Bloomberg Law

White Collar Crime Report™

BRIBERY

Two attorneys with Patterson Belknap discuss the Second Circuit's ruling that overturned the conviction of former New York State Assembly leader Sheldon Silver. The authors examine the ruling in light of the U.S. Supreme Court's *McDonnell* decision, and look ahead in addressing what can be expected in a likely retrial.

Silver Conviction Vacated Due to Jury Instructions

BY HARRY SANDICK AND JESSICA RICE

On July 13, the U.S. Court of Appeals for the Second Circuit released an opinion vacating the conviction of Sheldon Silver and remanding the case to the district court for further proceedings including a retrial. The Second Circuit concluded that the evidence of guilt was sufficient to permit a retrial, but found that the jury instructions did not comport with the U.S. Supreme Court's decision in 2016 in *McDonnell v. United States*, and that the error was not harmless. The panel took no joy in rendering its decision, observing that ''many would view the facts adduced at Silver's trial with distaste.'' Nor did the panel blame either the district court or the government for the reversal, recognizing that the *McDonnell* decision—which changed the law of the Circuit—was issued after the Silver trial had concluded. Nevertheless, the panel—composed of Judges JoseA. Cabranes, Richard C. Wesley, and William K. Sessions III, sitting by designation from the District of Vermont—felt itself compelled by *McDonnell* and the facts of the case to decide the matter as it did.

Harry Sandick is a partner at Patterson Belknap Webb & Tyler LLP in New York and a member of the firm's White Collar Defense and Investigations team. A former assistant U.S. attorney for the Southern District of New York, he focuses his practice on white collar criminal defense, securities fraud, internal investigations, complex civil litigation and appellate litigation.

Jessica Rice is an associate in Patterson Belknap's litigation department in New York.

Sandick and Rice are both contributors to the Second Circuit Criminal Law Blog at http://www.secondcircuitblog.com.

Background

Silver served as Speaker of the New York State Assembly from 1994 until his resignation in 2015, which came after he was indicted in the Southern District of New York. While Silver served in the Assembly, he continued to practice law on a part-time basis, which is permitted in New York.

Two aspects of his legal practice drew the government's scrutiny. First, the government alleged that he ''performed favors'' for a doctor at a New York City hospital, Dr. Robert Taub, and that in exchange, the doctor referred mesothelioma patients to Silver's law firm, where they could initiate products liability lawsuits. Dr. Taub testified that he made the referrals in order to benefit Silver personally in his law practice. A few months after Dr. Taub made these referrals, Silver directed state research grants to Dr. Taub's hospital in order to support his research. After state law changed

in a manner that would have required additional disclosure by Silver about this arrangement, no further grants were made to Dr. Taub or his hospital. However, Dr. Taub continued to make referrals and Silver continued to provide benefits to Dr. Taub, such as hiring his daughter and donating funds to a non-profit organization associated with Dr. Taub's wife. Over a 10-year period, Silver received roughly $3 million in referral fees for cases referred to Silver's law firm by Dr. Taub.

The money laundering analysis required the Court to resolve an open question about the interpretation of 18 U.S.C. § 1957. Does this statute—sometimes called the ''money spending'' statute—require the government to trace ''dirty'' funds that are comingled with ''clean'' funds in a single account?

The government also alleged a second and wholly distinct kickback scheme. The government adduced evidence at trial to prove that Silver also performed favors for two real estate developers who then hired a different law firm that also paid referral fees to Silver. The two developers were dependent on favorable state legislation and tax-exempt financing, which must be approved by a state agency. Given Silver's role as Assembly Speaker, he was in a position to exercise influence on behalf of the developers in both regards. Silver allegedly induced the developers to hire a particular law firm for tax certiorari matters that paid Silver a referral fee in the amount of 25% of what the firm earned on the particular matter. The developers claimed not to know of Silver's financial arrangement with the law firm but feared alienating Silver lest he decide not to advance the legislative matters that were important to their business. Silver acted favorably toward the developers, and over an 18-year period, Silver received approximately $835,000 in referral fees from the law firm.

Finally, the government charged Silver with money laundering based on allegations that he invested the proceeds of these two schemes into private investment vehicles. The PIVs were high-yielding vehicles managed by a private investor. Silver asked the investor to place a portion of the funds in an investment in the name of Silver's wife in order to avoid publicly disclosing the full amount of the investment.

