

United States of America
First Circuit Court of Appeals

NO. 2019-1185

UNITED STATES OF AMERICA

Appellee,

v.

LACHLAN OLEN GRANITE

Defendant/Appellant.

APPEAL FROM MAINE FEDERAL DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT
LACHLAN GRANITE

September 15, 2019

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
1st Cir. Bar No. 33963

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... [3](#)

STATEMENT OF JURISDICTION..... [5](#)

STATEMENT OF THE ISSUE. [6](#)

STATEMENT OF FACTS. [7](#)

STATEMENT OF THE CASE..... [8](#)

SUMMARY OF ARGUMENT. [9](#)

ARGUMENT..... [10](#)

 I. There Was No Prior Specific Order Which
 Prohibited Furnishing False Information to the
 Social Security Administration.. [10](#)

CONCLUSION. [16](#)

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION. [17](#)

ADDENDUM. [17](#)

1. Judgment in a Criminal Case. [18](#)

TABLE OF AUTHORITIES

Federal Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007).	14
<i>United States v. Bell</i> , 598 F.3d 366 (7th Cir. 2010)..	12
<i>United States v. Blount</i> , 906 F.3d 381 (5th Cir. 2018)..	11
<i>United States v. Brigham</i> , 447 F.3d 665 (9th Cir. 2006).	12
<i>United States v. Davenport</i> , 286 F.3d 217 (5th Cir. 2002)..	12
<i>United States v. Deutsch</i> , 987 F.2d 878 (2d Cir. 1993).	13
<i>United States v. Eve</i> , 984 F.2d 701 (6th Cir. 1993)..	14
<i>United States v. Flanders</i> , 491 F.3d 1197 (10th Cir. 2007).	12
<i>United States v. Iley</i> , 914 F.3d 1274 (10th Cir. 2019).	11
<i>United States v. Johnston</i> , 631 F. App'x 381 (6th Cir. 2015)..	12
<i>United States v. Maloney</i> , 406 F.3d 149 (2d Cir. 2005).	12
<i>United States v. Nash</i> , 729 F.3d 400 (5th Cir. 2013)..	10, 12
<i>United States v. Pentrack</i> , 428 F.3d 986 (10th Cir. 2005)..	10, 11, 12
<i>United States v. Rowe</i> , 202 F.3d 37 (1st Cir. 2000)..	10, 13

<i>United States v. Scarano</i> , 975 F.2d 580 (9th Cir. 1992).....	11
<i>United States v. Shaddock</i> , 112 F.3d 523 (1st Cir. 1997).	11, 13
<i>United States v. Stochel</i> , 901 F.3d 883 (7th Cir. 2018).....	11

Federal Statutes and Guidelines

18 U.S.C. § 3624(b).	15
18 U.S.C. § 3742.	5
28 U.S.C. § 1291.	5
42 U.S.C. § 408(a)(6).	5, 10
USSG § 2B 1.1(a)(2).	10
USSG § 2B1.1(b)(9)(C) (2018).	6, 10, 14, 16
USSG § 2B1.1(b)(9)(C) cmt. n. 8(C).....	11
USSG § 5.	8

STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On July 25, 2018, Lachlan Olen Granite was found guilty after pleading guilty in the United States District Court for the District of Maine, of one count of furnishing false information to the Social Security Administration, contrary to 42 U.S.C. § 408(a)(6).

On February 19, 2019, the court (*George Z. Singal, J.*), sentenced Mr. Granite to 18 months committed, plus three years of supervised release (including standard and special conditions).

A notice of appeal was filed on February 19, 2019.

STATEMENT OF THE ISSUE

- I. Did the sentencing court err in applying USSG sentencing guideline § 2B1.1(b)(9)(C) (2018), when there was no “prior, specific ... order” enjoining conduct constituting the crime of furnishing false information to the Social Security Administration?

