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The Evolution of Criminal Conspiracy Law and 'Flipping the Script' in *United States v. Elizabeth Holmes*

Set against the backdrop of the upcoming fraud trials of Theranos founder Elizabeth Holmes and former President and Chief Operating Officer Ramesh "Sunny" Balwani, with Holmes' trial currently set for October 2020 in San Jose, California, and Balwani's to follow, this article on federal conspiracy law is presented in two parts.

Part 1 explores the evolution of criminal conspiracy law in the United States, provides a short modern primer on how DOJ has used the flexibility of conspiracy law to its advantage in the prosecution of white collar crime, and presents some ways the defense can effectively challenge conspiracy charges.

Part 2 considers how DOJ is expected to advance its case against Holmes and Balwani by using the government's built-in advantages of conspiracy law. Finally, the article explores how the defense potentially can turn the tables on DOJ and try to weaponize conspiracy law and concepts as a defense tactic: by putting the government on trial and creating a narrative for the jury of a "press / government conspiracy."

Part 1: A Modern Primer on Conspiracy Law

1. The Evolution of Criminal Conspiracy Law in the United States

Described by the U.S. Supreme Court as an "elastic, sprawling and pervasive offense,"[1] at its core, a conspiracy is an agreement between two or more persons to commit a crime.[2] Phrased more succinctly, a conspiracy is a "partnership in crime."[3] The Supreme Court has repeatedly expressed the view that criminal conspiracies pose a more significant threat to society than offenses committed by individuals.[4] In that vein, the Supreme Court has noted that criminal conspiracies are dangerous because the association of more than one criminal actor makes it easier, and thus more likely, to attain a more complex criminal goal.[5]

The law of criminal conspiracy in the United States is largely based on legislative enactments, not common law. Unlike many common law crimes that can be traced back to England, the birth of modern conspiracy law in this country has its primary roots in statutes enacted during the Civil War, such as the first laws targeting conspiracies to violate federal law or to defraud the government.[6]

Since then, Congress has enacted numerous additional criminal conspiracy statutes. One is the general federal conspiracy statute, 18 U.S.C. § 371, which was enacted as part of Congress's attempt to modernize the federal criminal code by consolidating two early conspiracy statutes into one and incorporating Supreme Court precedent into the statute.[7] But Congress has also created specialized conspiracy statutes to address specific kinds

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of conspiracies, including white collar conspiracies. These include statutes criminalizing conspiracies to commit federal fraud offenses (such as wire fraud, mail fraud, securities fraud and health care fraud), to violate civil rights, to commit money laundering, to violate the Controlled Substances Act (including drug trafficking), to commit acts of terrorism, to use weapons of mass destruction, and to murder U.S. employees, among others.[8]

Although these statutes all share the fundamental basis for a conspiracy — an agreement between two or more people to engage in a criminal act — they vary in other ways. For example, the general conspiracy statute, § 371, requires proof of an "overt act" in furtherance of the conspiracy, *i.e.,* some affirmative step taken by at least one of the conspirators to advance the criminal scheme, even if the overt act itself is legal,[9] such as a phone call.[10] By contrast, many of the more specific statutes, such as 18 U.S.C. § 1349 (conspiracy to commit fraud offenses, including mail and wire fraud), do not require proof of an overt act in order to obtain a conviction.[11]

The various conspiracy statutes also have different statutory maximum sentences. Section 371 has a relatively short statutory maximum of five years imprisonment. Other conspiracy charges carry a heavier punishment, such as conspiracy to commit money laundering, with a statutory maximum of 20 years imprisonment, and conspiracy to commit health care fraud if the violation results in death, with a statutory maximum of life imprisonment.[12] Thus, federal prosecutors can choose from a diverse arsenal of specific statutes with higher statutory imprisonment ranges to increase the potential sentences of criminal conspirators without having to fall back on the general conspiracy statute. Indeed, § 371 is considered to have a low statutory maximum, especially for serious fraud convictions where the defendant's U.S. Sentencing Guidelines calculation commonly exceeds the five-year statutory maximum of § 371.

The Supreme Court has played a large role in the development of criminal conspiracy law, in some instances broadening conspiracy law and, in others, narrowing it. Every law student learns of *Pinkerton* liability, first announced in the Supreme Court case *Pinkerton v. United States*.[13] In *Pinkerton*, the Court held that any member of a conspiracy is liable for the foreseeable criminal acts of his or her co-conspirators committed in furtherance of the conspiracy, regardless of whether that particular defendant participated in those acts. In other words, even the least involved co-conspirator may be criminally liable for co-conspirators' foreseeable criminal conduct, exponentially expanding the potential criminal liability that each conspirator faces.

