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Corruption in Basketball: Understanding *United States v James Gatto et. al.*

What Comes Next?

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In *United States v. James Gatto et. al.*,ⁱ federal prosecutors successfully argued that violations of rules adopted by private associations can form the basis for federal criminal prosecution. The convictions in the *Gatto* case established that rules promulgated by the National College Athletic Association, the NCAA, could serve as the basis for felony charges of, among others, wire fraud and conspiracy to commit wire fraud. The *Gatto* trial was part of a much larger investigation by the FBI into NCAA sports corruption. This paper will look at the NCAA investigation with a focus on James Gatto and his associates, the *Gatto* trial and conviction, and the potential ramifications of the legal theory successfully deployed by SDNY prosecutors in the *Gatto* trial.



What is the state of the NCAA investigation?

On September 26, 2017, the U.S. Attorney's Office for the Southern District of New York announced the arrest of 10 individuals, including agents, coaches and apparel company employees,ⁱⁱ accused of paying and taking bribes in a plot to violate NCAA amateurism rules regarding college basketball players. The arrests followed an investigation that started in 2015 in which the FBI discovered two separate bribery schemes involving college athletes and the people attempting to monetize these athletes' success. In one scheme, business managers and financial advisors paid bribes to college basketball coaches and in return, the coaches pressured their players to retain the services of the managers and advisors upon becoming professional basketball players.ⁱⁱⁱ In another scheme, an Adidas senior executive, James Gatto, conspired with Merl Code, an Adidas consultant, and Christian Dawkins, an aspiring agent, to funnel payments to promising high school basketball athletes and their families in order to secure their commitments to universities sponsored by Adidas.^{iv}

Code, Dawkins, and Gatto were the first to go to trial in October 2018 on charges of wire fraud and conspiracy to commit wire fraud.^v They were convicted and sentenced in March: Gatto to 9 months in prison and Dawkins and Code to 6 months each.^{vi} Code and Dawkins were ordered to pay over \$28,000 in restitution and Gatto's amount is still to be determined.^{vii} Among the institutions seeking restitution from Gatto, the University of Kansas is seeking more than \$1 million, North Carolina State has asked for close to \$260,000, and Louisville has asked for close to \$32,000.^{viii} Code and Dawkins are also scheduled to stand trial again in April on related charges of bribing college basketball coaches.^{ix}

In addition to the three defendants convicted at trial, several other defendants have pled guilty. On March 19, 2019, former Auburn assistant coach Chuck Person pled guilty to a single conspiracy charge,^x becoming the fourth and final college basketball coach to plead guilty as part of this investigation. Former assistant coaches Lamont Evans, Emanuel "Book" Richardson and Tony Bland^{xi} have all pled guilty. Through a guilty plea, Person avoided trial in June on charges including bribery, conspiracy to commit bribery, honest services wire fraud, wire fraud and Travel Act conspiracy.^{xii} Former NBA referee Rashan Michel is still expected to stand trial in June.^{xiii}

When and why did the investigation start?

The FBI has been investigating corruption and fraud involving players and coaches involved with the NCAA since 2015.^{xiv} As part of their investigation, the FBI obtained court authorized wiretaps of the phones of Dawkins, Gatto, and Code, and sent in undercover law enforcement agents who pretended to be sports financiers.^{xv} FBI agents accused the defendants of making illicit payments to the families of highly touted high school basketball recruits so that they would join college basketball teams sponsored by Adidas and eventually sign with affiliated agents.^{xvi} Eventually, Adidas would benefit by being the sponsor of winning basketball teams, and Dawkins would benefit by having clients for his fledgling business. These payments allegedly violated NCAA rules forbidding amateur athletes from accepting payments for their athletic skills or through commercial advertisement, promotion, or endorsement.^{xvii} If the NCAA discovered these payments, the players involved would likely lose

their amateur status and thus the right to participate in NCAA games, and the universities would potentially face sanctions by the NCAA, which could include post-season bans, limits on available scholarships and even the “death penalty,”^{xviii} a complete ban from participating in a particular sport for a period of at least one year.^{xix}

