Winter 2015 | Volume 27 | Number 1

ATTICUS

NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Publication of the
New York State Association of Criminal Defense Lawyers

INSIDE *this* ISSUE

2015 NYSACDL Foundation Annual Dinner
Award Recipients

The Honorable Jenny Rivera
Hon. William Brennan Award for Outstanding Jurist
Page 30

Herbert L. Greenman, Esq.
Thurgood S. Marshall Award for Outstanding Criminal Practitioner
Page 31

Vincent Warren, Esq.
Justice Award
Page 32

Warrior Cops, Revenge Porn & more, inside…

New York State Association of Criminal Defense Lawyers
atticus@nysacdl.org
www.nysacdl.org
90 State Street, Suite 700
Albany, New York 12207
Phone: 518-443-2000
Fax: 888-239-4665

EDITORS
Benjamin Ostrer
John S. Wallenstein
Jessica Horani
Richard J. Barbuto, Acquisitions and Book Review Editor

A publication of the
New York State Association of Criminal Defense Lawyers

90 State Street, Suite 700
Albany, New York 12207
Phone: 518-443-2000
Fax: 888-239-4665
www.nysacdl.org
atticus@nysacdl.org

From the Editors' Desk



On December 5, 2015, The New York Law Journal published the following letter written by Michael Shapiro, NYSACDL Vice President (and co-chair of Carter Ledyard & Milburn's white collar practice):

"In 1971, after a year of hearings concerning rampant corruption permeating the NYPD (think Serpico), the blue-ribbon Knapp Commission recommended and Governor Nelson Rockefeller established, the creation of an independent Special Prosecutor's Office that superseded the jurisdiction of the five local district attorneys in New York City.

The Knapp Commission recognized the inherent conflict of interest in a local district attorney investigating and prosecuting police-committed crimes. The district attorneys and the police department work hand in glove on a daily basis; that same district attorney cannot reasonably be expected to bring unvarnished objectivity to a case in which the police themselves are the suspects. The special prosecutor's office, established in 1972, and disbanded in 1987 (allegedly for budgetary reasons) had its own investigators and lawyers.

Many of the district attorneys, especially legendary New York County District Attorney Frank Hogan, were unhappy to say the least. While the first special prosecutor, Maurice Nadjari, found himself quickly enmeshed in controversy because of his excessive zeal, his successors, among them now-Southern District Judge John Keenan, established a remarkable track record in fairly, objectively and successfully investigating and prosecuting police officers and others in the criminal justice system suspected of criminality.

Had there been special prosecutors investigating the death of Michael Brown in Ferguson, Missouri and Eric Garner in Staten Island, as there was in Florida for the George Zimmerman case, the result of the grand jury presentations would almost certainly have been different.

Perhaps it is time for the reestablishment of the special prosecutor's office."

A few days later in a lead editorial, the New York Times joined an expanding chorus calling for the establishment of a Special Prosecutor's Office to investigate and prosecute instances of alleged serious police criminality. Shortly thereafter, Attorney General Schneiderman offered to take on that role. A dissenting view has been expressed by Kings County District Attorney Kenneth Thompson, who asserts that he and his office are ready, willing and able to go after criminal cops.

With due regard for the views of Mr. Thompson, who has been in office for less than a year, and some of his district attorney

Continued on page 6

Find NYSACDL on Facebook, LinkedIn & Twitter

Decision Making As Property:

Can You Steal What You Can't Extort?

By Michael Shapiro

Giridhar Sekhar was a managing partner at FA Technology Ventures, an investment fund management company. The Office of the New York State Comptroller, the agency responsible for investing all of New York State's employee pension funds, was considering investing in the FA Technology company, but decided not to do so. Somehow, Sekhar heard rumors that the general counsel in the Comptroller's Office was having an extramarital affair.

The general counsel then received a series of emails demanding that he persuade the Comptroller to move ahead with the FA investment or the general counsel's alleged affair would be disclosed to his wife, the media and others. The general counsel called the cops. The police traced the emails to Sekhar.

Sekhar was charged and ultimately convicted after trial of, among other things, extorting the general counsel, a violation of the Hobbs Act.

Michael Shapiro is a partner at Carter, Ledyard & Milburn,LLP, where he is co-chair of the White Collar and Government Investigations Practice, and Chair of the firm's Diversity Committee. He is a Vice-President of NYSACDL and has been practicing criminal law for 41 years.

