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ARTICLE

CARPENTER V. UNITED STATES: DID BEING GAY MATTER?

Ellen S. Podgor *

"Winans and Carpenter are homosexuals who have been involved in what they describe as a 'spousal relationship' for over ten years."[1]

I. Background

Carpenter v. United States[2] is a case commonly discussed in business entities, corporations, securities,

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[1] United States v. Winans, 612 F.Supp. 827, 829 (S.D.N.Y. 1985).

[2] Carpenter v. United States, 484 U.S. 19 (1987).

and white-collar crime classes. This case is also mentioned in journalism classes, as students discuss the importance of ethical journalism and neutrality in covering topics and events.[3] But some of the nuances in these discussions may be lost to important legal and ethical principles. This essay looks behind the Court's opinion to consider the contextual setting for what happened here.[4] More importantly, it asks the question of whether the sexuality of two of the defendants made a difference in how the case was handled.

The *Carpenter* case tells the story of a Wall Street Journal reporter, R. Foster Winans, who traded on the Journal's pre-publication material, and along with others was criminally charged and convicted. Winans was one of two authors of the famed Wall Street Journal column "*Heard on the Street*," a column which the district court determined had "impact on the market."[5] It was a well-read column that provided information to investors, making the pre-publication content valuable, or, in legal terms, "material."[6]

There are both disputed and undisputed facts that surround the case. Undisputed is that Winans provided pre-publication information from the *Heard on the Street* columns to Peter N. Brant and Kenneth Felis, individuals who, along with others, would trade on the information.[7]

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[3] *See generally* GENE FOREMAN, THE ETHICAL JOURNALIST: MAKING RESPONSIBLE DECISIONS IN THE PURSUIT OF NEWS (2010) (providing the Winans case as a case study).

[4] *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015) (noting the importance of looking at the contextual setting).

[5] Carpenter, 484 U.S. at 22–23 (the district court noted that it may be "difficult . . . to quantify in any particular case." (*citing* Winans, 612 F.Supp. at 830)). In 1984, studies estimated that the number of subscribers to the Wall Street Journal was 6.8 million.

[6] *Id.*

[7] Carpenter, 484 U.S. at 23; Thomas B. Rosenstiel, *When Financial Columnists Talk, the Market Listens*, THE

According to Winans it was Brant who proposed the idea.[8] He described Brant as "evangelical."[9] He said, "Peter was never a more romantic figure in my professional life than he was that night: younger, handsome, and richer than most of my Wall Street contacts."[10] Disputed is who initiated this idea, as Brant's testimony claimed that the impetus for this criminal activity came from Winans.[11]

Likewise, it was undisputed that the Wall Street Journal had a policy that required employees to keep the information in the articles confidential prior to publication.[12] Disputed, however, was whether Winans was aware of the Journal's policy prohibiting this conduct.[13] Regardless, he acknowledged at trial that his

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PITTSBURGH PRESS, May 1, 1984, at 19 (discussing the business readership of the newspaper as 6.8 million); *see also* Merrill Brown, *Leaks Inevitable on Fiercely Competitive Wall Street*, THE HONOLULU ADVERTISER, Apr. 8, 1984, at 105, *reprinted in* WASH. POST (stating that the "'*Heard on the Street*' column 'reaches two million readers five days a week, and its contents are distributed on the 'broad tape' or Dow Jones wire service to thousands of brokerage houses and news organizations before that day's stock trading opens.'").

[8] R. FOSTER WINANS, TRADING SECRETS: SEDUCTION AND SCANDAL AT THE WALL STREET JOURNAL 13–14 (1984).

[9] R. FOSTER WINANS, *supra* note 9, at 13.

[10] R. FOSTER WINANS, *supra* note 9, at 13.

[11] Winans, 612 F.Supp. at 832.

[12] Carpenter, 484 U.S. at 23 (noting that "[t]he official policy and practice at the Journal was that prior to publication, the contents of the column were the Journal's confidential information").