In line with this broad reach of conspiracy liability, a co-conspirator who joins a conspiracy after it begins is liable for the substantive offenses the other co-conspirators committed through every moment of the conspiracy's existence.[14] Thus, a co-conspirator remains liable for all foreseeable criminal acts committed in furtherance of the conspiracy, regardless of how active he or she is in the conspiracy, unless the co-conspirator can affirmatively demonstrate a withdrawal from the conspiracy, either by informing the authorities or communicating the withdrawal to the other conspirators.[15] Regardless, even after withdrawal, the individual remains liable for the reasonable foreseeable crimes committed in furtherance of the conspiracy during the time that individual was a member.[16] This is true even if the pre-withdrawal crimes are substantial and the withdrawing co-conspirator's role in the conspiracy was minimal.[17]

Other Supreme Court decisions have narrowed criminal conspiracy law. Many seasoned defense attorneys are familiar with the "hub and spoke" challenge to a prosecutor's attempt to join multiple but distinct conspiracies. This defense tactic has its roots in *Kotteakos v. United States*, in which the Supreme Court held that where there was one central defendant (the "hub") who engaged in several similar but distinct conspiracies with separate defendants who were not connected to each other (the "spokes"), each defendant must be charged with the central defendant in a separate conspiracy.[18] Prosecutors can successfully charge a single, overarching conspiracy only if each "spoke" defendant agreed with each other "spoke" defendant to participate in the same scheme, creating a "rim" between the spokes. Thus, *Kotteakos* limits conspiracy liability, restricting the benefits, discussed below, that prosecutors can secure from charging multiple defendants with a single, wide-ranging conspiracy.

There is no shortage of examples of successful conspiracy prosecutions in the white collar context. A few notable cases include the prosecutions of former WorldCom CEO, Bernard Ebbers, and the founder of the hedge fund Galleon Group, Raj Rajaratnam. Ebbers was charged with, among other things, conspiracy to commit securities fraud under § 371, based on his agreement with WorldCom's chief financial officer to engage in a scheme to defraud the public by hiding WorldCom's true financial performance.[19] Ebbers was convicted on all charges by a jury, and his conviction and sentence were upheld on appeal.[20] Similarly, Rajaratnam was charged with four counts of conspiracy to commit securities fraud under § 371; the indictment alleged that he had agreed and worked with others to trade on insider information.[21] Ultimately, Rajaratnam was convicted on 14 counts of securities fraud and conspiracy and sentenced to 11 years in prison; his conviction and sentence were affirmed on appeal.[22]

However, DOJ's decision to charge conspiracy offenses does not always guarantee that the government will convict. One notable example of governmental overreach in the conspiracy context can be seen in the "Chicago Eight" case. Following the riots in Chicago surrounding the 1968 Democratic National Convention, the government brought charges against eight demonstrators for conspiring to use interstate commerce with intent to incite a riot in violation of the anti-riot provisions of the then newly enacted Civil Rights Act of 1968.[23] The defendants, known initially as the "Chicago Eight," and later as the "Chicago Seven" after an early mistrial of one of the defendants, had little connection among themselves other than having attended some of the same rallies and planning meetings. Nevertheless, the government charged that a conspiracy existed because the defendants had a "tacit understanding" of a common goal of promoting a riot.[24] The defendants were acquitted of the conspiracy charges, delivering a blow to the government's attempt to string together these disparate demonstrators as co-conspirators.[25] The takeaway here is that federal prosecutors must do more than simply show a common intent when trying multiple defendants under a conspiracy theory — they must show an actual agreement. The particular difficulties of proving an actual conspiratorial agreement in cases where the defendants act in a "siloed" manner is explored in Part 2 of this article, the Theranos case study. As detailed below,

Holmes and Balwani occupied distinct and separate roles within the operation of the company and the alleged fraud, potentially posing challenges for the government to prove they entered into a conspiratorial agreement.

2. Commonly Charged Conspiracy Offenses in White Collar Crime Cases

Two federal conspiracy statutes merit special attention in the white collar context: 18 U.S.C. §§ 371 and 1349. DOJ has charged these fraud-based conspiracy statutes in many notable white collar cases. For example, all four conspiracy counts against Raj Rajaratnam for insider trading were brought under § 371, as was the conspiracy count brought against Bernard Ebbers for securities fraud based on WorldCom's false SEC filings. Jeffrey Skilling, the former Enron CEO, was also charged under § 371 for conspiring to commit honest services fraud in violation of 18 U.S.C. §§ 1343 and 1347.[26]

But the government also frequently relies on § 1349 to obtain convictions for conspiracies including those to violate the wire fraud and health care fraud statutes. This conspiracy statute allows the government to seek a longer sentence than the five-year statutory maximum under § 371, and to do so without having to prove an overt act.[27] Indeed, the government charged Holmes and Balwani with § 1349, conspiracy to commit wire fraud, in the Theranos case.

3. Built-In Advantages for the Government

Almost 100 years ago, in 1925, Judge Learned Hand referred to conspiracy charges as "the darling of the modern prosecutor's nursery."[28] Sixty-five years later, in 1990, not much had changed, with the Seventh Circuit observing that "prosecutors seem to have conspiracy on their word processors as Count I."[29] There is good reason for this view. Charging a conspiracy provides prosecutors with several distinct advantages. And as seen in Part 2 of this article, the government is likely to rely on many of these advantages in the trials of Holmes and Balwani.