The Hobbs Act, 18 U.S.C. § 1951(a), criminalizes acts that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a) (2014). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (2014). The Hobbs Act and its definition of extortion have their roots in § 850 of the 1909 New York Penal Law and its antecedent, the 19th century Field Code. In drafting the Hobbs Act, Congress copied the New York law, including its definition of extortion, but did not include in the Hobbs Act the related crime from the New York statutes, coercion. *Id.* The New York Penal Law defined coercion as "the use of threats to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." N.Y. Penal Law § 530 (1909), earlier codified in N.Y. Penal Code § 653 (1881), the Field Code. The elements of each crime differ. Specifically, as it pertains to an alleged victim's property, extortion requires the extortionist to actually acquire property; coercion, on the other hand, merely requires interference with an individual's right to act or abstain from acting, and is not limited to property crimes. In reversing Sekhar's conviction, the United States Supreme

Continued on next page

Continued from previous page

Court made clear that threatening someone to affect their exercise of an intangible right, such as recommending an investment, does not violate the Hobbs Act because Congress chose not to include coercion within its ambit. *Sekhar v. United States*, 133 S.Ct. 2720, 2727 (2013).

The federal mail fraud statute, first enacted in 1872, prohibits the use of the postal system in "furtherance of 'any scheme or artifice to defraud'" unsuspecting victims of their money or property. *McNally v. United States*, 483 U.S. 350, 356 (1987) (quoting 18 U.S.C. 1341). Congress added the specific language referring to money or property in the statute, "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," after the initial clause in response to the Supreme Court's decision in Durland v. United States, 161 U.S. 306 (1896), in which the Court ruled that the statute not only applied to misrepresentations of existing fact but also to false promises concerning future events. McNally v. United States, 483 U.S. at 356-57. In McNally, the Court interpreted this new clause as Congress' method of codifying the Durland decision and explicitly stating that fraudulent future promises were illegal under the statute. McNally v. United States, 483 U.S. at 358-59. Although this interpretation seems contrary to the plain meaning of the statute, which implies the second clause is independent and explicitly prohibits using the mail fraudulently to obtain property, the Court clarified this seeming discrepancy by defining "to defraud" as "to wrong one in his property rights by dishonest methods or schemes," and therefore the term "property" was already applicable to the statute through the initial clause. *McNally v. United States*, 483 U.S. at 358 (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The wire fraud statute, which Congress enacted in 1952, contains language virtually identical to the mail fraud statute; it prohibits the use of wire, radio, or television communication for fraudulent schemes to deprive individuals of their property. 18 U.S.C. 1343 (2014). What, therefore, is property?

SUPREME COURT'S DEFINITION OF "PROPERTY"

The Court's interpretation of the term "property" has been shaped by several key decisions and it has expanded its definition of property in important criminal statutes beyond traditional, physical property. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that intangible property rights, such as the right to confidential business information, received protection under criminal statutes similar to actual property. *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (holding that the Wall Street Journal's right to confidential information in yet to be released news articles in its publication was property under the mail and wire fraud statutes). However, in *Cleveland v. United States*, 531 U.S. 12 (2000), the Justices reversed a mail fraud conviction, holding that obtained property must be considered property in the hands of the victim and it is not sufficient that the item may become property in the hands of the recipient. *Cleveland v. United States*, 531 U.S. 12, 15 (2000) (holding that the video poker license that would be obtained from the State through misrepresentations in the application was not property and could not therefore be obtained). In *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003), the Court looked to whether the defendants pursued or received "something of value which the [defendant] can exercise, transfer, or sell" in determining whether or not the property rights at issue were property. *Scheidler v. NOW, Inc.*, 537 U.S. 393, 405 (2003) (citing *United States v. Nardello*, 393 U.S. 286, 290 (1969)) (holding that abortion opponents' acts did not constitute extortion where the intangible right to exercise control over use of a business' assets was not obtained or attempted to be obtained by the abortion opponents who sought to shut down abortion clinics).

In 2013, the Supreme Court decided *Sekhar*, another seminal opinion defining "property" as it pertains to criminal statutes, particularly the extortion statute. The Court held that under the Hobbs Act, the property extorted must be obtainable property; the property must be "transferable – […] capable of passing from one person to another." *Sekhar v. United States*, 133 S.Ct. at 2725. In the opinion, Justice Scalia emphasized that "the obtaining of property from another" is an essential requirement for extortion under the Hobbs Act and to be guilty of extortion the victim must be deprived of his or her property and the extortionist must take possession of the property. *Id.* at 2725. For this to occur, Justice Scalia writes, the property itself must be capable of being transferred from the victim to the extortionist, which was not possible under the circumstances before the Court. *Id.* The Court ruled that "a yet-to-be-issued recommendation that would merely approve (but not effect) a particular investment" was not transferable property, and therefore was not obtainable property. *Id.* at 2727. Resultantly, the Court found that Sekhar was more likely guilty of coercion than extortion, but given that the charges were for attempted extortion, the Court reversed the Second Circuit's affirmance of the conviction. *Id.*