[13] Winans, 612 F.Supp. at 829. Winans claimed he had not seen the booklet with the Wall Street Journal policy or any other conflicts policy. The court rejected Winans' claim finding that "Winans had actual knowledge of the policy with respect to maintaining the confidentiality of the column." *Id.* at 831. *See also* Herb Greenberg, *Winans Claims Broker Proposed Stock Scheme*, CHICAGO TRIBUNE (March 20, 1985), https://www.chicagotribune.com/news/ct-xpm-1985-03-20-8501150919-

conduct was unethical and a potential firing offense.[14] It was undisputed that the profits from this scheme were approximately $ 690,000, of which Winans and Carpenter received approximately $31,000.[15]

II. The Criminal Case

After the Securities Exchange Commission (SEC) started investigating this matter, it was Carpenter and Winans who voluntarily went to the SEC and "testified fully about the scheme."[16]Co-conspirators Felis and Brant did not come forward or acknowledge wrongdoing at this time. Winans was charged with 61 counts, Felis 47 counts, and Carpenter 15 counts in an indictment that included conspiracy, mail fraud, and insider trading.[17]

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story.html (describing how Winans stated that he was not aware that he was violating the law and would not have done it if he was aware of this). *But see* R. FOSTER WINANS, *supra* note 9, at 296. Sadly, the Wall Street Journal's coverage of Winan's testimony disregarded his claim of no knowledge of the internal ethics rule with a statement claiming " . . . [t]hat he had lied to the SEC and *Journal* editors about this matter . . . .". *Id.*

[14] Fred R. Bleakley, *Winans Denies Scheme was Devised by Him*, N.Y.TIMES (March 19, 1985), https://www.nytimes.com/1985/03/19/business/winans-denies-scheme-was-devised-by-him.html.

[15] *Broker in Winans Case Sentenced*, NY TIMES (Feb. 27, 1988), https:www.nytimes.com/1988/02/27/business/broker-in-winans-case-is-sentenced.html.

[16] Winans, 612 F.Supp. at 837–38 (stating that initially Winans was not truthful with his employer or investigators, but on March 29th, both Winans and Carpenter went to the SEC to expose the entire scheme).

[17] *Id.* at 829. It was and remains common for prosecutors to charge many counts. The aim may be to achieve a plea, cooperation, or if the case goes to trial to obtain a conviction on a weak case through jury compromise; *see generally* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV.

One of the lawyers representing Carpenter at trial was Jed S. Rakoff, then an attorney with Mudge, Rose, Guthrie, Alexander & Ferdon,[18] and now a judge in the Southern District of New York.[19] Although Winans and Carpenter went to the SEC and exposed the misconduct, the government's cooperation benefit was given to Peter Brant, who testified against the other three at a bench trial that lasted twenty days.[20]

District Court Judge Stewart found Winans guilty of 59 counts, Carpenter guilty of 12 counts, and Felis guilty of 41 counts. Carpenter was not considered a co-conspirator, but rather one who aided and abetted in the scheme.[21] Winans initially received a sentence of 18 months and a $5,000 fine, [22] although it was later reduced

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L. REV. 1521 (1981) (discussing the misuse of prosecutorial discretion).

[18] Winans, 612 F.Supp. at 829.

[19] *Id.* (stating that R. Foster Winans was represented by Don Buchwald, the former deputy chief of the Southern District of New York's Criminal Division. Interestingly the prosecutor on the case, Assistant United States Attorney Peter Romatowski, had as his former bosses in the U.S. Attorney's Office both Buchwald and Rakoff); *see* Barbara Bradley & David Clark Scott, *The Inside World of Insider-Trading Counsel*, THE CHRISTIAN SCIENCE MONITOR (Feb. 27, 1987), https://www.csmonitor.com/1987/0227/fatty.html (discussing the attorneys in Winans trial).

[20] Bradley & Scott, *supra* note 20 (explaining those who cooperate and assist the government are typically provided with a benefit at sentencing); *see The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NACDL, July 2018, https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct (reporting on the decline of federal criminal trials and the deficiencies in a system with pleas that infringe on Sixth Amendment trial rights) (Hereinafter *The Trial Penalty*).

[21] Winans, 612 F.Supp. at 850.

[22] Michael A. Hiltzik & Tony Robinson, *Winans Gets 18-Month Jail Term, Fine: Stiff Sentence Handed Ex-Journal Reporter*,

to a sentence of a year and a day.[23] Carpenter was given three years' probation and 200 hours of community service,[24] and Felis received a six month sentence.[25] Cooperator Brant, received a sentence of eight months in prison, $10,000 fine, five years' probation and 750 community service hours. [26] He, like Felis, was also given the benefit of serving his sentence in installments on weekends.[27] The United States Attorney commented at Brant's sentencing that Brant had provided "extended cooperation" to the government.[28]

LA TIMES (Aug. 7, 1985), https://www.latimes.com/archives/la-xpm-1985-08-07-fi-3892-story.html.

