New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 23
WEDNESDAY, AUGUST 3, 2016

WHITE-COLLAR CRIME

Expert Analysis

More Bridgegate Fallout: Revealing Unindicted Co-Conspirators?

By **Robert J. Anello**

And **Richard F. Albert**

The so-called Bridgegate scandal, in which New Jersey Governor Chris Christie's administration allegedly closed entrance lanes to the George Washington Bridge in September 2013 to create traffic jams in retribution for the mayor of Fort Lee's failure to endorse Christie, already has had a significant impact on a number of prominent careers, and perhaps even on our national politics. Because of its high profile, the recently argued appeal of a demand by the media for disclosure of the names of unindicted co-conspirators in the pending federal prosecution of two top Christie associates involved in Bridgegate also is likely to have an impact well beyond New Jersey's borders. Its result can be expected to influence courts' future deference to the reputational interests of individuals implicated but not charged in prominent investigations, and to influence federal prosecutors' willingness to provide needed disclosure to defendants by means of informal bills of particulars.

'United States v. Baroni'

In *United States v. Baroni*, Crim. No. 15-193 (SDW), in April 2015, a New Jersey federal grand jury charged William Baroni, a Christie appointee to the Port Authority of New York and New Jersey, and Bridget Anne Kelly, Christie's former deputy chief of staff, in a nine-count indictment alleging conspiracy to commit and the commission of wire fraud and the deprivation of civil rights. All but one of the counts also include an unidentified group of "others." In November 2015, Baroni and Kelly filed motions including a demand for a bill of particulars identifying, among other things, the other co-conspirators referenced in the indictment.

> The result in the prosecution of top Christie associates can be expected to influence federal prosecutors' willingness to provide needed disclosure to defendants by means of informal bills of particulars.

The government objected and opposed the motion, but agreed to provide additional information, including a letter listing unindicted co-conspirators "about whom the Government has sufficient evidence to designate as having joined the conspiracy" (hereinafter, the Conspirator Letter). The government did not file the Conspirator Letter, but sent it to defense counsel and to the trial judge along with a letter requesting that it be sealed. The trial judge thereafter dismissed the defense motion for particulars as "moot." The media then sought release of the Conspirator Letter, which the district court granted. John Doe, one of the co-conspirators named in the letter, appealed the decision, and the government joined in opposing the letter's release. The U.S. Court of Appeals for the Third Circuit stayed the release of the letter. Trial of Baroni and Kelly is scheduled to begin Sept. 12.

'Judicial' Documents

Because of how the case law distinguishes between documents for which there is and is not a public right of access, whether or not the Conspirator Letter technically constitutes a "bill or particulars" is a significant issue in the appeal, which was argued before the Third Circuit on June 6, 2016. Established law provides that as an extension of the public's First Amendment right of access to criminal trials, a presumptive right of public access applies to "judicial" documents in a criminal case. To determine whether a document falls within this category, a court must examine whether the document is

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello P.C.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

relevant to the performance of the judicial function and useful in the judicial process.[1] Such category does not generally include documents exchanged between parties in the course of criminal discovery.

In a prior public corruption prosecution where the media sought the names of unindicted co-conspirators, *United States v. Smith*,[2] the Third Circuit specifically addressed whether a bill of particulars is a judicial document. The court stated that because a bill of particulars sets parameters for the government's case and "there can be no variance between the notice given in a bill of particulars and the evidence at trial," a bill of particulars is more like the indictment than discovery, and therefore is a judicial document that presumptively is accessible.

The Third Circuit nevertheless upheld the district court's order denying access to the portion of the bill of particulars identifying co-conspirators, finding that the district court's order was narrowly tailored to serve the compelling government interest of protecting the rights of third parties. The government admitted during oral argument that in order to avoid having its proof restricted at trial, it drafted its "co-conspirator" list particularly broadly, including both co-conspirators and individuals whom the evidence "could conceivably show" to be co-conspirators. All such individuals would face being named by the government as potentially guilty of serious felonies, but they would have no opportunity to prove their innocence at trial.

Thus, the court held, the disclosure of their names "would almost certainly result in extremely serious, irreparable and unfair prejudice" to their reputational and privacy interests, which were entitled to deference even though some of the individuals were public officials. Courts in the Second Circuit have endorsed a similar position, explaining that privacy interests of third parties "should weigh heavily" in determining the public's access to judicial documents.[3]

Applying 'Smith'

In the Bridgegate appeal, John Doe and the government devote a lot of energy arguing that the Conspirator Letter is not a bill of particulars, but an item of discovery voluntarily delivered to the defendants. The media parties argue the opposite. They assert that the Conspirator Letter was submitted to the district court and prepared in specific response to the defendant's motion for a bill of particulars. Because by the Conspirator Letter the government provided the specific information demanded in direct response to a defense motion for a bill of particulars, and the court then effectively confirmed that approach by ruling the motion "moot," it appears that the media parties have the better of it.

If the Third Circuit finds the letter was indeed a bill of particulars, such a finding may in the future make it that much harder to convince prosecutors to provide defendants with needed disclosure in the nature of particulars, whether styled as a formal "bill of particulars" or an informal letter, as in this case. The government is typically highly resistant to providing particulars, and a prominent decision opining that an informal letter will function like a formal bill and restrict the government's proof at trial will likely make prosecutors all the more resistant.

But the question of whether or not the Conspirator Letter technically is or is not a bill of particulars tends to obscure the larger issues at stake: appropriate regard for the privacy and reputational interests of the unindicted co-conspirators. In granting the media parties' motion for access in the Bridgegate case, the district court distinguished *Smith* because there the government admittedly had drafted its co-conspirator list broadly, whereas here, the government included only those it currently had "sufficient evidence to designate as having joined the conspiracy."

Experience teaches, however, that it is common for the government to prioritize the breadth of its own prerogatives at trial when deciding whom to identify as a co-conspirator. Indeed, the reason that the government tends to provide such information in informal letters is to preserve its ability to later make an argument similar to one it made in the Bridgegate appeal: that its list is not a formal "bill of particulars," so its proof should not be restricted at trial.

Furthermore in its brief on the Bridgegate appeal, the government recognizes that, as is typical, the main purpose of its list is to enable it to take advantage of the co-conspirator exception to the hearsay rule to admit the statements of such persons at trial. Such purpose exerts significant pressure on the government to increase the number of individuals it identifies as co-conspirators.

For these reasons, the outcome of the Bridgegate appeal should not turn on whether, as in *Smith*, the prosecutor expressly concedes that a co-conspirator list is overbroad. An overbroad bill of particulars is a "judicial" document just as is a narrowly tailored one. Thus the real import of *Smith* is its holding affirming the sealing of co-conspirator names, not its language pronouncing general principles of access to bills of particulars. Because co-conspirator lists are unaccompanied by any facts or context for evaluating the involvement of a named individual who has no opportunity to clear her name in the courtroom, the severe reputational injury that is sure to result from publication should be delayed as long as possible. That is, until such time, if ever, that specific names are revealed at trial.

1. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995).

2. 776 F.2d 1104 (3d Cir. 1985).

3. *United States v. Amodeo*, 71 F.3d 1044, 1050-51 (2d Cir. 1995) (internal citations omitted).