The *Gatto* case largely centered around the FBI’s finding that Gatto, Code, Dawkins, and a financial advisor, Munish Sood, worked together to funnel \$100,000 from Adidas to the family of Brian “Tug” Bowen in exchange for his commitment to play at University of Louisville, which is sponsored by Adidas.^{xx} The defendants funneled money to Bowen and other athletes’ families indirectly, using surrogates and non-profit institutions;^{xxi} they also produced fake invoices and handed off cash in hotel rooms and parking lots to conceal their payments.^{xxii}

What were the arrests and the legal theory behind the charges in Gatto?

Gatto, Code, and Dawkins, were arrested in September 2017. The government argued that by paying student-athletes and their families, the defendants exposed the universities to risk and interfered with how the universities dispersed athletic scholarships. In using these allegations to support federal wire fraud charges, the government relied upon Second Circuit precedent holding that a defendant does not need to obtain money or property to violate the mail and wire fraud statutes: property can include “intangible interests such as the right to control the use of one’s assets.”^{xxiii} The government’s theory of the case cast the universities as victims of the fraudulent scheme, and focused on the defendants’ interference with the right of such universities to control their assets, the so called “right to control” theory. Prosecutors argued that the actions taken by the defendants rendered the recruits ineligible to play college basketball, and the further acts of concealment essentially fooled the universities into giving out scholarships to ineligible players and exposed the universities to economic harm that would result from potential NCAA sanctions related to the ineligible players.^{xxiv} Thus, under the government’s theory, a defendant did not need to obtain or desire to obtain property from the victims, only to interfere with a victim’s property rights. As discussed below, a similar theory had been rejected by the Seventh Circuit more than two decades ago.^{xxv}

Criminalizing NCAA violations: What was the relevant case law at the time of the Gatto trial?

The *Gatto* trial was not the first time that federal prosecutors sought to criminally punish NCAA violations through a “right to control” theory. In 1993, in a similar case, *United States v. Walters*,^{xxvi} Norby Walters was convicted of a mail fraud scheme involving illicit payments to NCAA football players. Walters, along with his partner Lloyd Bloom, signed NCAA college football players to contracts by which he would serve as their agent once the players reached the NFL. In return, he would reward the players with money and property, such as cars. However, under NCAA rules, signing with an agent renders a student-athlete a professional, making the football players ineligible to play college sports. Walters falsely dated the contracts to correspond with the time when the players would join the NFL and promised to lie to the universities if they asked.^{xxvii}

Walters was convicted of mail fraud for causing the universities to allocate athletic scholarships to athletes who were ineligible to play as a result of losing their amateur status. Federal prosecutors argued that a mail fraud conviction does not require actual or potential transfer of property from the victim to the defendant, only that the victim suffers a loss, whether or not the defendant intended to harm the victim.^{xxviii} The Seventh Circuit declined to endorse such an expansive interpretation of the mail fraud statute^{xxix} and reversed the conviction, rejecting the idea that Walters was defrauding the universities of property. The court noted that “a customer who loses the honesty of traders, but no money, has not been defrauded of property; a university that loses the benefits of amateurism likewise has been deprived only of an intangible right, which per *McNally*¹ does not support a conviction.”^{xxx}

In *Gatto*, the defense filed a pretrial motion to dismiss the indictment, arguing that based on the reasoning in *Walters*, Gatto and his associates could not be guilty of wire fraud. The district court rejected their argument, and distinguished *Walters* on several grounds. The court noted that in *Walters*, the government failed to show that defendants had any intent to obtain money or property from the universities.^{xxxi} In addition, the court also noted that unlike the Seventh Circuit, the Second Circuit endorsed a “right to control” theory in *United States v. Finazzo*.^{xxxii} In *Finazzo*, the Second Circuit held that “property” under the mail and wire fraud statutes may include “intangible interests such as the right to control the use of one’s assets” which can be harmed “when a victim is deprived of potentially valuable economic information it would consider valuable in deciding how to use its assets.”^{xxxiii} The district court held that under *Finazzo*, the government does not need to prove that the

¹ Although the 7th Circuit cites *McNally v. United States*, 483 U.S. 350(1987), in this particular decision its reasoning does not depend on *McNally* still being good law. Thus, *Walters* is still good law in the 7th Circuit.

victims, the universities, were “out of pocket” to Gatto and his associates.^{xxxiv} Rather, that they had suffered or could suffer some economic harm as a result of Gatto’s scheme.

