for "playing games, shopping or watching sports highlights." The Department of Justice notified the Ninth Circuit in August 2013 that it would not seek review by the Supreme Court.

Trial

The case having returned to the district court, Nosal's attorneys, including panelist Martha Boersch, argued that District Judge Edward Chen should dismiss the remaining CFAA charges. The government, including panelist Kyle Waldinger, argued that in addition to using information from the database, Nosal also improperly accessed the database. Judge Chen denied Nosal's motion in March 2013, finding that the government's allegation that former employees accessed the company's computers with passwords given to them by current employees sufficed under the CFAA. Furthermore, Judge Chen ruled that the government was not required to allege that Nosal evaded technological barriers in order to show that his access was illegal.

At trial, Nosal's defense was focused more on the law than the facts, which were really not in dispute. Nosal argued that Christian and the executive assistants actually accessed the database, and all had permission to do so at the time. Nosal put on no defense in his case in chief.

Conviction & Sentencing

Nosal was convicted of six felonies in April 2013 following two weeks of trial. The conviction included a count of computer fraud and unauthorized downloading, and possession of trade secrets. Judge Chen denied Nosal's motions for acquittal and a new trial in August 2013. Nosal argued that the information Nosal obtained did not constitute trade secrets. Nosal is expected to be sentenced in early January 2014.