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Pleading Crimes In Indictments

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In two recent cases, *United States v. D'Amelio*[1] and *United States v. Gonzalez*,[2] the U.S. Court of Appeals for the Second Circuit addressed issues related to the constructive amendment and sufficiency of indictments. The cases are potentially important for those considering challenges to indictments, and they leave open an important issue regarding whether harmless error analysis applies when an indictment fails to set forth all of the elements of the crime alleged in the indictment.

'United States v. D'Amelio'

In *D'Amelio*, the indictment charged the defendant, Daniel D'Amelio, with attempted enticement of a minor in violation of 18 U.S.C. §2422(b). The indictment was a single paragraph, which alleged that the defendant:

> unlawfully, willfully and knowingly, did use a facility and means of interstate commerce to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can be charged with a criminal offense, and attempted to do so, to wit, [D'Amelio] used a computer and the Internet to attempt to entice, induce, coerce, and persuade a minor to engage in sexual activity in violation of New York State laws.

Even though the "to wit" clause referred only to the use of a computer and the Internet, the district court instructed the jury that it could convict if it found that the defendant had used either the Internet or the telephone as a facility or means of interstate commerce. The defendant objected that the instruction effected a constructive amendment of the indictment, but the district court overruled the objection, and the defendant was convicted.[3]

Upon consideration of the defendant's motion for a new trial, however, the district court concluded that its instruction had impermissibly amended the indictment. The indictment, the district court observed, had "charge[d] the crime in narrow and specific terms rather than in broad general ones." The jury instruction, by contrast, permitted the jury to convict the defendant on a theory that had not been set forth in the indictment, i.e., the use of the telephone rather than the use of the Internet. The district court found that its jury instruction and the government's evidence had "so altered an essential element of the charge that it is not certain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment."[4]

> Two cases leave open an important issue regarding whether harmless error analysis applies when an indictment fails to set forth all of the elements of the crime alleged in the indictment.

The government appealed. Before the Second Circuit, the defendant argued that his case was controlled by the leading case on the impermissible amendment of indictments, *Stirone v. United States*,[5] in which the U.S. Supreme Court reversed a Hobbs Act, 18 U.S.C. §1951, conviction. The indictment in that case alleged that the interstate commerce that was allegedly interfered with was the shipment of sand into Pennsylvania, but the trial court permitted the government to introduce evidence of the defendant's interference with sand shipments that affected prospective steel shipments from a not-yet-constructed mill in Pennsylvania to other states, and instructed the jury that it could convict the defendant based on his obstruction of those exports from Pennsylvania to other states.[6] The Supreme Court held that the defendant's conviction had to be reversed because the defendant may have been convicted of a charge that the grand jury never made against him.[7]

D'Amelio argued that his case was just like *Stirone*: He may have been convicted based on evidence of his use of the telephone, but there was no basis to believe that the grand jury had found that he had used the phone in furtherance of his efforts to "persuade, induce, entice, [or] coerce" the victim to engage in sexual activity.

The Second Circuit reversed. According to the court, the "core of criminality" alleged in the indictment was the use of interstate facilities to entice a minor to have sexual relations. That is what D'Amelio was charged with, and the rest was simply the "particulars of how a defendant effected the crime."[8] The court found that the defendant's charged offense "took place 'as part of a single course of conduct,'" with "a single, ultimate purpose," namely, to entice the victim (who was in fact an NYPD detective posing as a 12-year-old girl).

The court emphasized that "[t]he government's proof at trial did not modify an 'essential element' of the alleged crime." "Whether D'Amelio used the Internet or a telephone makes no difference under the relevant statute, …and affect[ed] neither the

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[g]overnment's case nor the sentence imposed." The court emphasized that use of the telephone or the Internet was a "specific means used by a defendant to effect his or her crime," not an "essential element" of the offense.[9]

The Second Circuit rejected the defendant's *Stirone* argument, finding that whereas the government's evidence and proof in *Stirone* fell beyond the "core of criminality" alleged in the indictment in that case, the telephone-related evidence in D'Amelio's case was different because it related to "a single course of conduct," as described in the indictment.[10] The court concluded that D'Amelio "received constitutional notice" and that he would "not suffer any risk of double jeopardy," and it therefore reversed the trial court's ruling on the motion for a new trial.[11] It also stated that "[a]s a final observation, we agree with the district court that this particular litigation could have been avoided had the government been more careful in wording its indictment."[12]

'United States v. Gonzalez'

In *Gonzalez*, the defendant, Omar Gonzalez, was initially indicted for engaging in a conspiracy to distribute controlled substances in violation of 21 U.S.C. §846. The first superseding indictment stated that the controlled substances involved were mixtures containing cocaine "in violation of 21 U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(C)." The second superseding indictment was exactly the same except that the reference to 841(b)(1)(C) was replaced by a reference to 841(b)(1)(B).[13] The difference, of course, is that while both 841(b)(1)(B) and 841(b)(1)(C) criminalize the possession with intent to distribute substances containing cocaine and the distribution of such substances, 841(b)(1)(C) does not specify an amount and carries no mandatory minimum term of imprisonment, whereas 841(b)(1)(B) criminalizes possession with intent to distribute 500 grams or more of a substance containing cocaine and carries a mandatory minimum penalty of 10 years imprisonment if the defendant has a prior felony drug offense conviction (which Gonzalez did).[14]