First, the government frequently relies upon the expansive scope of criminal conspiracy law because a conspiracy — an agreement — is often easier to prove than the underlying substantive offenses. The government also does not have to prove a formal agreement among the conspirators — any meeting of the minds is enough.[30] Indeed, the government can bring conspiracy charges whether or not the underlying substantive offense even occurred.[31] The government has successfully prosecuted criminal conspiracy cases against a single defendant where the co-conspirators were not present at trial. For example, federal prosecutors charged Zacarias Moussaoui, one of the terrorists convicted in the September 11 attacks, with five separate conspiracy counts, ranging from aircraft piracy to murder of government employees, but no substantive counts. Moussaoui was tried alone, because his co-conspirators either were dead or outside of the country.[32] The government's core theory was that Moussaoui was a member of the group of terrorists that planned and carried out the attacks, even though he ultimately did not personally take part in piloting or hijacking any of the aircraft. The government's use of conspiracy charges resulted in Moussaoui pleading guilty and receiving a life sentence.[33] Moussaoui's case is additionally relevant in the context of the Theranos case, discussed below, because the two co-conspirators, Holmes and Balwani, will be tried alone for conspiring with one another.

Charging a conspiracy provides prosecutors with significant advantages, but defense lawyers have opportunities to fight back.

Second, Federal Rule of Evidence 801(d)(2)(E) provides that a co-conspirator's statements made in furtherance of the conspiracy are *not* hearsay when offered against the defendant.[34] This gives prosecutors a significant evidentiary advantage because they can admit into evidence damaging and inculpatory statements against defendants in a conspiracy, even when those statements might otherwise be inadmissible hearsay in other contexts. Under this government-friendly feature of evidence law, the defendant against whom the statements are offered does not even need to know that the statements had been made during the conspiracy for them to be admitted into evidence. In order to admit such statements, the government only needs to show by a mere preponderance of the evidence the existence of the conspiracy, the defendant's and co-conspirator's participation in the conspiracy, and that the statement was made during and in furtherance of the conspiracy.[35] The contents of the statement itself can be enough to satisfy the government's evidentiary burden.[36] This rule is broad so as to encompass not only out of court oral declarations, but also "records, notes, recordings, and other documents completed by a co-conspirator."[37]

Third, conspiracy charges also permit the government to charge multiple defendants in one indictment, enabling the government to try numerous defendants together, regardless of their varying roles in the conspiracy.[38] Not only does trying multiple defendants together in a joint trial reduce prosecutors' workloads when compared to individual trials, but it also permits prosecutors to show the jury the full breadth and scope of the alleged criminal enterprise. To defendants' chagrin, a trial in which several co-conspirators are sitting next to each other at the defense table often causes evidence to "spill over" between the defendants, creating a "guilt by association" dynamic. Indeed, the Supreme Court itself has cautioned that the joinder of defendants in criminal cases may make it more difficult for juries to distinguish between the more and less culpable defendants.[39] Yet courts rarely permit the severance of co-conspirators who can be tried together.[40] It was somewhat surprising then, in March 2020, that the judge in the Theranos case ordered that the trials of the two defendants be severed. Elizabeth Holmes will go to trial first in October 2020 with Balwani's trial to follow.[41] The judge did not explain his rationale, noting only that there was "good cause" for the rare severance.[42]

Fourth, conspiracy charges may span long time periods that exceed the statute of limitations of the underlying substantive offense. Under general conspiracy law, the statute of limitations begins to run at the time of the *last* act in furtherance of the conspiracy.[43] By charging a conspiracy offense, the government can include conduct that would have otherwise been excluded by the statute of limitations. Although courts can exercise judicial review of perceived overreaches in this area,[44] prosecutors may view a conspiracy charge as a way to expand the look-back period and capture older conduct. In the Theranos case, however, the remaining charges in the current superseding indictment allege only that the criminal

conduct took place during the relatively brief time frame of 2013 to 2015. It is notable that the government could have taken a more expansive approach to capture more years of conduct. For example, DOJ could have defined the time period of the conspiracy to include the years 2009 and forward — the time period during which Holmes and Balwani were both running Theranos (Holmes founded the company in 2003 and Balwani joined in 2009). In this way, DOJ would have more of the duo's lengthy and complex history to present to the jury in support of the conspiracy charges. Although the government revealed at an April 2020 status conference that it intends to seek a second superceding indictment and expand the time frame of the conspiracy to defraud investors back to 2010, at present, no such superceder has been handed up.[45]

Fifth, the operation of conspiracy law permits the government to seek long sentences following a guilty plea or conviction.[46] In line with the *Pinkerton* theory of vicarious liability for a co-conspirator's conduct, a defendant's sentence for a conspiracy conviction can be based on the reasonably foreseeable conduct of co-conspirators as well as the defendant's own.[47]

4. Opportunities for the Defense

As seen above, conspiracy law provides the government with some significant advantages when pursuing a case. But all hope is not lost, and there are some opportunities for defense counsel to combat conspiracy charges.

First, the defense can ask for a pretrial hearing to determine the admissibility of statements that the government intends to introduce against a defendant as statements made by alleged co-conspirators in furtherance of the alleged conspiracy. The defense can request such a hearing pursuant to Federal Rules of Evidence 104(a) and 801(d)(2)(E) and *United States v. Vinson*.[48] In the Sixth Circuit, a court may choose one of three alternatives when a defendant asks for a hearing regarding the admissibility of a co-conspirator's statement: (1) conduct a "mini-hearing" outside the presence of the jury during which the court hears the government's proof that (a) the conspiracy existed, (b) the defendant and the declarant were members of the conspiracy, and (c) the statement was made in furtherance of the conspiracy to determine the admissibility of the proffered statements; (2) require the government to meet its initial burden of producing non-hearsay evidence before the introduction of the hearsay evidence (a *Vinson* proffer); or (3) admit the hearsay statements subject to connection.[49] If granted a hearing, the defense may gain significant insight into the government's case, particularly if the court permits a "mini-trial" about those statements.