What happened at the Gatto trial?

Following a three-week criminal trial, the jury deliberated for more than 19 hours over three days before they reached a guilty verdict on October 24, 2018.

During the trial, the government argued that by bribing student-athletes and their families and concealing such schemes, the defendants “obtained property,” under the wire fraud statute, from the defrauded universities in two ways: first, they interfered with the universities’ right to control the disbursement of its athletic scholarships, and second they exposed the universities to the risk of economic loss that would result from NCAA sanctions related to ineligible athletes playing for their teams.^{xxxv} They argued that the universities agreed to provide athletic scholarships to student-athletes who would have been ineligible to compete as a result of the bribe payments, a violation of NCAA rules, and that the universities would have potentially given scholarships to other student-athletes if they had known about the payments. Indeed, they pointed to the fact that the University of Louisville removed Brian Bowen from the basketball team when they discovered the illicit payments to his father.^{xxxvi}

The government emphasized the clandestine nature of many of these illicit transactions, such as the fake invoices the defendants used in order to conceal the nature of their transactions.^{xxxvii} They introduced evidence establishing the relationships between the coaches, players, and the defendants, including text messages^{xxxviii}, as well as testimony from Brian Bowen, the father of a high school basketball player whose family was paid for him to sign with the University of Louisville.^{xxxix}

The defense conceded that the defendants violated NCAA rules, but they argued that rules violations did not equal the crimes.^{xl} The defendants claimed they actually helped the universities by bringing them top high school athlete recruits, as well as helping poor and underprivileged families of the student-athletes through these payments. In a joint motion, the lawyers for the defendants wrote “it is not against the law to offer a financial incentive to a family to persuade them to send their son or daughter to a particular college.”^{xli} Because the defendants never sought to obtain money from the universities, the defense argued that they could not have committed fraud because they received no benefit. The defense argued that college basketball coaches also contacted Adidas and implicitly asked for them to help the student-athletes’ families financially.^{xlii}

In general, the defense framed the case as a question of whether the defendants thought that they were helping or harming the universities, writing in the proposed jury charges that “because a necessary element of wire fraud is a specific intent to defraud, there can be no ‘scheme to defraud’ where the scheme’s purpose is to benefit the victim.”^{xliii} In their opening statements, defense counsel for Gatto suggested that Gatto was trying to help the universities by bringing in talented athletes who would raise ticket sales.^{xliv} The defense also argued that Gatto believed that rival apparel companies Nike and Under Armour were simultaneously making payments to families on behalf of the colleges they sponsored and that Gatto’s actions were just “part of his job.”^{xlv} Relying on the concept of “unclean hands,” the defense claimed that the universities were in on the scheme and had agreed to take on the risks of bribery. Gatto explained that in order to protect the universities from being scrutinized by the NCAA, Gatto did his dealings under the radar.^{xlvi} The defendants questioned the government’s assertion that their intent was to harm the universities, supporting their argument with evidence that the coaches were involved in the scheme.^{xlvii}

As noted, all three defendants were found guilty.

What follows after Gatto?