The government stated in open court that the reason it obtained the second superseding indictment was that it wanted the benefit of the mandatory minimum, and would attempt to prove that Gonzalez's conspiracy was an agreement to distribute or possess with intent to distribute more than 500 grams of a substance or mixture containing cocaine.[15] However, when the government provided a proposed jury interrogatory that asked the jury to determine whether the defendant had conspired to distribute or possess with intent to distribute 500 or more grams of a substance or mixture containing cocaine, the defendant objected on the grounds that although the indictment specifically referred to 841(b)(1)(B) "'what it doesn't say in this indictment is that there was over 500 grams of cocaine.'" The amount of drugs is an element of the offense, the defendant argued, and it was not expressly alleged in the indictment.[16]

The district court rejected Gonzalez's argument "stating that because §841(b)(1)(B) was referred to in the text of Count 1, rather than merely in the parenthetical citation at the end of the textual allegations, drug quantity was sufficiently charged to permit Gonzalez to be convicted and sentenced under that section." The case went to the jury which convicted Gonzalez and in response to a jury interrogatory asking about the amount of cocaine at issue answered that it was in excess of 500 grams.[17]

The Second Circuit reversed the conviction. The court noted that the defendant had the constitutional right to be tried on only such charges as were found by a grand jury. The court found that there was no clear allegation in the indictment that the defendant had conspired to distribute or to possess with intent to distribute 500 or more grams of a substance containing cocaine, and therefore the indictment was defective.[18] The court held that the indictment could not be saved by the citation to the statute, 841(b)(1)(B). It cited extensive authority that the mere citation to a statute in that part of an indictment that identifies the statutes allegedly violated cannot cure an indictment that does not state all of the elements of the crime alleged.[19] It also found that there was no other indication anywhere in the indictment that the grand jury had been instructed on or considered the 500-gram question: "We have no reason to believe that members of a grand jury, in determining what charges to bring, think in terms of statutory subsections rather than in terms of facts. The text of an indictment gives the necessary assurance that the grand jurors knew and agreed to charge that which the text describes; but it gives no comparable assurance that the grand jurors considered or were advised as to the terms of a statutory section that is referred to only by a naked number."[20]

Lessons

Lesson 1: The importance of elements. Although *D'Amelio* and *Gonzalez* involved very different indictments and arose from different circumstances, at their cores they raised the same question: whether the defendants had been convicted of crimes for which they had been indicted. That the results in these two cases were different shows the importance of distinguishing between, on the one hand, the elements of a crime, and, on the other hand, the means by which crimes may be committed.

It is well established that indictments must set forth the elements of any crime alleged.[21] *D'Amelio* supports the proposition that elements are the only thing that an indictment is required to charge. The reason that D'Amelio's conviction was affirmed was that D'Amelio's indictment properly set forth the elements of the crime, and its inaccuracy—its failure to refer to telephonic communications—related to the means of committing the crime, not an element of the crime.[22]

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In *Gonzalez*, by contrast, the court found that the indictment did not set forth one of the elements of the crime alleged, the quantity of the controlled substance, and thus Gonzalez's conviction was reversed. *Gonzalez* demonstrates that the Second Circuit will strictly enforce the requirement that the indictment must set forth the elements of the crimes alleged. Some cases hold that indictments should be liberally construed in favor of sufficiency if the challenge is a facial challenge (as *Gonzalez's* was) and it is brought after jeopardy has attached.[23]

The reasoning underlying the holding is that if the defect is apparent on the face of the indictment, then by waiting until jeopardy attaches to object, the defendant may secure an unfair advantage. The government made that argument in *Gonzalez*, but the court was unpersuaded. "Even were we to agree that the second superseding indictment here should be so read [i.e., should be read liberally in favor of sufficiency], we find no helpful language [in the indictment] to construe." The citation to §841(b)(1)(B) was insufficient, and the indictment "includes no caption or other language that carries any implication as to quantity, or any other language that provides a basis for inferring that the quantity was considered by the grand jury."[24]

Lesson 2: Less is more. Although the defendant's conviction in *D'Amelio* was reinstated, it was surely a close call and both the district court and the Second Circuit suggested that the problem arose from a governmental self-inflicted wound.