Jury Instructions Silver was charged with four counts of honest services fraud, two counts of Hobbs Act extortion, and one count of money laundering. The first two sets of counts required a definition of the term ''official act,'' as Silver only could be held responsible if he received bribes or kickbacks in exchange for performing an official act.

Prior to trial, both Silver and the government offered competing jury instructions about how to define an ''official act''—the term given a more narrow construction by the Supreme Court in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Silver's proposed instruction quoted the federal bribery statute (Section 201(a)(3)): ''[a]n 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity.'' In contrast, the government offered a broader definition: an official act is ''any act taken under color of official authority.''

Then, at the charge conference, Silver offered a slightly different definition of official act: ''the exercise of actual governmental power, the threat to exercise such power, or pressure imposed on others to exercise actual government power.'' The government proposed an instruction that was similar to its original instruction: ''any action taken or to be taken under color of official authority.''

The final jury instruction followed the government's proposal. The jury would have to find ''that a bribe or kickback was sought or received by Mr. Silver . . . in exchange for the promise or performance of official action. Official action includes any action taken or to be taken under color of official authority.'' Silver objected to this jury instruction at trial.

The district court also gave a charge on the statute of limitations, stating that the jury needed to find that Silver engaged in the charged offenses after February 19, 2010—five years before Silver's indictment.

Conviction and Post-Trial Motions Silver was convicted on all counts and sentenced to 12 years' imprisonment; $5.4 million in forfeiture and a $1.75 million fine were also ordered. After sentencing, Silver sought continued bail pending a decision in *McDonnell*. While this motion was *sub judice*, *McDonnell* was decided. The district court stated that Silver's case was ''factually almost nothing like *McDonnell*,'' but she recognized that there was a ''substantial question'' raised by *McDonnell* about whether the jury instructions were erroneous.

Second Circuit Opinion

Sufficiency of the Evidence The panel had little difficulty finding that sufficient evidence supported Silver's conviction. With respect to the Hobbs Act convictions, the panel rejected Silver's argument that no one was deprived of property, finding that the mesothelioma leads and tax certiorari business were both valuable, albeit intangible, property. With respect to the honest services fraud, the Court quickly concluded that the case involved bribes and kickbacks—precisely the types of honest services fraud claims available in the wake of the Supreme Court's *Skilling* decision, 561 U.S. 358 (2010).

The money laundering analysis required the Court to resolve an open question about the interpretation of 18 U.S.C. § 1957. Does this statute—sometimes called the ''money spending'' statute—require the government to trace ''dirty'' funds that are comingled with ''clean'' funds in a single account? Two circuits (the Fifth and the Ninth) have ruled that such tracing is required, but seven circuits have rejected such a requirement. The Court adopted the majority view, reasoning that such a requirement would allow individuals to defeat a Section 1957 charge by commingling legitimate funds and criminal proceeds. This formerly open issue in the Circuit is now resolved.

  WCR ISSN 1559-3185

***McDonnell*'s Definition of Official Act** The Court did find error in the district court's jury instructions in light of *McDonnell*, which gave a more narrow definition of ''official act'' than the Second Circuit has applied in the past. In *McDonnell*, the Supreme Court reversed the conviction of the former Virginia governor and laid out a new two-part test for determining whether there was an official act:

First, ''[t]he 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.'' 136 S. Ct. at 2372.

Second, ''to qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so.'' *Id.* Such an action or decision ''may include using [an] official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official.'' *Id.*

Jury Instructions and Harmless Error Analysis Given this revised definition of ''official act,'' the Circuit had little difficulty finding that the jury instruction was erroneous. The jury was permitted to convict based on a finding that Silver took ''*any action* taken or to be taken under color of official authority.'' This is far broader than the definition approved by the Supreme Court in *McDonnell*. The jury was not informed that the official act needed to be a ''decision or action on a matter involving the formal exercise of government power akin to a lawsuit, hearing, or agency determination.'' The jury might also have thought that ''meetings or events with a public official to discuss a given matter'' qualified as official acts. Indeed, the government even argued in its summation for the broadest possible definition of the term.

The Court then concluded that the error could not be said to be harmless beyond a reasonable doubt. Unlike the sufficiency analysis, which is favorable to the government, the harmless error standard requires reversal of the conviction unless the government can prove that it is clear beyond a reasonable doubt that a rational jury would've found the defendant guilty absent the error. The government offered evidence of both official acts and acts outside the definition of ''official act'' laid down in *McDonnell*, and so the Court could not determine which acts the jury viewed as essential to its guilty verdict. The conviction therefore had to be vacated.

