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SECOND CIRCUIT REVIEW

Expert Analysis

Narrowing the Definition Of Quid Pro Quo

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In *United States v. Silver*, the U.S. Court of Appeals for the Second Circuit vacated former Speaker of the New York State Assembly Sheldon Silver's conviction on several counts for the second time in two and a half years. The decision reflects the court's increasingly narrow theory of bribery, one that increases the government's burden for proving that an official engaged in a quid pro quo, which is necessary to sustain a public corruption conviction. In an opinion written by U.S. Circuit Judge Richard Wesley and joined by Circuit Judge Richard J. Sullivan, the Second Circuit held that honest services fraud and Hobbs Act extortion require specificity in the jury instructions as to the question or matter to be influenced by the official, and that the district court's jury instructions failed to convey this limitation.

While reversing his conviction on three of the counts, the court affirmed Silver's conviction on four other counts, holding that the error in the jury instructions was harmless. In a concurring opinion, Circuit Judge Raymond Lohier insisted that, despite its narrowing effect, *Silver* does not represent a significant change in the law.

Prior Proceedings in 'Silver'

This was Silver's second appeal to the court, following his second trial before U.S. District Court Judge Valerie Caproni. In 2015, Silver was convicted on all seven counts with which he was charged—two counts each of honest services mail fraud under 18 U.S.C. §1341, honest services wire fraud under 18 U.S.C. §1343, Hobbs Act extortion under 18 U.S.C. §1951, and one count of money laundering under 18 U.S.C. §1957. The crimes at issue involved two referral schemes: the first (the "Mesothelioma Scheme") related to official acts Silver performed for a physician-researcher, Dr. Taub, in exchange for referrals to Silver's law firm; the second (the "Real Estate Scheme") related to official acts Silver performed for two real estate development firms in exchange for referrals to a friend's law firm, from which he received referral fees. Together, the two schemes generated over $3.5 million in referral fees for Silver.

On his first appeal, Silver argued that *McDonnell v. United States*, 136 S. Ct. 2355 (2016), decided seven weeks after his trial, rendered Judge Caproni's jury instructions erroneous due to their broad definition of an "official act." The Second Circuit agreed with Silver and remanded all seven counts to the district court for a new trial. During his second trial, Judge Caproni's jury instructions tracked the Supreme Court's language in *McDonnell*, defining an "official act" as a "decision or action

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on a specific matter," where the "decision must *be made* on a question or matter that involves a formal exercise of power…[and] the question or matter must be *specific, focused,* and *concrete*." *United States v. Silver*, 2020 WL 284426, *13 (2d. Cir. Jan. 21, 2020) (quoting the district court's jury instructions (emphasis added)). Silver was again convicted on all seven counts.

The Second Circuit Opinion

Silver appealed his convictions a second time, arguing that the district court's jury instructions were erroneous on two grounds: first, that they omitted the requirement of "agreement" between a bribe's payor and receiver; and second, that they failed to convey a sufficiently narrow definition of an "official act" in light of *McDonnell*. Id. at *3. The court quickly rejected Silver's first argument, maintaining that neither extortion under color of right nor honest services fraud requires a "meeting of the minds" in common corrupt intent. Id. at *3-7.

The court did find "limited merit," however, in Silver's second argument, agreeing that *McDonnell* requires evidence that the official understood, at the time of payment, the particular question or matter to be influenced. *McDonnell* established that an "official act" requires a decision or action on a "specific and focused" question or matter. *McDonnell*, at 2371-72. Although Judge Caproni's district court instructions required specificity as to the matter to be influenced, they did not require such specificity at the time of payment. They required only that Silver "promised to perform some or any official acts, *for the benefit of the payor*, as the opportunities arose." 2020 WL 284426, at *19 (emphasis added). The court held that the instructions were therefore erroneous.