Second, the Federal Rules of Evidence offer impeachment opportunities to challenge the credibility of any alleged co-conspirators. Rule 806 of the Federal Rules of Evidence states:

> When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, *the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness*. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

(Emphasis added). If the government seeks to use the statements of alleged co-conspirators, then the witness proffering those statements may be cross-examined as if the original source had testified. This cross-examination can be particularly fruitful if the alleged co-conspirator statements are offered via recording. In these circumstances, the witness is left trying to explain the alleged co-conspirator's shortcomings, criminal history, and potentially other unsavory impeachment material without the personal knowledge to minimize the conduct. Also, in discovery, defense counsel should request impeachment material for all alleged co-conspirators so that the declarant can be impeached pursuant to Rule 806 through the testifying witness, even if the testifying witness is a law enforcement agent.

Third, as noted earlier, defendants charged with a conspiracy may be able to have their trials severed and be tried separately, which, although rare, happened with the trials of Holmes and Balwani. In the Ninth Circuit, for example, there is a strong preference for joint trials, and severance will only be granted where a joint trial would be "manifestly prejudicial."[50] Even in light of this stringent standard, defendants should strongly consider seeking severance — multiple trials not only increase the government's workload, but severance permits the defendant who is to be tried second to observe the first trial and get a preview of the government's case and witnesses. If the first trial results in an acquittal or only a conviction on some of the government's charges, the second defendant is well-positioned to seek full or partial dismissal of the government's case, or negotiate a favorable plea or some other more favorable outcome. This is likely what Balwani will try to accomplish, as his trial is scheduled after Holmes's.

Part 2: Case Study

1. The Government's Advantages in Conspiracy Law as Seen in *U.S. v. Elizabeth Holmes*

A textbook case study that illuminates the prosecutor's weapon of federal conspiracy law are the upcoming trials of Elizabeth Holmes and Ramesh "Sunny" Balwani. Holmes famously founded Theranos in 2003 as a 19-year-old Stanford University dropout. Balwani, who joined the company in 2009, was Holmes' right-hand man and boyfriend.

Background

In June 2018, the U.S. Attorney's Office for the Northern District of California announced the indictment of Holmes and Balwani. According to the original 2018 indictment, Holmes and Balwani were charged with two conspiracies: a conspiracy to defraud investors and a separate conspiracy to defraud doctors and patients. The charges detail an alleged $700 million scheme involving Theranos, a private health care and life sciences company with the stated mission of revolutionizing medical laboratory testing through innovative methods for drawing and testing blood and interpreting the resulting patient data.[51]

The government's case focuses on alleged lies Holmes and Balwani told investors and others to promote Theranos' proprietary blood analyzer. The defendants claimed the analyzer was able to perform a full range of clinical tests using only a small drop of blood taken from a finger stick, as opposed to the traditional venous arm-draw. The defendants also represented that the analyzer could produce results that were more accurate and reliable than those yielded by conventional blood-drawing methods. Theranos' blood analyzer was

considered potentially revolutionary and stood to disrupt the blood testing market, which largely relied upon more painful arm-draws and lengthier waiting periods for blood test results.

The indictment alleges that Holmes and Balwani knew that the analyzer had serious accuracy and reliability problems but concealed that information and lied about it. According to DOJ, Holmes and Balwani defrauded potential investors by using direct communications, marketing materials, statements to the media, and financial statements to transmit their alleged misstatements.

Charges

In the original indictment, Holmes and Balwani were charged with 18 U.S.C. § 1349, conspiracy to commit wire fraud against Theranos investors; six substantive counts of wire fraud under 18 U.S.C. § 1343 relating to specific investors; 18 U.S.C. § 1349, conspiracy to commit wire fraud against doctors and patients; and three substantive wire fraud counts under 18 U.S.C. § 1343 relating to specific patients and related advertising.

In February 2020, the court granted the defendants' motion to dismiss certain counts of the indictment, dismissing the § 1349 conspiracy to commit wire fraud against doctors and patients and the three related substantive counts of wire fraud relating to specific patients and related advertising.

The Government's Conspiracy Law Advantages Against Holmes and Balwani

The conspiracy law advantages for DOJ in this trial are classic.

First, under Federal Rule of Evidence 801(d)(2)(E)'s co-conspirator exception to the rule against hearsay, DOJ will likely seek to admit each defendant's statements into evidence against the other defendant. As described above, this rule of evidence defines certain co-conspirator statements as *not* hearsay and allows the government to admit into evidence such statements against co-conspirators if the statement "was made by the party's co-conspirator during and in furtherance of the conspiracy."[52]

This evidentiary advantage will be key for the prosecution because Holmes and Balwani are alleged to have been somewhat compartmentalized in their roles in the alleged fraud. Theranos has been described as having two worlds: a "carpeted" world of the executive suite, which was Holmes' domain, and a "tiled" world of the lab, where Balwani and others were in charge.[53] In the "carpeted" world, Holmes ruled supreme. She was the public face of the company, the main fundraiser and the key contact for investors. By contrast, in the "tiled" world, Balwani was alleged to be closely involved in overseeing the lab, where, based on the allegation that Theranos' blood testing machine never worked as advertised, the core of the fraud existed. The government will likely seek to admit into evidence statements made by each defendant and will probably aim to marry them together as the two sides of the same coin of fraud.