The Court first focused on the fact that the ''mesothelioma scheme'' included considerable evidence of official acts that occurred outside the five-year statute of limitations period. Some of the acts within the relevant time period might not constitute official acts under *McDonnell*, such as Silver's assistance to Dr. Taub in obtaining permits for a charity race, or his helping Dr. Taub's son obtain a job with a non-profit that received state funding. One of the acts relating to Dr. Taub that Silver conceded was ''official'' involved Silver's passage of a resolution honoring Dr. Taub, but this pro forma legislative exercise (a ''*de minimis quo*[]'') might not have been sufficient for a jury to prove a *quid pro quo*. The Court observed that the most significant *quid pro quo* arrangement—the trade of referral fees for grants—occurred well outside the statute of limitations period.

The Circuit also assessed the evidence of official acts taken as part of the ''real estate scheme'' and concluded that the acts alleged by the government might not have been sufficient for conviction. For example, Silver wrote a letter opposing the opening of a methadone clinic near one of the developer's properties but this is not a formal exercise of governmental power and therefore not an official act under *McDonnell*. Nor would a meeting between Silver and a group of lobbyists to discuss legislation qualify as an official act. Silver's legislative votes would qualify as official acts, but here the Court explained that a jury might not conclude that these were part of a *quid pro quo* arrangement.

Finally, the Court concluded that the money laundering count rested on the other convictions and therefore also needed to be vacated.

Analysis

First, just a few short hours after the decision's release, the government stated that it intends to retry Silver. The Court gives somewhat mixed messages about whether it views this as a triable case on remand. While the Court had no difficulty finding the evidence sufficient, its harmless error analysis provides a road map for Silver's counsel on retrial. The defense will argue first that most of the acts taken by Silver are either time-barred or not official acts. To the extent that his actions are both timely and official, Silver can argue that they are so *de minimis* or uncontroversial that they do not qualify as part of a *quid pro quo* arrangement—which they must in order to survive scrutiny under the *Skilling* rule. But it is clear that despite these hurdles, the U.S. Attorney's Office will not walk away from one the most prominent public corruption convictions that it won during the tenure of Preet Bharara.

Second, the Circuit's distaste for the unseemly facts of the case will no doubt be mirrored by public reaction to this decision. The Speaker of the New York Assembly—one of the ''three men in a room'' who make our State's laws—was trading favors for referral fees, over extended periods of time. This decision may give the public the impression that it is impossible to prevent this type of corruption. Indeed, *McDonnell* was met with a similar response: Why should it be legal for a politician to sell his or her office in this way? It calls to mind the Michael Kinsley witticism that sometimes the real scandal is not what is illegal, but what is legal. At the same time, the Supreme Court and the Second Circuit have been concerned for many years that the honest services fraud theory is too loose and flexible to give fair notice to politicians about the difference between constituent services and an illegal scheme to defraud the public. Public corruption is wrong, but our criminal laws must be fair to all, even politicians. It will be interesting to see if Congress acts again—as it did after the Supreme Court struck down the honest services fraud theory in *McNally v. United States*, 483 U.S. 350 (1987).

Third, in *United States v. Boyland*, No. 15-3118, an appeal involving another New York politician, William F. Boyland, Jr., also convicted of honest services fraud, the Circuit found that the jury instructions also failed to comport with *McDonnell* but nevertheless affirmed Boyland's conviction. The panel opinion here acknowledges *Boyland* but notes the ''clear factual differences'' between the two cases and emphasizes that a different standard of review applied in *Boyland* as there had

been no objection to the jury instructions at trial. Plain error is a more demanding standard and it shifts the burden of proving prejudice to the defendant.

Fourth, the Second Circuit has yet to decide the appeal of former New York Senate Majority Leader Dean Skelos, involving the conviction of another of the three men in a room. The Circuit's decision in *Silver* and in *Boyland* suggests that the Circuit will find error in the Skelos jury instructions and will then be required to perform a fact-specific analysis in order to determine if the error was harmless or prejudicial.

Finally, although hardly the main event in this opinion, those who follow the money laundering statutes will take note that the Circuit has finally taken a side in the question of how to handle cases brought under Section 1957 involving the commingling of dirty and clean funds. Given the protracted circuit split on this issue, it is ripe for Supreme Court review.

  WCR ISSN 1559-3185