STATEMENT OF FACTS

Pressed by his new wife to get a job, and his former wife to pay child and spousal support, in July and August 2017 Lachlan Granite applied for a social security card. INDICTMENT (Apr. 13, 2018). Granite was formerly known as Scott Edward Bounds, but had changed his name and moved to New England to begin a new phase of life. LETTER FROM DEFENDANT TO COURT (Feb. 13, 2019); *Sent.Trn.* at 50-62 (defendant's allocution); LETTER FROM LEAH GRANITE TO COURT (Feb. 13, 2019); *Sent.Trn.* at 40-50 (wife's sentencing statement).

On a Social Security Administration (SSA) questionnaire, in a follow-up interview, and during a voice-mail to the government, Granite made a series of statements that were false – that he had grown up in a religious cult and had never had a social security card, never been employed, never applied for government benefits, never had a bank account, never filed a tax return. All were easily checkable, and upon investigation, the SSA readily discovered the falsehoods. PROSECUTION VERSION (July 20, 2018); *Sent.Trn.* at 19-20, 24-28 (government's statement of facts); *Sent.Trn.* at 67-71 (court's findings).

STATEMENT OF THE CASE

In April 2018, Granite was indicted on two counts of furnishing false information to the Social Security Administration. In July, he pleaded guilty to one of them.

In establishing his sentence, the court adopted Probation's calculation in its Pre-Sentence Investigation Report (PSR) (contained in sealed appendix). *Sent.Trn.* at 66; PSR ¶ 19.

The calculation started with a base offense level of 6. It brought that up to level 10 "because he's in violation of court ordered child support [and] spousal support at the time of the offense[,] and changing his Social Security Number further facilitated the subversion of these orders." *Sent.Trn.* at 66; PSR ¶ 20. The court also enhanced by 2 points for "willfully obstruct[ing] the administration of justice," *Sent.Trn.* at 66; PSR ¶ 24, producing a total offense level of 12. *Sent.Trn.* at 66; PSR ¶ 28. Based on a 2014 California DWI, the court assigned a criminal history category of II, placing him in Zone C, USSG § 5 SENTENCING TABLE, and resulting in an advisory guideline range of 12 to 18 months. *Sent.Trn.* at 66; PSR ¶ 31-33.

In February 2019, the court sentenced Granite to 18 months committed, plus three years supervised release.

SUMMARY OF ARGUMENT

Lachlan Granite argues that he was unlawfully sentenced for the crime of furnishing false information to the Social Security Administration. The sentencing court, regarding a California family court order as a “prior, specific ... order,” added 4 points to Granite’s sentencing calculation. The guideline, however, applies only when the prior existing order specifically enjoins the conduct which constitutes the crime. Here, the California orders did not address false reports to the SSA, and therefore the court erred in applying the guideline.

ARGUMENT

I. There Was No Prior Specific Order Which Prohibited Furnishing False Information to the Social Security Administration

The court correctly pinned the base offense level at 6 for the crime of furnishing false information to the SSA. 42 U.S.C. § 408(a)(6); USSG § 2B 1.1(a)(2). However, the court stepped up the base offense level to 10, relying on USSG § 2B1.1(b)(9)(C) (2018), to which the defendant objected. PLEA AGREEMENT ¶3B (July 25, 2018). That section provides:

If the offense involved ... a violation of any *prior, specific* judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines ..., increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

USSG 2B1.1(b)(9)(C) (emphasis added).

Just because there is a pre-existing court order on something, somewhere, in someone's life, does not make it a "prior, specific ... order" for the purposes of the guideline.