The defendants will likely try to distance themselves from one another by employing the standard executives' defense of "I was too busy to know about the operation of the business at a granular level." Holmes may seek to distance herself from Balwani's oversight of the lab, claiming she was too occupied with raising capital and interacting with investors to know about the problems the company experienced with the blood testing machines. Although this "distancing" argument may have more resonance with a jury now that the trials have been severed, the defense will still not be able to get around Rule 801(d)(2)(E). When charged with a conspiracy, under Rule 801(d)(2)(E), any "statement" made by Holmes or Balwani during and "in furtherance of" the conspiracy will come into evidence against the other even if the defendant had no knowledge of or participation in the co-conspirator's statement.[54] Rule 801(a) defines "statement" broadly as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." This includes anything written by the defendant, such as emails and notes. Hence, any emails or texts Balwani wrote about his knowledge of the problems with the blood analyzer will be admissible against Holmes — even if she never saw them or did not know about them at the time.

Balwani in turn may try to claim he did not understand the significance of the blood testing machines' failures, in an attempt to cast doubt on whether he had the requisite *mens rea* to commit a crime. After all, Balwani did not have a medical or laboratory background, but rather only a background in IT and software.[55] Although at first blush, this "lack of comprehension" defense may appear to be a fruitful avenue for Balwani to pursue, the jury will undoubtedly learn that Balwani instituted keystroke surveillance on Theranos employees, monitoring their emails and activities on Theranos computers.[56] The government may ask the jury to draw reasonable inferences that Balwani, by way of this surveillance of the employees' emails, knew and understood that there were significant deficiencies with Theranos' blood-testing machines.

Second, given that Holmes and Balwani were romantically involved but not married, the government will likely seek to admit into evidence under the co-conspirator hearsay exception their off-duty statements — without the hindrance for the government of the marital privilege. However, to admit them under the co-conspirator hearsay exception, the government will need to prove that such statements were "in furtherance of the conspiracy" and not just idle domestic chit-chat.[57]

Another major source of statements are the pair's SEC depositions, Holmes' taken in July 2017, and Balwani's a month later. Although during her deposition, Holmes uttered the words "I don't know" more than 600 times, she made other key admissions, such as that Theranos technology was never deployed in the battlefield or used in medevac helicopters, as she had allegedly claimed to investors.[58] However, under the current superseding indictment, the government will be hard-pressed to admit these as co-conspirator statements because the depositions did not occur "during … the conspiracy"; they took place in 2017, and the sole remaining conspiracy count is alleged to have ended in "approximately 2015."[59] Hence, the government may just seek to admit statements from the SEC depositions against each defendant individually under Federal Rule of Evidence 801(d)(2)(A) as party admissions, as opposed to co-conspirator statements, and ask for an appropriate limiting instruction.

2. How Holmes and Balwani Can Turn the Conspiracy Tables on DOJ and 'Put the Government on Trial'

Given all the government's built-in legal and evidentiary advantages that accompany conspiracy charges, what can the defense do to fight back? The strategy of putting the government on trial is one way to try to turn the conspiracy tables on DOJ. It is a time-honored defense strategy that aims to shift the focus of the trial away from the defendants and onto the government's failings. This strategy at its core tries to make the narrative of the trial about errors made by the government in investigating the case. It seeks to expose government missteps and highlight internal government inconsistencies or doubts about the evidence.

Holmes and Balwani appear to be weaponizing this strategy. In November 2019, the defense won a motion to compel, which essentially expanded the government's disclosure obligations to regulatory agencies beyond the traditional DOJ prosecution team.[60] By way of background, the defense sought a wide range of documents from the U.S. Food and Drug Administration ("FDA"), the Centers for Medicare and Medicaid Services ("CMS"), and other federal and state regulators. Among other documents, they sought all of FDA's and CMS's internal and external communications about Theranos, and all the agencies' communications with *Wall Street Journal* investigative reporter John Carreyrou. The defense argued that they were entitled to these documents as potentially exculpatory *Brady* material and under Federal Rule of Criminal Procedure 16(a)(1)(E) as items "material to preparing the defense." They also claimed that DOJ "cherry-picked" certain FDA and CMS documents to make its case, and the defense needed a complete set of documents to mount a defense.[61]

But what is the significance of FDA and CMS to the case? Regarding FDA, the superseding indictment alleges that the defendants represented to investors that Theranos did not need FDA approval for its blood analyzer (but rather was applying for approval on a voluntary basis), but in reality, FDA had required Theranos to apply for approval.[62] According to media reports, Theranos submitted various applications to FDA, receiving approval on only one rarely used herpes test.[63] The other agency, CMS, has oversight authority over clinical laboratories, and Theranos is alleged to have sent CMS results derived from commercially available Siemens blood testing machines, not from the Theranos machines. Additionally, CMS performed a surprise on-site inspection and Theranos personnel are alleged to have intentionally taken inspectors to certain labs, but not the key fingerstick lab. After the on-site inspection, CMS revoked the lab's charter.[64]