[23] *Sentence Cut For Winans*, N.Y.TIMES (July 26, 1988), https://www.nytimes.com/1988/07/26/business/sentence-cut-for-winans.html.

[24] *David Carpenter, 41, Figure in 80's Fraud,* N.Y. TIMES, Jan. 19, 1991, *available at* https://www.nytimes.com/1991/01/19/obituaries/david-carpenter-41-figure-in-80-s-fraud.html. The collateral consequences of a conviction may even include the insertion of the case in one's obituary. *Id.*

[25] Pat Widder, *Reporter's Insider Conviction Upheld*, CHICAGO TRIBUNE (Nov. 17, 1987), https://www.chicagotribune.com/news/ct-xpm-1987-11-17-8703260877-story.html. Felis was allowed to serve his sentence on weekends, allowing him to continue to work and raise his children. He also was fined $25,000 given five years' probation and 500 hours of community service. *See* Winans, 612 F.Supp. at 306.

[26] *Broker in Winans Case Sentenced, supra* note 16.

[27] *Broker in Winans Case Sentenced, supra* note 16. Both Felis and Brant had young children, while Winans was childless. The disparity in Winans spending nine months in prison should also be considered as at that time he was in a new relationship with someone who he is now married to and has been with for thirty-two years.

[28] *Broker in Winans Case Sentenced, supra* note 16. Brant also provided cooperation to the government in the accompanying case against David W.C. Clark, a New York lawyer, who was involved in improper trading. Clark died at the age of 38, six days prior to being sentenced. "Medical investigators said the death was caused by complications of chronic alcoholism." *Id.*

The Second Circuit upheld the convictions with the exception of Winan's conspiracy conviction, which it reversed as having transactions that "were not within the scope of the unlawful agreement to trade on the misappropriated information."[29] The misappropriation theory was approved by the Second Circuit with the exception of a dissenting opinion by Judge Roger Miner, who dissented on the securities fraud convictions stating that "the misappropriation theory cannot be interpreted so expansively as to encompass the activities of these defendants."[30] Thus, the misappropriation theory came out of the Second Circuit with a 2-1 split opinion.[31] The Supreme Court, thereafter, accepted certiorari.[32]

The Supreme Court issued the *Carpenter* opinion within months of its decision in *McNally v. United States*,[33] a case in which the Court rejected the use of mail fraud based upon "intangible rights." Referencing a 1909 amendment to the mail fraud statute, the *McNally* Court held that the "original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."[34] Lacking an indictment and jury instruction that included a deprivation of "money or property," the Court in *McNally* overturned the mail fraud conviction.[35]

The *Carpenter* case, coming mere months after *McNally*, allowed the Court to reexamine *McNally* to determine what constitutes "property" for purposes of mail fraud. The Court in *Carpenter* permitted "intangible property" to fit the mail fraud statute[36] and held that the

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[29] United States v. Carpenter, 791 F.2d 1024, 1026 (1986).
[30] *Id.* at 1036. Circuit Judge Minor, who dissented, voted to affirm the mail fraud count.
[31] *Id.*
[32] Carpenter v. United States, 479 U.S. 1016 (1986).
[33] McNally v. United States, 483 U.S. 350, 357–58 (1987).
[34] *Id.* at 356.
[35] *Id.* at 361.
[36] Carpenter, 484 U.S. at 28.

Wall Street Journal pre-publication information traded on by the parties constituted "money or property" as "intangible property." The Court affirmed the mail fraud counts in an 8-0 opinion, a decision that laid the groundwork for distinguishing between "intangible rights" and "intangible property."[37]

The second issue examined by the Court in *Carpenter* pertained to whether insider trading could be premised on a misappropriation theory.[38] This was the first time the Court was examining the misappropriation theory as initiated from *Chiarella v. United States*.[39] The circuit courts were split on its viability,[40] and the *Carpenter* case was the ideal setting for resolving the circuit split. But in the end, whether to allow the misappropriation theory did not get resolved in the Supreme Court review of *Carpenter* as the justices were tied 4-4, leaving intact the lower court decision.[41]

III. Did Being Gay Matter?

To understand the context of the *Carpenter* case, it is important to consider the status of gay rights during

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[37] *Id.* at 24. Congress would restore "intangible rights" in its passage of 18 U.S.C. § 1346 (2018), a statute that defines the term "scheme or artifice to defraud" as "include[ing] a scheme or artifice to deprive another of the intangible right of honest service."