Before 2000, the guideline allowed enhancement for violation of *any* judicial order, which led to a circuit split regarding the specificity with which the underlying order must prohibit the conduct constituting the subsequent crime. In 2000, the sentencing commission added the current "prior, specific" language to the guideline. *United States v. Pentrack*, 428 F.3d 986, 989-90 (10th Cir. 2005). The amendment fulfills the purpose of the enhancement, which is to punish recidivist behavior. *United States v. Nash*, 729 F.3d 400, 405 (5th Cir. 2013); *United States v. Rowe*, 202 F.3d 37, 42 (1st Cir. 2000) ("The rationale for the

enhancement is to redress the aggravated criminal intent that exists when a defendant engages in wrongful conduct despite a prior order that directs him not to do so.”); USSG § 2B1.1(b)(9)(C) cmt. n. 8(C) (“A defendant who does not comply with ... a prior, ... judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment.”). It also ensures defendants have adequate knowledge of the conduct for which a subsequent sentence might be enhanced. *United States v. Stochel*, 901 F.3d 883, 891 (7th Cir. 2018); *Pentrack*, 428 F.3d at 990.

Even before the 2000 amendment, courts narrowly interpreted the enhancement. *United States v. Shaddock*, 112 F.3d 523, 529 (1st Cir. 1997) (court bankruptcy forms do not constitute a prior order); *United States v. Scarano*, 975 F.2d 580 (9th Cir. 1992) (bail order requiring defendant to “commit no crimes,” insufficient notice for subsequent enhancement).

In *all* known cases applying the enhancement, including those cited by Probation, PSR ¶ 20, n.3, there existed a prior order addressing or prohibiting the *specific* behavior involved in the subsequent crime. *United States v. Iley*, 914 F.3d 1274 (10th Cir. 2019) (accountant disciplined by state accountancy board for taking clients’ tax money but not forwarding it to government; enhancement for subsequent fraud involving same conduct); *United States v. Blount*, 906 F.3d 381, 386 (5th Cir. 2018) (securities broker sanctioned by FINRA, prohibiting him from securities industry; enhancement for subsequent fraud in which defendant held himself out as securities broker); *Stochel*, 901 F.3d at 891 (receiver appointed for business involved in litigation, with court instructions to secure judicial approval before withdrawing corporate

funds; enhancement for subsequent fraud involving personal use of corporate funds); *United States v. Johnston*, 631 F. App'x 381, 385 (6th Cir. 2015) (estate executor under court instructions to distribute assets to rightful beneficiaries; enhancement for subsequent fraud for diverting assets to himself); *Nash*, 729 F.3d at 405 (convenience store operator warned by USDA to cease accepting food stamps for ineligible items; enhancement for subsequent fraud involving same conduct); *United States v. Bell*, 598 F.3d 366, 372 (7th Cir. 2010) (overruled on other grounds, *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012)) (parent under court order to pay child support; enhancement for subsequent non-payment under Deadbeat Parents Punishment Act); *United States v. Flanders*, 491 F.3d 1197, 1218 (10th Cir. 2007) (bank owner in bankruptcy, under administrative order to secure board approval before transferring assets; enhancement for subsequent fraud in which defendant sought to sell the bank building); *United States v. Brigham*, 447 F.3d 665, 670 (9th Cir. 2006) (restaurant entrepreneur under state court injunction to refrain from selling or offering to sell stocks; enhancement for subsequent conviction of making false statements in pledging stock as collateral); *Pentrack*, 428 F.3d at 990 (salesman under state court injunction to refrain from deceptive and misleading sales conduct; enhancement for subsequent fraud for purporting to sell auto and aircraft parts he did not own); *United States v. Maloney*, 406 F.3d 149, 150 (2d Cir. 2005) (parent under court order to pay child support; enhancement for subsequent non-payment under Deadbeat Parents Punishment Act); *United States v. Davenport*, 286 F.3d 217, 220 (5th Cir. 2002) (estate planner who swindled elderly investors under injunction prohibiting

unauthorized practice of law; enhancement for subsequent fraud involving same scheme); *United States v. Rowe*, 202 F.3d 37, 42-43 (1st Cir. 2000) (property owner under bankruptcy court order to “disclose his assets in their entirety”; enhancement for subsequent fraud in not disclosing property); *United States v. Deutsch*, 987 F.2d 878, 885 (2d Cir. 1993) (mountebank under court order prohibiting holding himself out as an attorney; enhancement for subsequent fraud in which he claimed to be a lawyer).