The government fought the effort to obtain these FDA and CMS documents, claiming that "Defendants' speculative bias theory regarding FDA and CMS is too far afield from the subject matter of the government's case in chief."[65] Additionally, DOJ pointed out that the government had already produced approximately 300,000 pages of CMS and FDA documents (out of a total of 20 million pages of overall materials).[66] At oral argument, the prosecutor argued that the case is "not about the FDA," but rather is a wire fraud case.[67]

The government's arguments did not gain traction with the court, and in November 2019, the district court ordered DOJ to produce documents from FDA and CMS as part of its Rule 16 discovery obligations.[68] The order came one day after a hearing at which Holmes' attorneys accused FDA of destroying documents, including emails of the former director of FDA's diagnostic regulatory division, in violation of preservation orders.[69] The motion to compel was heavily litigated, with five hearings between April 2019 and January 2020.[70]

Given Theranos' regulatory problems with FDA and CMS, why has the defense focused on these documents, and what in them could be helpful to the defense? This hard-fought battle over the regulators' files appears to be part of a defense strategy to put the government on trial. Three viable defense themes stand out.

First, the defense appears to be trying to show that there were internal government disagreements and inconsistencies about the federal regulatory approach to Theranos. As noted above, the superseding indictment alleges that the defendants represented to investors that Theranos did not need FDA approval for its blood analyzer, but in reality, the FDA had required the approval. The defense has focused on one FDA employee who allegedly conceded that it was "debatable" whether Theranos' blood analyzer actually needed FDA approval. Holmes' attorneys have also claimed that they are aware of at least one other FDA employee who "took a different position" on whether FDA regulatory approval was needed.[71] In the possible treasure trove of additional FDA documents the court has ordered be produced, the defense may find more FDA dissenters.[72] The defense will likely comb through the documents, looking for internal government inconsistencies and government regulators' doubts about whether the Theranos blood analyzer really needed FDA approval. DOJ's worst nightmare is the defense calling as witnesses a parade of FDA bureaucrats, each with a different point of view as to how (or if) Theranos should have been regulated. Showing internal government disagreement and inconsistencies about the federal regulatory approach to Theranos may help the defense plant the seed in the mind of the jury that if the government bureaucrats cannot agree whether the blood analyzer should have been regulated, then the defendants' statements to investors that Theranos did not need FDA approval were not a crime.

Second, the defense has highlighted alleged irregularities in how CMS and FDA performed their regulatory functions prior to the demise of Theranos. The defense has argued that "[e]vidence of bias or procedural irregularities in the regulatory inspections that set in motion the collapse of Theranos go to the heart of the government's case."[73] In support, Holmes' attorneys have cited reports of interviews of CMS and FDA employees who admitted that certain aspects of their regulatory activities regarding Theranos were "unusual." The defense cited FDA employees who stated that the 2015 inspection of Theranos was unusual in that compliance officers and subject matter experts were sent to the inspection. CMS employees interviewed in the investigation stated that it was unusual that CMS central office personnel attended the Theranos inspection.[74] Although these "irregularities" standing on their own may not directly cast doubt on the strength of the government's evidence, enough deviations from standard protocol could cause the jury to question the integrity of the government's motives and whether Theranos was treated fairly.

Third, the defense appears to be trying to craft a narrative that FDA and CMS engaged in something akin to a "government/press conspiracy" with *Wall Street Journal* investigative reporter John Carreyrou, with the ultimate objective of destroying Theranos and putting the defendants behind bars. As has been widely reported, Carreyrou developed several former Theranos employees as whistleblower sources that led him to expose the alleged fraud. The defense has argued and may attempt to show at trial that Carreyrou unduly influenced the different federal agencies that regulated and investigated Theranos to the point that the federal government developed an animus against the company. Holmes' attorneys appear to be trying to make Carreyrou the "bogeyman" and have argued that he was "eager to break a story … and was exerting influence on the regulatory process in a way that appears to have warped the agencies' focus on the company and possibly biased the agencies' findings against it."[75] In support of this theory, the defense cited a report of an interview with an FDA inspector who inspected Theranos in 2015. The inspector allegedly stated that the details of the complaint that led to the inspection were the same as what Carreyrou had reported in the *Wall Street Journal*, and that she probably had read the article before the inspection.[76]

Although this strategy is far from a sure winner, it could inject reasonable doubt in the jury's mind and find resonance with a Silicon Valley jury that may be disinclined to trust the government.

Conclusion

Should Holmes and Balwani proceed to trial, expect the government's presentation of evidence to be a textbook exposition of the many advantages it enjoys when it brings conspiracy charges. The defense will undoubtedly fight back vigorously and likely will try to "flip the conspiracy script" by putting the government on trial and asking the jury to see the case as a "government/press conspiracy" against the company and the defendants. At the end of the day, the trials of these two Theranos executives are expected to provide an excellent lens through which to examine the advantages and disadvantages to both the government and the defense of prosecuting and defending federal conspiracy charges in a white collar case.

Notes

1. *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

2. *United States v. Jimenez Recio*, 537 U.S.270, 274 (2003).

3. *United States v. Felix*, 503 U.S. 378, 389-90 (1992).

4. *See* Charles Doyle, Cong. Research Serv., R41223, *Federal Conspiracy Law: A Brief Overview*, 1 (Jan. 20, 2016), https://fas.org/sgp/crs/misc/R41223.pdf.

