

*Month in Review: July 2008*¹

United States v. Gillespie, No. 3:08-cr-00054; United States v. Mack Associates, Inc., No. 3:08-cr-00053; United States v. Moore, No. 3:08-cr-00060; United States v. Richmond, No. 3:08-cr-00055 (D. Nev. July 16, 2008); Department of Justice Press Release 08-616 (July 16, 2008)

Immigration and Customs Enforcement Branch Probes McDonald's Franchisee -- Criminal Enforcement of Immigration Laws on the Rise
<http://www.usdoj.gov/opa/pr/2008/July/08-opa-616.html>

Criminal enforcement of U.S. immigration laws is on the rise. In one recent case, an investigation by the U.S. Department of Homeland Security's Immigration and Customs Enforcement branch ("ICE") revealed that a McDonald's franchisee corporation that owns 11 restaurants in and around Reno, Nevada, knowingly hired 58 illegal alien workers. The corporation, its director of operations, and its former vice-president pled guilty to felony immigration offenses for encouraging illegal aliens to reside in the United States.

According to the plea agreements, the corporation's management employed individuals they knew to be illegal aliens by providing them with names and Social Security numbers belonging to other individuals, including the deceased ex-husband of the director of operations' wife. The court accepted the plea agreements, sentenced the corporation to one year of probation and ordered the corporation to pay the agreed-upon \$1 million fine, with \$300,000 payable immediately and the balance to be paid within nine months. As part of the corporation's plea agreement, the government agreed not to bring charges against the president and sole shareholder of the corporation.

Sentencing for the individual defendants has been scheduled for October. The franchisee's former vice-president pled guilty to one felony count of inducing an illegal alien to remain in the United States. He faces up to five years in prison and a \$250,000 fine, and his plea agreement implies that the Sentencing Guidelines will recommend at least six to twelve months imprisonment. Information regarding the director of operations' plea agreement is currently unavailable. The executive assistant to the president of the corporation pled guilty to a misdemeanor count of continuing employment of an unauthorized alien, punishable by up to six months imprisonment and a \$3,000 fine.

Since its creation in 2003, ICE has considerably increased efforts to investigate the unlawful employment of illegal aliens. In the previous fiscal year, ICE made more than 4,900 arrests in worksite enforcement cases, of which 863 involved criminal violations. Last year's figure represented a 45-fold increase in criminal worksite arrests compared to fiscal year 2001, and the

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number of criminal arrests continues to increase. In the current fiscal year (October 2007 through July 11, 2008), ICE has already made 937 criminal arrests in connection with its worksite enforcement investigations. Of those arrests, 99 involved owners, managers, supervisors or human resources employees who face charges ranging from harboring to knowingly hiring illegal aliens. ICE has also made more than 3,500 administrative arrests for immigration violations during worksite investigations in the current fiscal year.

United States v. Finnerty, No. 07-1104-cr, (2d Cir. July 18, 2008)

“Interpositioning” Not a Deceptive Act Under Federal Securities Law

http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA3LTExMDQtY3Jfb3BuLnBkZg==/07-1104-cr_opn.pdf

The Second Circuit found that the practice of “interpositioning” did not constitute a deceptive act under federal securities law, despite the defendant’s violation of NYSE rules and subsequent cover-up.

The Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1995) (“10b-5”), prohibit the use of deception or fraud in connection with the sale or purchase of any security. Defendant David Finnerty was a specialist at the NYSE who engaged in “interpositioning,” a practice in which a trader interposes himself between matching public orders for securities to realize a profit based on the difference between the bid price and ask price of the customers’ orders.

Finnerty was tried for three counts of securities fraud under 10b-5 in the Southern District of New York. After the jury returned a guilty verdict on all three counts, the district court granted Finnerty’s motion for a judgment of acquittal on the ground that the government failed to prove that interpositioning constituted a deceptive act under federal securities law. The government appealed. The only issue on appeal was whether Finnerty’s conduct was deceptive.

The Second Circuit held that the defendant’s conduct was not deceptive, thus affirming the defendant’s acquittal. In affirming, the Court noted that the government could not identify any misstatements attributable to Finnerty. Without a misstatement to rely on, the Court argued that the government had to show deceptive conduct. Although the Court declined to hold that some type of communication is always required to establish deception under 10b-5, the Court’s rationale for rejecting each of the government’s arguments for liability hinged on the government’s inability to identify a specific misleading statement or action by Finnerty.