In *United States v. Shadduck*, 112 F.3d 523, 529 (1st Cir. 1997), a debtor, in filing for bankruptcy, filled out standard court forms in which he attested to disclosing all his property. In a later conviction for bankruptcy fraud, this court reversed application of the enhancement, because the guidelines “contemplate[] only a specific order.” The result was opposite in *United States v. Rowe*, 202 F.3d 37, 42-43 (1st Cir. 2000). There, a debtor’s petition for bankruptcy did not include a list of assets. In response, the court issued a “notice specifically directed at Rowe with a tailored command to cure the defects in his original petition so as to provide complete disclosure,” and warned of consequences for non-compliance. Rowe nonetheless concealed his interests in property. When later charged with fraud, this court approved application of the sentencing enhancement. Together, *Shadduck* and *Rowe* show that while a general command to comply with the law is not sufficient, a specific order enjoining the conduct that constitutes the subsequent crime is.

In Granite’s case, it is not clear what “prior, specific . . . order” is being relied on. It is either: a probation penalty for a 2014 California drunk driving conviction, PSR ¶ 31; or, more likely, a California “court-

ordered child and spousal support,” PSR ¶ 20; *Sent.Trn.* at 29, which is not in the record. Granite’s crime, however, was furnishing false information to the Social Security Administration. The California traffic and family court orders are unrelated to the conduct constituting the crime. Even if they could conceivably contain the required admonitions, that has not been demonstrated in the record.

If Granite had been successful in getting a new social security card, *see, e.g., United States v. Eve*, 984 F.2d 701, 702 (6th Cir. 1993), it may have made enforcement of the California orders more difficult, but nowhere has it been alleged that the California orders included a broad prohibition on making false statements, or a specific prohibition encompassing the conduct which constitutes Granite’s crime.

Because neither California order was the “prior, specific ... order” required by USSG 2B1.1(b)(9)(C), the sentencing court failed in its first obligation to “correctly calculat[e] the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007).

Pursuant to the guideline, Granite received a 4 point enhancement, so that his base offense level was 10 rather than 6. Had he not received the increase, his guideline sentencing range would be 4 to 10 months (Zone B), rather than 12 to 18 months (Zone C). The court conspicuously sentenced him to the top of the guidelines range. *Sent.Trn.* at 30, 67. But a top-of-the-range penalty in the lower range is 8 months shorter.

Granite was sentenced and incarcerated in February 2019, and his current release date is in May 2020. *See* FEDERAL INMATE LOCATOR, <www.bop.gov/inmateloc/>. Had Granite been lawfully sentenced, he

would be released from prison imminently – in November 2019.

Accordingly, this court should order Granite released from federal custody within 10 months of his incarceration, taking into account good time. 18 U.S.C. § 3624(b) (credit toward service of sentence for satisfactory behavior). In the alternative, this court should remand for re-sentencing. Because this appeal may not conclude before his lawful release date, this court should also order bail pending the resolution of this appeal.

CONCLUSION

The court erred in applying USSG § 2B1.1(b)(9)(C), when there was no “prior, specific ... order” prohibiting Granite from furnishing false information to the SSA. Accordingly, this court should order Granite’s release within 10 months of his incarceration. In the alternative, this court should remand for re-sentencing, and in the interim, order release on bail pending resolution of the appellate proceeding.

Respectfully submitted,

Lachlan Granite
By his Attorney,
Law Office of Joshua L. Gordon

/s/

Dated: September 15, 2019

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Defendant requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on September 15, 2019, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a), and that it contains no more than 2,112 words, exclusive of those portions which are exempted.

Dated: September 15, 2019

/s/

Joshua L. Gordon, Esq.

ADDENDUM

1. Judgment in a Criminal Case. [18](#)