5. *Iannelli v. United States*, 420 U.S. 770, 778 (1975), *quoting Callanan v. United States*, 364 U.S. 587, 593-94 (1961); *see also United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003) (explaining that conspiracies pose a threat "because the combination in crime makes more likely the commission of [other] crimes and because it decreases the probability that the individuals involved will depart from their path of criminality." (internal quotation marks omitted)).

6. *See* Charles Doyle, Cong. Research Serv., R41223, *Federal Conspiracy Law: A Brief Overview*, 3-4 (Jan. 20, 2016), https://fas.org/sgp/crs/misc/R41223.pdf.

7. *See* H.R. Rep. No. 80-304, at 28-29 (1947) (discussing history of criminal conspiracy law 18 U.S.C. § 371).

8. *See, e.g.*, 18 U.S.C. § 241 (civil rights conspiracy); 18 U.S.C. §§ 1114 & 1117 (conspiracy to kill U.S. officers and employees); 18 U.S.C. § 1349 (fraud conspiracy); 18 U.S.C. § 1956(h) (money laundering conspiracy); 18 U.S.C. § 2332a(a) & b(a) (terrorism and WMD conspiracies); 21 U.S.C. § 846 (drug trafficking conspiracy).

9. *See, e.g.*, *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) ("The overt act need not be criminal itself.").

10. *See, e.g.*, *United States v. Mason*, 479 F. App'x 397, 398 (2d Cir. 2012).

11. *See, e.g.*, *Whitfield v. United States*, 543 U.S. 209, 219 (2005) (citing 18 U.S.C. 1956(h)); *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (citing 21 U.S.C. 846).

12. 18 U.S.C. § 371; 18 U.S.C. § 1956(h); 18 U.S.C. §§ 1347, 1349.

13. *Pinkerton v. United States*, 328 U.S. 640 (1946).

14. *See Smith v. United States*, 568 U.S. 106, 111 (2013) ("Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of [the conspiracy's] existence, and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." (citations and internal quotation marks omitted; alteration in original)).

15. *United States v. Bostick*, 791 F.3d 127, 143 (D.C. Cir. 2015) ("To withdraw from a conspiracy, an individual must come clean to the authorities or communicate his or her abandonment 'in a manner reasonably calculated to reach co-conspirators.'").

16. *See Smith*, 568 U.S. at 111.

17. *United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009) ("Once a conspiracy is established, only a slight connection to the conspiracy is necessary to support conviction. The term slight connection means that a defendant need not have known all the conspirators, participated in the conspiracy from its beginning, participated in all its enterprises, or known all its details.").

18. *Kotteakos v. United States*, 328 U.S. 750 (1946).

19. *See generally United States v. Bernard J. Ebbers*, S.D.N.Y. No. 1:02-cr-01144-VEC-3, Third Superseding Indictment, Dkt. No. 167.

20. *See United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006).

21. *See generally* Press Release, FBI New York Field Office, Manhattan U.S. Attorney Files Additional Charges Against Raj Rajarathnam and Danielle Chiesi (Feb. 9, 2010), https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo020910a.htm.

22. *See* Jonathan Stempel, *Rajaratnam fails to cut U.S. insider trading conviction, sentence*, Reuters.com (June 1, 2018), https://www.reuters.com/article/usa-crime-rajaratnam/rajaratnam-fails-to-cut-us-insider-trading-conviction-sentence-idUSL2N1T3103; Bob Van Voris, *Galleon's Raj Rajaratnam Is Released From Prison Two Years Early*, Bloomberg.com (Sept. 6, 2019), https://www.bloomberg.com/news/articles/2019-09-06/galleon-s-rajaratnam-free-from-prison-after-almost-eight-years (reporting that Rajaratnam was released two years early, in 2019, under the First Step Act, to home confinement due to his age and health).

23. *See* Bruce Ragsdale, *The Chicago Seven: 1960s Radicalism in the Federal Courts*, Federal Judicial Center, at 4 (2008).

24. *Id.* at 15.

25. *Id.*

26. Skilling was convicted of the conspiracy and other substantive counts, but later had his conviction reversed by the Supreme Court based on its narrowing of the honest services fraud statute. *Skilling v. United States*, 561 U.S. 358, 358 (2010).

27. *See, e.g.*, *United States v. Roy*, 783 F.3d 418, 419 (2d Cir. 2015) (per curiam) (no proof of overt act requirement); *see also* 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

28. *Harrison v. United States,* 7 F.2d 259, 263 (2d Cir. 1925).

29. *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990).

30. *See, e.g.*, *United States v. Acevedo-Hernandez*, 898 F.3d 150, 161 (1st Cir. 2018).

31. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("It is elementary that a conspiracy may exist and be punished whether … the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.").

32. *See United States v. Zacarias Moussaoui*, E.D. Va. No. 01-455-A, July 2002 Superseding Indictment, https://www.fjc.gov/sites/default/files/2014/TRVAE026.pdf.

33. *See* Bill Mears, *Terrorist Zacarias Moussaoui's appeal of life sentence denied*, CNN.com (Jan. 4, 2010), https://www.cnn.com/2010/CRIME/01/04/us.moussaoui.conviction/index.html.

34. Fed. R. Evid. 801(d)(2)(E) (a statement is not hearsay if "offered against an opposing party and . . . made by the party's co[-]conspirator during and in furtherance of the conspiracy").

