

Marchelletta's Tax Convictions Overturned By Appeals Court

White collar crimes such as alleged tax or securities law violations are different than alleged crimes such as murder, rape and robbery — because they typically don't involve a factual dispute of what the defendant did or didn't do. The key issue is the intent of the accused in doing or not doing something. That is because white collar crimes are solely created by statutes that can have different interpretations of when a person has committed a criminal violation.

The defense of a person claiming actual innocence of murder, rape or robbery is they didn't commit the physical act constituting the crime, while the defense of a person claiming actual innocence of a white collar crime is typically that they had no intention to commit a crime by their involvement in the physical acts alleged to constitute the crime. Barry Bonds prosecution for allegedly lying to a federal grand jury about knowingly using anabolic steroids is an example of a typical white collar prosecution by a person claiming innocence. Bonds' defense was he didn't knowingly use steroids, so he had no criminal intent to lie to the grand jury. Although convicted of a single count of obstruction of justice, Bonds' conviction may be overturned on appeal.

Consequently, jury instructions about what does and does not constitute intent to commit the defendant's alleged crime are critically important in a white collar case.

Gerard M. Marchelletta, Jr [Junior] and his father Gerard M. Marchelletta, Sr [Senior]

New Zealand cont. from p. 16

was either in prison or released on bail.

Det. Sergeant Peter Govers was responsible for procuring Knight's false confession and the prosecution of Johnston and Knight for a crime they didn't commit. Govers has not been disciplined and continues working.

Sources:

Police apologise to duo wrongly jailed for arson, New Zealand Lawyer, March 23, 2007.

[Pair Still Await Compo](#), *Manawatu Standard*, December 12, 2009.

[Rough justice sees mums fight](#) sons' case, TVNZ, May 8, 2011.

["Compensation for Two Persons Wrongly Convicted and Imprisoned For Arson,"](#) New Zealand Cabinet, February 15, 2010.

[Tearful mother](#) hits out at 'institutional bullying', *Otago Daily Times*, May 11, 2011.



Gerard Marchelletta Jr. in May 2011 (Bita Honarvar - AJC)

After an extensive investigation of their personal and business finances, Junior, Senior and Circle Industries bookkeeper Theresa L. Kottwitz were indicted for tax related violations for 1999, 2000 and 2001. Those alleged violations allegedly resulted in the non-payment of about \$1.5 million in taxes by the Marchellettas.

Among the charges were that the three defendants conspired to impede the collection of revenue by the I.R.S., they aided and abetted the filing of a false corporate tax return in 2001 for Circle Industries, and Kottwitz aided in the filing of a false personal tax return for Junior in 1999 and Senior in 2000.

During the three defendant's October 2007 trial the government contended "that the Marchellettas "conspired with each other and their long-time loyal employee, . . . Kottwitz, the bookkeeper" to hide money from taxes by "cooking the books" and "through accounting tricks," and by filing false tax returns." *USA v. Theresa Kottwitz, et al*, No. 08-13740 (11th Cir 08-19-2010), Op. Cit. 26-27.

Their defense was they relied on the expert advise and regular assistance of Circle Industries' accountant as well as other experts that included a "forensic accountant and former IRS agent." So if there were any errors on the tax returns or how Kottwitz kept the books it was due to their reliance on erroneous expert accounting advice. That negated that they had the requisite criminal intent to violate the law.

At the close of evidence the defendants moved for a directed verdict of acquittal because the government didn't introduce any evidence they intended to violate the tax laws. The judge denied the motion.

The defendant's then requested a "good faith reliance on accountant" jury instruction because, "The Government must estab-

lish beyond a reasonable doubt that the Defendant acted willfully and with specific intent as charged in the indictment. "Good faith reliance on a qualified accountant . . . [is] a defense to willfulness in cases of tax fraud." So, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith an . . . accountant whom the Defendant considered competent, made a full and accurate report to that . . . accountant of all material facts of which Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that . . . accountant." The judge refused to give the jury instruction.

owned a drywall (sheetrock) contracting company based in Atlanta, Georgia that worked on large east coast commercial construction projects. After being awarded the drywall contract for the Atlantis Hotel and Casino in Nassau, The Bahamas, U.S. Customs began an investigation of their company — Circle Industries — and that investigation involved the Internal Revenue Service.

lish beyond a reasonable doubt that the Defendant acted willfully and with specific intent as charged in the indictment. "Good faith reliance on a qualified accountant . . . [is] a defense to willfulness in cases of tax fraud." So, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith an . . . accountant whom the Defendant considered competent, made a full and accurate report to that . . . accountant of all material facts of which Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that . . . accountant." The judge refused to give the jury instruction.

The defendants were convicted of all charges except for one that the government dismissed prior to the beginning of jury deliberations.

They appealed, and on August 19, 2010, a three-judge panel of the federal 11th Circuit Court of Appeals unanimously overturned all of the convictions except for the conspiracy charge.

The three defendant's filed a motion for reconsideration, and on December 22, 2010 the three-judge panel overturned the conspiracy count on the basis that the judge failed to give the "good faith reliance on accountant" jury instruction that could have been expected to result in the defendant's acquittal because they relied on the advice of accounting experts for everything they did.

The government filed a motion for reconsideration by the 11th Circuit *en banc*, but the motion was denied.

In a May 5, 2011 front-page story in the *Atlanta Journal-Constitution* about the Marchelletta's case their attorney estimated they had spent more than \$4 million in legal fees fighting the tax charges.

Circle Industries' [website](#) has the following quote by Ralph Waldo Emerson: "When a resolute young fellow steps up to the great bully, the world, and takes him boldly by the beard, he is often surprised to find it comes off in his hand, and that it was only tied on to scare away the timid adventurers."

Sources:

USA v. Theresa Kottwitz, et al - No. 08-13740 (11th Cir 08-19-2010) (panel decision acquitting the defendants of some charges)

USA v. Theresa Kottwitz, et al - No. 08-13740 (11th Cir 12-22-2010) (panel decision on rehearing that jury instruction should have been given)

[Fighting to clear his name](#), company, *Atlanta Journal-Constitution*, May 5, 2011