The Court first addressed the government’s argument that Finnerty held himself out as a specialist obligated to follow NYSE rules, and that the NYSE’s prohibition of interpositioning would have misled customers familiar with NYSE rules into thinking that Finnerty would not engage in interpositioning. The Court noted that the NYSE’s rules were not promulgated by or attributable to Finnerty. Any confusion resulting from customers’ familiarity with these rules was, therefore, insufficient to establish liability for Finnerty under 10b-5.

The government also argued that Finnerty’s interpositioning was inherently deceptive and unfair, as evidenced by his attempts to conceal his activities from the NYSE. The Court held that the mere violation of an NYSE rule cannot establish securities fraud in a criminal or civil case. The Court also noted that not all unfair transactions are necessarily fraudulent, and that even the

existence of a cover-up is insufficient to prove a violation of 10b-5. Absent proof of actual misleading statements or conduct, the government could not establish liability.

Finally, the Court refused to invoke the fraud-on-the-market presumption described in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), because the government could not point to any deceptive statements or conduct that deceived the public or impacted the price of any public stock.

Given the government's failure to identify any specific misstatements or conduct by Finnerty, the Second Circuit affirmed the judgment of acquittal. Its opinion will likely severely limit the usefulness of 10b-5 as a means to punish and discourage interpositioning, and may have further-reaching implications in other 10b-5 cases in which specific misleading conduct or statements are difficult to identify.

***United States v. Stevens*, No. 05-2497 (3d Cir. July 18, 2008)**

Statute Criminalizing Visual Depictions of Animal Cruelty Violates the First Amendment
<http://www.ca3.uscourts.gov/opinarch/052497p.pdf>

Noting that the Supreme Court has not declared an entire category of speech unprotected by the First Amendment in over two and a half decades, the Court of Appeals for the Third Circuit refused to add depictions of animal cruelty to the select few types of speech that enjoy no protection under the First Amendment, such as pornography depicting actual children, fighting words, threats, speech that imminently incites illegal activity, and obscenity.

The defendant, Robert J. Stevens, advertised videos depicting organized dog fights in an underground publication featuring articles on illegal dogfighting. Stevens was charged and convicted of three counts of “knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain,” and he was sentenced to 37 months of imprisonment and three years of supervised release.

Under the relevant statute, “[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.” 18 U.S.C. § 48(a). The Court analyzed whether this statute regulated protected speech, subjected the statute to strict scrutiny, and found the statute to be unconstitutional.

First, because the statute regulates the creation, sale, or possession of a *depiction* of animal cruelty, the Court found that the First Amendment was obviously implicated. Second, the Court could not analogize depictions of animal cruelty to unprotected speech like child pornography because the factors that favored the creation of a category of unprotected speech for child pornography were not present. Specifically, the Court was unwilling to state that animal protection was a compelling state interest. The Court acknowledged that while the Supreme Court has not always been clear as to what qualifies as a compelling interest, it has rarely found such an interest for content-based restrictions, and has never found a compelling interest that was related to the well-being of animals. Ultimately, the Court held that preventing cruelty to animals simply did not implicate interests of the same magnitude as protecting children from the physical and psychological harm caused by child pornography.

The Court also held that even if preventing animal cruelty was a compelling interest, the statute was not narrowly tailored to protect that interest using the least restrictive means. First, the Court found the statute to be underinclusive because it did not prohibit all depictions of animal cruelty. The Court also found the statute to be overinclusive because it criminalized the interstate sale of depictions of acts of animal cruelty when those acts may have been legal in the state or country in which they were performed. The Court reasoned that banning the interstate sale of such depictions limited speech without actually discouraging the underlying acts of animal cruelty. The Court was also unconvinced that banning depictions of animal cruelty was a necessary tool for prosecuting individuals that engage in animal cruelty. As such, the Court held that the statute was not narrowly tailored to prevent animal cruelty.

Ultimately, the Court found that the government failed to meet its burden of proving the constitutionality of the statute because the statute did not protect a compelling government interest, and, even if it did, was not narrowly tailored to protect that interest. Stevens's conviction was vacated and the statute was invalidated.