While it agreed with Silver in part, the court did not read *McDonnell* as narrowly as he urged. Silver argued that *McDonnell* did away with the "as the opportunities arise" theory of bribery, "under which an official need not have promised to perform any specific official acts at the time of payment," which was established by the Second Circuit in *United States v. Ganim*, 510 F.3d. 134 (2d. Cir. 2007). 2020 WL 284426, at *8. The court disagreed that *McDonnell* replaced *Ganim*'s legacy with a requirement that the government prove a specific *act* to be performed in exchange for payment. Id. at *19. Instead, the court insisted that *Ganim*'s "as the opportunities arise" theory not only survives *McDonnell*, but that the two cases also "fit[] comfortably" together. Id. at *12. The court reasoned that *Ganim* already required "an anticipated exchange of payment for 'particular kinds of influence'"—similar to the specificity required by *McDonnell*, except that the latter requires that the official understand this specificity at the time he makes his promise or accepts payment. Id. The court met the parties in the middle—accepting neither the government's reliance on an "open-ended interpretation of *Ganim*," nor Silver's "overread[ing] of *McDonnell*" to require evidence of a specific act. Id. at *14. The court settled instead on an interpretation of *McDonnell* that serves as a "narrowing gloss" on the "as the opportunities arise" theory. Id. at *12.

> 'Silver' limits significantly the Second Circuit's longstanding bribery precedent, raising the bar for what the government must prove to establish the existence of a quid pro quo in public corruption cases.

Three of Silver's seven convictions—those involving the Mesothelioma Scheme—did not withstand this narrowing gloss. The court held that the district court's jury instructions described a quid pro quo that is too open-ended, failing to convey that for honest services fraud, the government needed to prove that Silver promised, at the time he accepted the bribe, to take official action on a specific and focused question or matter as the opportunities to take such action arose; and that for extortion under color of right, the government needed to prove that Silver understood, at the time he accepted the extorted property, that he was expected to take official action on a specific

and focused question or matter as the opportunities to do so arose. Id. at *24.

The court held that this error was not harmless as to the Mesothelioma Scheme convictions and, further, that the government had not proven beyond a reasonable doubt that Silver promised anything more to Dr. Taub than to keep him happy as the opportunities to do so arose. Id. at *22. The only quid pro quo between Silver and Dr. Taub that the government could prove beyond a reasonable doubt—and which the court noted was a "quintessential example of a public official extorting a constituent under color of right and committing honest services fraud"—was Silver's acceptance of referrals in exchange for the promise of influence over the question of whether the Assembly would allocate HCRA grants to Dr. Taub. Id. at *16. But this conduct was time-barred. Id. As a result, the court remanded to the district court to dismiss all three counts related to Dr. Taub and the mesothelioma patients. Id. at *29.

The court held that the error was harmless as to the Real Estate Scheme convictions because there was sufficient evidence to convince a rational jury that, at the time Silver accepted payment (i.e., referral fees from business provided to his friend's firm by developers), he understood the particular matter he was expected to influence (i.e., tax abatement and rent stabilization programs). Id. at *24. The evidence presented at trial included the fact that the developers knew that Silver's vote alone could prevent them from receiving funding from the Public Authority Control Board (PACB), and that Silver had significant power to influence the Rent Act, specific provisions of which were essential to the developers' business. Id.

The government's evidence also included a "side letter" retainer agreement between Silver and the developers indicating that Silver would receive a portion of the referral fees in exchange for his help in securing funding from the PACB. Id. at *23. The court affirmed Silver's three convictions related to this scheme, as well as his conviction for money laundering, which the court held was unaffected by the erroneous jury instructions. Id. at *28.

The court's opinion is particularly salient today, when the term "quid pro quo" has become an integral part of the public lexicon.

Concurrence

Judge Lohier wrote separately to comment on the "quite narrow scope" of the court's opinion. Id. at *29. He first noted that the opinion "simply clarifies, without altering the 'as the opportunities arise' doctrine that has long been a part of [Second Circuit] precedent." Id. He further reconciled *McDonnell* and *Ganim*, lending support to the majority's earlier point that the two "fit[] comfortably" together. Id. Next, Judge Lohier pointed out that the majority had not addressed how specific the payor or receiver of a bribe must be in defining the particular matter or question at the time of the promise, and that this is a question that other courts will "iron out over time." Id. at *30. Finally, Judge Lohier noted that the majority's opinion was limited to the "as the opportunities arise" theory of bribery from *Ganim* and does not extend to other theories of bribery not implicated in Silver's case. Id.

Conclusion

The court's opinion is particularly salient today, when the term "quid pro quo" has become an integral part of the public lexicon. On its face, *Silver* limits significantly the Second Circuit's longstanding bribery precedent, raising the bar for what the government must prove to establish the existence of a quid pro quo in public corruption cases, despite the majority's and concurrence's insistence that the decision is merely a "narrowing gloss." Post-*Silver*, however, the government may face significant hurdles in charging and trying public corruption cases.