35. *See* Sean Lavin, Grace Manning & Alyse Ullery, *Federal Criminal Conspiracy*, 56 Am. Crim. L. Rev. 905, 922 & nn. 108-11 (2019) (citing, *inter alia*, *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1980)).

36. *Id.* at 180-81.

37. *Id.*

38. *See* Fed. R. Crim. P. 8(b) (joinder of defendants); *United States v. Williams*, 553 F.3d 1073, 1078-79 (7th Cir. 2009).

39. *See Kotteakos v. United States*, 328 U.S. 750, 774 (1946).

40. *See* Lavin, Manning, & Ullery, *supra* note 35 at 928 n.147 (collecting cases).

41. Order Re Severance of Trials, DE 362.

42. Order Re Severance of Trials, DE 362.

43. *See Fiswick v. United States*, 329 U.S. 211, 216 (1946) (under Section 371, "the statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy").

44. *See, e.g., United States v. Licciardi*, 30 F.3d 1127, 1133 (9th Cir. 1994).

45. Dorothy Atkins, *Ex-Theranos CEO's Criminal Trial Delayed Until October,* Law360, (Apr. 16, 2020), *https://www.law360.com/whitecollar/articles/1263926/ex-theranos-ceo-s-criminal-trial-delayed-until-october?nl_pk=c7a0ebe4-3379-4521-88ac-ab8873481643&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.*

46. *See generally* Lavin, Manning & Ullery, *supra* note 35 at 928-930 and accompanying notes.

47. *See* U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(A), (B), cmt. N.4 (U.S. Sentencing Comm'n 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf; *see also United States v. Childress*, 58 F.3d 693, 723 (D.C. Cir. 1995).

48. 606 F.2d 149 (6th Cir. 1979).

49. *Id.* at 152-53.

50. *United States v. Doe*, 655 F.2d 920, 926 (9th Cir. 1980) (explaining that district courts should grant severance only where joinder is "so manifestly prejudicial that it outweighs the dominant concern with judicial economy").

51. Press Release, DOJ, U.S. v. Elizabeth Holmes, et al., https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al (Updated Nov. 19, 2019).

52. FED. R. EVID. 801(d)(2)(E).

53. *The Inventor: Out for Blood in Silicon Valley*, HBO documentary, 2019.

54. *See, e.g., United States v. Daane*, 221 F. App'x 508, 511 (9th Cir. 2007) (spreadsheets completed by co-conspirator admissible against defendant without evidence that defendant had knowledge of the spreadsheets).

55. JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP 73 (2018) (print version).

56. *Id.* at 296; *The Inventor: Out for Blood in Silicon Valley*, HBO documentary, 2019.

57. *See, e.g., United States v. Moran,* 493 F. 3d 1002, 1010 (9th Cir. 2007) (statements made for "personal objectives" outside the conspiracy or as part of "idle conversation" are not admissible under the co-conspirator hearsay exception); *United States v. Maliszewski*, 161 F.3d 992 (D.C. Cir. 1998) (court held that certain statements that were offered under Rule 801(d)(2)(E) were not shown to have been made in furtherance of the conspiracy, but amounted to nothing more than idle chatter between a husband and wife); *United States v. Santos*, 20 F.3d 280 (7th Cir. 1994) (mere idle chatter, narrative statements of past events, and superfluous casual conversations are not statements in furtherance of a conspiracy).

58. Superseding Indictment, Docket Entry ("DE") 39 ¶ 12(E); Taylor Dunn, Victoria Thompson, Rebecca Jarvis & Ashley Louszko, *Ex-Theranos CEO Elizabeth Holmes says 'I don't know' 600-plus times in never-before-broadcast deposition tapes*, ABC News (Jan. 23, 2019), https://abcnews.go.com/Business/theranos-ceo-elizabeth-holmes-600-times-broadcast-deposition/story?id=60576630.

59. Superseding Indictment, DE 39 ¶ 20.

60. Order Granting Motion to Compel, DE 174.

61. Holmes' Motion to Compel, DE 67 at 1.

62. Superseding Indictment, DE 39 ¶ 12(F).

63. *The Inventor: Out for Blood in Silicon Valley*, HBO documentary, 2019.

64. *Id.*

65. United States' Opposition to Defendant's Motion to Compel, DE 79 at 10-11.

66. *Id.* at 3.

67. Jody Godoy, *Feds Say 'Concise' Charges Against Ex-Theranos Exec Suffice*, Law360 (Jan. 14, 2020), https://www.law360.com/articles/1234389/feds-say-concise-charges-against-ex-theranos-exec-suffice.

68. Order Granting Motion to Compel, DE 174; Godoy, *supra* note 67.

69. Hailey Konnath, *Feds Ordered To Hand Over Docs To Ex-Theranos CEO*, Law360 (Nov. 6, 2019), https://www.law360.com/articles/1217700/feds-ordered-to-hand-over-docs-to-ex-theranos-ceo.

70. Dorothy Atkins, *FDA Slams Theranos Execs' 'Unprecedented' Doc Bid*, Law360 (Jan. 13, 2020), https://www.law360.com/articles/1233818.

71. *See supra* note 61 at 19.

72. *Id.*

73. Holmes' Reply in Support of Motion to Compel, DE 81, at 8.

74. *Id.* at 7.

75. *See supra* note 61 at 16.

76. *See supra* note 73 at 7.

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