The *Gatto* case was significant and not just within the world of college basketball. For some, it worryingly broadens areas in which the government can use the mail and wire fraud statutes, which come with significant criminal penalties.^{xlviii} One analyst has expressed concern with the expansion of criminal law into the area of rule enforcement by private entities.^{xlix} As defendants themselves argued, the NCAA is a private institution and its rule promulgation procedures are not subject to due process constraints or a legislative process. The case raises questions about whether private associations can now subject their members to an “affirmation and sanction” regime, where any violations by can result in criminal prosecution.¹

Gatto intends to appeal his conviction. It remains to be seen how the Second Circuit views the government’s “right to control” theory and whether the Circuit sees these charges as pushing the acceptable limits of applying federal criminal law to private institutions.

About:

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What is CAPI?

The Center for the Advancement of Public Integrity is a nonprofit resource center dedicated to improving the capacity of public offices, practitioners, policymakers, and engaged citizens to deter and combat corruption. Established as partnership between the New York City Department of Investigation and Columbia Law School in 2013, CAPI is unique in its city-level focus and emphasis on *practical* lessons and tools.

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- ^{xxv} *United States v. Walters*, 997 F.2d 1219, 1221 (7th Cir. 1993)
- ^{xxvi} *Id.*
- ^{xxvii} Will Hobson, *The FBI also probed payments to college athletes in the '80s. It didn't end well*, The Washington Post (Mar. 30, 2018), https://www.washingtonpost.com/sports/colleges/the-fbi-also-probed-payments-to-college-athletes-in-the-80s-it-didnt-end-well/2018/03/30/b0da0f98-339b-11e8-94fa-32d48460b955_story.html?utm_term=.af03725f0486
- ^{xxviii} *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993)
- ^{xxix} The court expressed its uneasiness with the prosecution's theory with a simple hypothetical and question: Individual A sends a letter to individual B inviting him to a surprise party for their mutual friend C; when B shows up to the party,

he finds an empty parking lot and discovers that he's been the butt of a joke; B has spent money on gasoline to get to the location; has A committed mail fraud? See *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993). The prosecutor confirmed that A would violate the mail fraud statute since he interfered with B's right to control the money he spent on gas, but that his office would not pursue these type of cases. See *Id.*

xxx *Id.* at 1226

xxxii *United States v. James Gatto et. al.*, 295 F.Supp.3d 336, 346-47 (S.D.N.Y. 2018)

xxxiii *Id.* at 346

xxxiiii *Id.*

xxxv *Id.*

xxxvi *Id.*

xxxvii *United States v. James Gatto et. al.*, 295 F.Supp.3d 336 (S.D.N.Y. 2018). Doc. 245 at 59, filed Nov. 2, 2018.

xxxviii *Id.* at 49

xxxix "1,300 recorded phone calls submitted as evidence in FBI's college basketball investigation": <https://www.courier-journal.com/story/sports/college/louisville/2017/12/21/fbi-college-basketball-investigation-university-louisville/973195001/>

xl *United States v. James Gatto et. al.*, 295 F.Supp.3d 336 (S.D.N.Y. 2018). Doc. 245 at 63, filed Nov. 2, 2018.

xli *Id.* at 66

xlii Thomas Novelly, *Lawyers seek dismissal in college basketball corruption scandal*, Courier Journal (Dec. 21, 2017, 12:39 PM), http://www.espn.com/mens-college-basketball/story/_/id/21855825/lawyers-argue-fbi-findings-college-basketball-corruption-scandal-violate-federal-law

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xliiii *United States v. James Gatto et. al.*, 295 F.Supp.3d 336 (S.D.N.Y. 2018). Doc. 178 at 15, filed Aug. 23, 2018

xliv *United States v. James Gatto et. al.*, 295 F.Supp.3d 336 (S.D.N.Y. 2018). Doc. 245 at 70, filed Nov. 2, 2018.

xlv *Id.* at 83

xlvi *Id.* at 87

xlvii *Id.* at 82

xlviii Paul Tuchmann, *From the Basketball Court to Federal Court: Perils of the Prosecutorial Approach to Wire Fraud in the NCAA Basketball Cases*, The Center for the Advancement of Public Integrity, available at <https://www.law.columbia.edu/public-integrity/basketball-court-to-federal-court>

xlix *Id.*

¹ *Id.* at 5