***McKithen v. Brown*, No. 02-CV-1670 (E.D.N.Y. July 21, 2008)**

Convicted Prisoners' Due Process Right to Access Physical Evidence for the Purpose of DNA Testing

<http://www.nyed.uscourts.gov/pub/rulings/cv/2002/02cv1670mo.pdf>.

Judge Jacobs of the Eastern District of New York held that the Due Process Clause grants convicted offenders access to “physical evidence for the purpose of DNA testing if it can be performed with negligible cost to the state and exculpatory results would undermine confidence in the outcome of the trial.”

Frank McKithen was accused of stabbing his wife after she testified against him before a grand jury in another case. McKithen was eventually sentenced to 23 to 46 years for attempted murder, witness intimidation, reckless endangerment, assault, weapon possession, and resisting arrest. Although McKithen did not request forensic testing of the knife before or during his trial, he requested testing of the knife after his conviction. McKithen claimed that his wife had fabricated his involvement, and asserted that DNA testing of the knife used in her stabbing would show that she had actually been attacked by her boyfriend.

After sentencing, McKithen sued for access to the knife for testing under New York's post-conviction DNA testing statute. After his request was denied by Queens County Supreme Court and the Appellate Division, McKithen filed suit in the Eastern District of New York under 42 U.S.C. § 1983, claiming that the district attorney's refusal to grant him access to the knife constituted a violation of his Due Process rights under the Fourteenth Amendment.

Judge Jacobs initially granted the government's motion to dismiss McKithen's claim on procedural grounds, but the Second Circuit remanded the case for consideration on the merits. The Second Circuit directed Judge Jacobs to determine whether the Constitution provides a post-conviction right of access to evidence for DNA testing, and, if so, the contours of that right.

Judge Jacobs first noted that under the Supreme Court decision in *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982), prisoners retain substantive liberty interests under the Fourteenth Amendment. He then considered whether those liberty interests included access to potentially exonerative DNA evidence. Judge Jacobs examined several potential grounds for concluding that prisoners

retain a post-conviction liberty interest in access to DNA testing of physical evidence, including the interest of an innocent prisoner in release from custody, the interest in meaningful access to existing executive clemency mechanisms, the entitlement to post-conviction relief, and the interest in meaningful access to the courts (such as when DNA evidence provides a “factual predicate for a claim that perjury at trial deprived the defendant of due process of law”). Judge Jacobs found meaningful access to existing executive clemency mechanisms, including pardon, commutation, and parole, to be the most compelling liberty interest.

Judge Jacobs concluded that prisoners’ liberty interests in meaningful access to executive clemency mechanisms require access to “evidence of innocence” when that evidence is reliable and could “undermine confidence in the outcome of a trial.” After balancing these liberty interests with the government’s interests in finality of outcome and in avoiding the high costs of DNA testing, Judge Jacobs held that prisoners should have access to evidence for DNA testing if the tests can be performed effectively at a reasonable cost, if the testing is non-duplicative, and if the results could potentially undermine confidence in the outcome of the trial. McKithen was granted access to the knife to conduct DNA testing on the condition that he preserve the integrity of the evidence and pay all the costs of testing.

***People v. Evans*, No. S141357 (Cal. July 24, 2008)**

Cal. Pen. Code § 1200 and Requests for Mitigation of Sentencing
<http://www.courtinfo.ca.gov/opinions/documents/S141357.PDF>

In *People v. Evans*, the California Supreme Court held that the California Penal Code abrogated the traditional common law right of criminal defendants to make a personal statement asking for lesser punishment. Henceforth, criminal defendants in California will only be able to address the court at sentencing under oath and subject to cross-examination.

The defendant Blaine Allen Evans was convicted of the felony of receiving stolen property. He had been convicted of five prior felonies, one of which constituted a “strike” under California law. *See* Cal. Penal Code § 1170.12(c)(1) (2006).

The California Penal Code states that “[w]hen the defendant appears for judgment he must be informed by the court . . . of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.” Cal. Penal Code § 1200 (“§ 1200”). The defendant may then show that he or she is insane or has good cause to offer against the judgment. *Id.* at § 1201.