In *United States v. Finazzo*, 2014 U.S. Dist. LEXIS 4690, 2014 WL 184134 (E.D.N.Y. Jan. 14, 2014), Judge Roslynn Mauskopf in the Eastern District of New York refused to extend the definition of property in *Sekhar* to property under the wire and mail fraud statutes. *United States v. Finazzo*, 2014 U.S. Dist. LEXIS 4690, *55, 2014 WL 184134 (E.D.N.Y. Jan. 14, 2014). In the case before the court, Finazzo was convicted of conspiracy to commit mail and wire fraud, violate the Travel act, and mail and wire fraud based on his undisclosed financial relationships with a vendor under contract with his employer, a major clothing retailer, that deprived his employer of its intangible right to make informed business decisions. *Id.* at *1. In failing to extend *Sekhar* to *Finazzo*, the district court reasoned that the text and history of the Hobbs Act and the mail and wire fraud statutes do not support the proposition that the statutes share the same definition of property. The Court came to the conclusion that the types of property in each statute are inherently different, because only the Hobbs Act requires the defendant to be successful in obtaining the property from the victim. *Id.* at *52-55.

PROPERTY IS PROPERTY IS PROPERTY (OR NOT)

Contrary to the reasoning in *Finazzo*, there is support from the Supreme Court for a unified definition of property among the mail and wire fraud statutes and the Hobbs Act. First, the Supreme Court has used the same precedents in defining property under both the Hobbs Act and the mail and wire fraud statutes. For example, in *Sekhar*, Justice Scalia compares the meaning of property under the mail and wire fraud statute and the Hobbs Act by citing the Court's previous opinion in *Cleveland*. Justice Scalia reasoned that if a license, prior to being issued by a State, is not considered property under the mail fraud statute, the general counsel's recommendation for the commitment is even less so obtainable property, in the Hobbs Act context. *Sekhar v. United States*, 133 S. Ct. at 2727. Similarly, in *Scheidler*, the Court references its opinion in *Carpenter* as a resource for its discussion of potential extortion liability for obtaining or attempting to obtain intangible property, instead of reiterating the argument in *Scheidler*. *Scheidler v. NOW, Inc.*, 537 U.S. at 402. The Supreme Court's repeated use of case law describing the property that can be obtained under the mail and wire fraud statutes and the Hobbs Act shows that they view the term uniformly in similar statutes, and accordingly, lower courts should adopt the same analytical framework.

Second, the purposes of both statutes also lends support to the notion that property should mean the same thing under both statutes. The Hobbs Act seeks to protect individuals from being forced to part with their property through threats of force, violence, fear, or under color of official right. Similarly, the mail and wire fraud statutes protect against the loss of property by false promises or fraudulent schemes. At their core, both statutes seek to protect individuals and entities from losing the economic value of something that had theretofore been duly obtained and to which the person or entity had a continuing right to possess. It should be of no moment that the obtaining of the property occurs via force or threat of force as in the Hobbs Act or by trick, lie or fraudulent omission as in mail or wire fraud. It is that which is obtainable and transferable that is key and should therefore be the same in both statutes.

The reasoning in *Finazzo* that the requisite completion of obtaining property under extortion leads to a different definition of property is flawed. The Court focused on the language in the mail and wire fraud statutes which allows a defendant to be found guilty for simply devising a scheme to defraud another, even if the scheme was ultimately unsuccessful. The Third Circuit provides a clear and reasonable explanation of how this provision should be read and understood, stating "the mail fraud statute was thus intended to cover 'any scheme or artifice to defraud [one of his money or property],' including any '[scheme] for obtaining money or property by means of false or fraudulent . . . promises.'" *United States v. Al Hedaithy*, 392 F.3d 580, 602 (3d Cir. 2004). Although property appears once in the first two joined clauses in the fraud statutes, the Court stated in *McNally* that property is impliedly included in the first clause through the definition of defraud. *McNally v. United States*, 483 U.S. at 358. Based on this reading, although obtaining property is not required for a violation of the mail fraud statute, it is one of the possible violations that could be charged under the statute. For an individual to even attempt to obtain property under a fraud scheme, aligning with the ruling in *Sekhar*, the property must be obtainable or transferable. It is simply inconsistent with fundamental statutory interpretation to use different definitions for the same terms within the same statute, to wit, Title 18 of the U.S. Code. The definition of property as explicated in *Sekhar* should be equally applicable to the property definition in all locations, implicit or explicit, in which it appears in the mail and wire fraud statute. Whether or not the property is actually obtained is inconsequential. In the same manner that the

Continued on next page

Decision Making

Continued from previous page

general counsel's investment recommendation in *Sekhar* was not amendable to being transferred or obtained, so to in *Finazzo*, the company's right to make informed business decisions concerning its assets was neither transferable nor obtainable, either by Finazzo or by anyone else. The Second Circuit will have its opportunity in the *Finazzo* appeal to conform the Hobbs Act and mail/wire fraud definitions of property by focusing on what harm was caused by Finazzo's disclosure omissions to his employer and whether the right of the employer to make business decisions based upon proper disclosure can fairly and logically be described as property under the federal fraud statutes. A