[38] *Id.* at 24.

[39] Chiarella v. United States, 445 U.S. 222, 235 (1980).

[40] ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL, & NANCY J. KING, WHITE COLLAR CRIME 2D 135 (2017).

[41] Carpenter, 484 U.S. at 24; *see also* E. Thomas Sullivan, Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1583–84 n. 51 (2004) "Justice Powell had retired . . . ", the Senate rejected the nomination of Robert Bork, and "Justice Kennedy had not yet been confirmed." *Id* at 1584 n. 51.

this time.[42] Gay and lesbian individuals were still called "homosexual." While many people were still closeted, at the time of this case it was reported that Winans was open about his sexuality, including his desire to start a gay journalist society.[43]

Also reported was that Winan's motive for the illegal activity was unclear as he was not thought of as an individual seeking wealth.[44] One has to wonder if the choice of a bench trial over a jury trial was because of a fear of the jury negatively reacting to a gay relationship.[45]

Comments made about the Winans-Carpenter relationship certainly point to a difference in both rhetoric and singling out of the male partnership.[46] At the time, the Wall Street Journal reported that the SEC was

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[42] When Winans and Carpenter went to the SEC in 1984, the health crisis affecting gay men, among others, which we now call AIDS, had only been changed from GRID -- Gay-Related Immune Deficiency -- two years prior. President Reagan had not yet uttered the word AIDS despite the number of deaths having exponentially risen since known cases in the U.S. were first found in 1980. The case of Bowers v. Hardwick, 478 U.S. 186, 190 (1986), the fight over the legality of homosexual sodomy, was still winding its way through the courts.

[43] Eleanor Randolph & Merrill Brown, *Inquiry on Wall Street Journal Expanded*, WASH. POST, (April 3, 1984) https://www.washingtonpost.com/archive/politics/1984/04/03/inquiry-on wall-street-journal-expanded/cb4ea487-b8a6-479a-a406-b80c86fe5c7a/?noredirect=on&utm_term=.b32296eaff6c. The Association of LGBTQ Journalists (NLGJA) was not formed until 1990. *See NLGJA Timeline- A Look Back*, NLGJA, https://www.nlgja.org/about/mission-history/timeline/.

[44] Randolph & Brown, *supra* note 44. "He was ambitious and diligent about his work, but one friend said he 'wore socks with holes in them and coat that looked like it came out of a rescue mission.'" There is a reference, however, to Carpenter having medical issues at this time. *Id.*

[45] *See* William R. Greer, *Violence Against Homosexuals Rising, Groups Seeking Wider Protection Say*, N.Y.TIMES, (Nov. 23, 1986), https://nyti.ms/29CNaFX.

[46] Randolph & Brown, *supra* note 44.

said to be investigating Winans' relationship with Carpenter.[47] The Washington Post reported that "[t]he SEC is . . . understood to be investigating Mr. Winans' relationship with Mr. Carpenter. The two are lovers. Mr. Winans recommended Mr. Carpenter for employment at the Wall Street Journal. They live together, and Mr. Winans wears a gold ring given to him by Mr. Carpenter.'"[48] Even, the district judge's opinion finding them guilty, includes a comment that "Winans and Carpenter are homosexuals who have been involved in what they describe as a 'spousal relationship' for over ten years."[49] But whether this language, or the fact that they were partners, influenced the legal rulings is less certain.[50]

Examining who was the most culpable for the criminality and who received a "deal" from the government may also raise questions as to whether the Winans-Carpenter relationship made a difference in the legal matter.[51] Winans and Carpenter were the ones to expose the intricacies of the scheme to the SEC, not Brant, yet Brant received the cooperation status and sentencing benefit.[52] Providing the keys to the government's case does not always suggest that the individual will receive the benefits of cooperation.[53] Likewise, it may be argued that the higher sentence for Winans over Brant was nothing more than the "trial penalty"[54] that many defendants face in exercising their