The lesson from the district court was that if the government had drawn the indictment more generally and with less specificity there would have been no question of constructive amendment. In its decision denying the defendant's objection to a jury charge that would permit the jury to convict if it found that the defendant used the telephones to commit the offense (the decision that the district court reversed when it granted the defendant's motion for a new trial), the district court expressed exasperation that the indictment had included any information beyond the bare recital of the elements of the crime: "I wish the government would leave the to wit clauses out of indictments, or would include, in the to wit clauses, everything of which it has evidence. And the government certainly knew that it had evidence of telephone conversations that were material to this case."[25]

In its opinion granting vacatur of the conviction and ordering a new trial, the district court again noted that the problem was the narrowness of the indictment's to wit clause, observing that "[i]t is the 'to wit' clause that gives rise to the instant motion for a new trial."[26] And the Second Circuit made a "final observation…that this particular litigation could have been avoided had the government been more careful in wording its indictment."[27]

In light of *D'Amelio*, the government will have an incentive to put less information in its indictments than it might otherwise. By keeping indictments as general as possible—reciting the elements and little else—the government can avoid the risk of a constructive amendment. The consequence may be to increase the importance of bills of particulars, for as indictments become less informative, bills of particulars may be more important for defendants seeking to prepare for trial.

Lesson 3: Harmless error is still an open question. *Gonzalez* leaves open a notable question: whether the indictment's failure to clearly set forth elements of the crime could constitute harmless error. It is established that a conviction may be upheld even if the indictment does not set forth each element of the alleged crime if there is no objection to the indictment.[28] Under such circumstances, the standard for determining whether to uphold the conviction is the "plain error" standard of Federal Rule of Criminal Procedure 52(b).[29] The Supreme Court has never answered the question, however, whether such an omission may be harmless—that is, whether a conviction may be upheld even if the defendant timely objects to the indictment's failure to set forth each element of the alleged crime—under the standard set forth in Federal Rule of Criminal Procedure 52(a).[30]

In *Gonzalez*, the Second Circuit expressly noted that it was not answering that question. It stated: "The government has not proffered and we have not requested the transcript (if any) of the prosecutor's advice to the grand jurors, and we express no view as to whether such a transcript could remedy a defective indictment."[31] The court thus left open the following intriguing scenario: Perhaps the prosecutor did explain to the grand jury that to indict the defendant for a conspiracy to violate section 841(b)(1)(B) it would have to find by a preponderance of the evidence that the defendant had conspired to distribute or possess with the intent to distribute over 500 grams of a substance or mixture containing cocaine. If that had happened, and one would therefore be confident that the grand jury had found the requisite elements of the crime charged, would the indictment's failure properly to list the element be deemed harmless?

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1. 683 F.3d 412 (2d Cir. 2012).
2. No. 11cr1490, 2012 WL 2927764 (2d Cir. July 19, 2012).
3. 683 F.3d at 414 (*D'Amelio*).
4. Id. at 416.
5. 361 U.S. 212 (1960).
6. Id. at 214 (discussed in 683 F.3d at 418-19 (*D'Amelio*)).
7. Id. at 219 (discussed in 683 F.3d at 419 (*D'Amelio*)).
8. Id. at 418.
9. Id. at 416, 422.
10. 683 F.3d at 421-22 (*D'Amelio*).
11. Id. at 423.
12. Id. at 424.
13. 2012 WL 2927764, at *1 (*Gonzalez*)
14. Compare 21 U.S.C. §841(b)(1)(B) with 21 U.S.C. §841(b)(1)(C).
15. 2012 WL 2927764, at *2 (*Gonzalez*).
16. Id. at *3.
17. Id. at *3.
18. Id. at *10.
19. Id. at *10 (citing authority).
20. Id. at *10.
21. See, e.g., *Almendarez-Torres v. United States,* 523 U.S. 224, 224 (1998) ("An indictment must set forth each element of the crime that it charges"); *Hamling v. United States,* 418 U.S. 87, 87 (1974); *United States v. Cook*, 84 U.S. 168, 170 (1872); 2012 WL 2927764, at *6 (*Gonzalez*) (citing authority); 683 F.3d at 419 (*D'Amelio*).
22. 683 F.3d at 423 (*D'Amelio*).
23. See, e.g., *United States v. Awad*, 551 F.3d 930, 937 (9th Cir. 2009) ("When, as in the present case, a defendant's challenge is not brought before trial, the indictment is 'liberally construed' because the defendant had an opportunity to resolve any ambiguity in the indictment through a pretrial motion"); *United States v. Just*, 74 F.3d 902, 904 (8th Cir. 1996) ("Although the sufficiency of an indictment is a jurisdictional issue that may be raised at any time, an indictment that is challenged after jeopardy has attached will be liberally construed in favor of sufficiency"). See also *United States v. Sabbeth*, 262 F.3d 207, 218 (2001) ("the level of scrutiny given to an indictment falls along a continuum depending on the timing of a defendant's objection") (quoted in *Gonzalez*, 2012 WL 2927764, at *9).
24. 2012 WL 2927764, at *9 (*Gonzalez*).
25. 683 F.3d at 416 (quoting District Court).
26. 636 F.Supp. 2d 234, 237 (S.D.N.Y. 2009), rev'd 683 F.3d 412 (2d Cir. 2012) (*D'Amelio*).
27. 683 F.3d at 424 (*D'Amelio*).
28. *United States v. Cotton*, 535 U.S. 625 (2002).
29. See id. at 631.
30. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 116-17 (2007) (Scalia, J., dissenting) (noting that the issue is an open one).
31. 2012 WL 2927764, at *9 (*Gonzalez*).

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