During sentencing, defense counsel admitted that there was “no legal cause” as to why a sentence could not be pronounced. *People v. Evans*, No. S141357, 2008 WL 2834276, at *1 (Cal. July 24, 2008). Defense counsel asked the court to place Evans on probation and order that he participate in a drug treatment program, but the court reasoned that the defendant did not “deserve the opportunity” for probation. *Id.* After the court found no good cause to dismiss the defendant’s prior “strike,” the defendant requested permission to speak in mitigation of his punishment. *Id.* The court denied the request and imposed a final sentence of five years imprisonment. *Id.*

Evans appealed the sentence, arguing that the trial court’s denial of his request to be heard at sentencing violated his right under § 1200 to make a personal statement in mitigation of punishment. The appellate court affirmed the sentence, refusing to follow a decision from

another division which held that § 1200 gives criminal defendants “a right . . . to make personal statements in their own behalf and present information in mitigation of punishment.” *In re Shannon B.*, 22 Cal. App. 4th 1235, 1238 (Cal. Ct. App. 1994). Evans appealed to the California Supreme Court, which agreed to hear the case in order to resolve the conflict between the divisions of the appellate courts.

The Supreme Court affirmed the lower court’s decision and upheld Evans’ sentence. *Evans*, 2008 WL 2834276 at *7. The Court noted that in 1872, when the California Legislature enacted § 1200, the prevailing practice in England and the United States was to permit the defendant to make a personal statement asking for a lesser punishment. The Court found, however, that the plain language of § 1200 abrogated any right to make a personal statement that may have existed at common law. *Id.* at *4. A defendant’s mere request for leniency does not qualify as a “legal cause to show why judgment should not be pronounced against him” under § 1200, so a defendant cannot claim a right to make a personal statement under § 1200.

The Court acknowledged, however, that § 1204 of the California Penal Code grants a defendant the right to call witnesses, including himself, to testify in court in order to make a statement concerning mitigation of punishment. The Court noted that any such statement must be made under oath and subject to cross-examination. Therefore, a defendant about to be sentenced is treated like any other witness, and must testify under oath subject to cross-examination when asking for mitigation of punishment.

***United States v. Gladish*, No. 07-2718 (7th Cir. July 31, 2008)**

Obscene Speech Not a Substantial Step For Purposes of Establishing an Attempt

http://sentencing.typepad.com/sentencing_law_and_policy/files/UnitedStatesvGladish.pdf

The Seventh Circuit, in an opinion by Judge Posner, held that the defendant’s obscene speech was not a substantial step for purposes of finding an attempt under a statute forbidding solicitation of minors to engage in illegal sexual acts.

Defendant Brian Gladish is a 35-year-old man who was caught in a sting operation in which a government agent posed as “Abigail,” a 14-year-old girl in an internet chat room. Gladish solicited “Abigail” to have sex with him, and even discussed the possibility of traveling to meet her at some point in the future. No travel arrangements were ever made.

A jury convicted Gladish under two federal statutes in connection with his conduct in the chat room. Gladish appealed only his conviction for violation of 18 U.S.C. § 2422(b) (“§ 2422(b)"). The relevant portion of § 2422(b) forbids knowingly attempting to persuade, induce, entice, or coerce a person under 18 to engage either in prostitution or in any sexual activity for which one could be charged with a criminal offense. To be guilty of an attempt, Gladish would have had to intend to complete the crime and take a substantial step toward completion.

The Court noted that a substantial step is a demonstration of dangerousness, and has been described as an “overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime.” *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980). The Court recognized that in underage sex sting operations, the substantial step is often traveling to meet the supposed minor. Making arrangements to meet,

reserving a hotel room, or buying a gift or bus ticket are other common substantial steps in cases like Gladish's.

Gladish did not undertake any of the typical substantial steps towards attempting to have sex with a minor, so the government argued that Gladish's explicit, sexual conversation with "Abigail" constituted a substantial step. The Court rejecting this reasoning, noting that all the cases reviewed by the Court involved more than just explicit talk. The Court distinguished the government's strongest case, *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007), because Goetzke attempted to lure his victim to Montana to make good on his sexual advances.

The Court expressed surprise at the government's decision to prosecute under § 2422(b), arguing that treating speech -- obscene or otherwise -- as a substantial step would essentially eliminate the requirement of a substantial step. The Court noted that the substantial step requirement is critical to distinguish people who pose actual threats to society from "those who are all hot air." The Court found that Gladish was only talking and fantasizing, and that his comments to "Abigail" did not rise to the level of an attempt. Accordingly, the Court reversed Gladish's conviction under § 2422(b) and directed the lower court to acquit on the § 2422(b) charges.

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