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[47] Randolph & Brown, *supra* note 44.
[48] Randolph & Brown, *supra* note 44.
[49] Winans, 612 F.Supp. at 829.
[50] *See* Carpenter, 484 U.S. at 22. One can say that it would be less likely to find this language in a ruling today. But it should also be noted that in the Supreme Court decision, Justice White referred to Carpenter as "Winans' roommate." *Id.*
[51] Winans, 612 F.Supp. at 837–38; *see also Broker in Winans Case Sentenced, supra* note 16.
[52] *Id.*
[53] *The Trial Penalty*, *supra* note 21.
[54] *Id.*

constitutional rights. "Don Buchwald, the lawyer for Mr. Winans, criticized the sentence given, saying it showed his client had been punished for going to trial."[55] But, it should be noted that in response to a government question on the witness stand, Winans stated that he had received an exploding offer from the government that required acceptance within twenty-four hours or David Carpenter would be indicted.[56] Again, one has to wonder if at that time this would have occurred if the parties were an opposite-sex married couple.

Although the judge gave a benefit to Brant, he noted that "[y]ou are at least as guilty as Mr. Winans, perhaps more so."[57] Looking at the disparity in the smaller amount of the moneys being received by Winans and Carpenter ($31,000) versus the remainder of the profits going to Brant and Felis ($659,000), it appears that Winans may have been being treated more harshly.[58]

Finally, this case was initially a civil matter.[59] Winans admitted he took $31,000, but his attorney argued that the government was "trying to 'pioneer' new legal ground in their fight against insider trading."[60] The misappropriation theory was not fairly entrenched in the

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[55] *Broker in Winans Case Sentenced, supra* note 16.

[56] *See* R. FOSTER WINANS, TRADING SECRETS: SEDUCTION AND SCANDAL AT THE WALL STREET JOURNAL 296–97 (1984).

[57] *Broker in Winans Case Sentenced, supra* note 16.

[58] *Id.*

[59] Some may attribute this case becoming a criminal case to the increase in prosecutions for insider trading by United States Attorney Rudolph W. Giuliani. *See* Associated Press, *Convictions in the '80s, Reversals in the '90s" Law: Critics Say Prosecutors Eager to Combat Wall St. crime were in fact overzealous. They Point to Recent Cases Overturned on Appeal*, L.A. TIMES (July 13, 1991), https://www.latimes.com/archives/la-xpm-1991-07-13-fi-1909-story.html (discussing the backlash to U.S. Attorney Giuliani's insider trading cases).

[60] Associated Press, *3 Indicted in Stock Fraud Linked to Wall St. Journal*, PHIL. INQUIRER, Aug. 29, 1984, at C01.

law and one wonders if its use here was because of considerations beyond the facts of the case.[61]

IV. Final Thoughts

In addition to the issues covered here, the case also raises many issues found in too many criminal prosecutions. These include prosecutorial discretion in overcharging a case, using new theories to proceed upon in a prosecution, using an exploding offer to an accused to try and obtain a plea bargain, pitting one defendant against another to secure cooperation, not providing cooperation credit when a federal agency maintains that the credit will be provided, and using an internal workplace rule as the basis for a criminal prosecution.[62] Many of these concerns cry out for accountability of prosecutorial discretion and the need for a fortified *mens rea* in criminal cases. When internal ethical violations become the basis for a criminal prosecution, one should question the necessity and value of the criminal action.

But in looking at this case from a lens that goes beyond the typical criminal justice concerns, many questions remain unanswered. Would the parties have fared better with a jury trial in an environment more accepting of gay relationships? Would the judge have even considered their relationship and would the mention of a ring on a person's hand been noticed? Would the sentences and cooperation credit have been different in a world that allowed gays to marry? There are many other questions that remain unanswered, but it is important to recognize that there is more to this case then just the misappropriation of prepublication articles of a newspaper.

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[61] Of course, there are also questions concerning the use of mail fraud in a case premised upon an office ethics policy, namely the Wall Street Journal's rule on confidentiality of articles prior to publication. Carpenter, 484 U.S. at 23.
[62] *See generally* Vorenburg, *supra* note 18.