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White-Collar Crime

Expert Analysis

'Menendez' Decision Clarifies Issues In Public Corruption Cases

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In white-collar criminal enforcement, attention has shifted in recent years from insider trading to high-profile cases of alleged public corruption. The U.S. Attorney's Offices for the Southern and Eastern Districts of New York have prosecuted a number of New York State legislators, although two of the most significant convictions—of former Assembly Speaker Sheldon Silver and former Senate Majority Leader Dean Skelos—were overturned on appeal, as we discussed in a recent article, Elkan Abramowitz and Jonathan Sack, "Limits on the Scope of Honest Services Fraud," N.Y.L.J. (Nov. 7, 2017). A Southern District jury recently reached a mixed verdict in the prosecution of Joseph Percoco (a former senior New York state executive branch staff member) and three others, finding Percoco guilty on three counts (and acquitting him on three others), deadlocking on Peter Galbraith Kelly Jr., convicting Steven Aiello on one count (and acquitting him on two others), and acquitting Joseph Gerardi. As this article goes to press, the trial of former Nassau County Executive Edward Mangano, his wife and former Oyster Bay Town Supervisor John Venditto has begun in the Eastern District.

In this article, we discuss the prosecution of U.S. Senator Robert Menendez and co-defendant Dr. Salomon Melgen, who were charged in the District of New Jersey with bribery, honest services fraud and related offenses. Senator Menendez was also charged with making false statements on federal financial disclosure forms. The prosecution resulted in a hung jury and mistrial in late 2017. After the district court, Senior District Judge William H. Walls, granted defense motions for acquittal as to seven of 18 counts in the indictment, *United States v. Menendez*, 2018 WL 526746 (D. N.J. Jan. 24, 2018), the government announced that it would dismiss the remaining counts and not try the defendants again, apparently concluding that the partial dismissal had severely weakened the government's case on the surviving counts.

> While the 'Menendez' decision did not break new legal ground, Judge Walls's detailed and thoughtful analysis provides guidance to prosecutors and defense counsel in future public corruption cases.

Below, we focus on two aspects of Judge Walls's decision. *First*, in discussing the benefits given by Dr. Melgen to Senator Menendez, the district court explained and applied

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a distinction in the law between campaign contributions and other things of value—a distinction derived from the First Amendment protection given to campaign contributions. *Second*, the district court rejected arguments of the defendants premised on a restrictive reading of "official act" under the Supreme Court's decision in *McDonnell v. United States*, 136 S.Ct. 2355 (2016). While the *Menendez* decision did not break new legal ground, Judge Walls's detailed and thoughtful analysis provides guidance to prosecutors and defense counsel in future public corruption cases.

The Prosecution

The prosecution of Senator Menendez and Dr. Melgen, a prominent Florida ophthalmologist, grew out of a roughly 20-year relationship which began when the two men met in the early 1990s, and which both men described as a strong friendship. Between 2006 and 2013, Dr. Melgen gave many personal gifts to Senator Menendez and made substantial political contributions to help the Senator; and Senator Menendez sought to assist Dr. Melgen on several occasions by contacting federal executive departments and agencies.

The two principal charges against them were bribery of a federal public official, in violation of 18 U.S.C. § 201, and a scheme to deprive the United States and citizens of New Jersey of their intangible right of honest services, in violation of 18 U.S.C. § 1346. One set of charges arose from personal gifts to the Senator, while a separate set of charges arose from political contributions made by Dr. Melgen on the Senator's behalf.

The evidence at trial showed that Dr. Melgen gave Senator Menendez a series of gifts between 2006 and 2010, including a stay in an upscale Parisian hotel; private, chartered and first-class commercial flights; and stays at Dr. Melgen's villa in the Dominican Republic. Dr. Melgen also made two sizeable political contributions in 2012, totaling $600,000, to a political action committee (PAC) that supported Senator Menendez's reelection; a $40,000 contribution to the New Jersey Democratic State Committee in 2012 for a "get out the vote" effort on behalf of Senator Menendez; and a $20,000 contribution in 2012 to a fund that paid legal expense for Senator Menendez. Between roughly 2007 and 2012, Senator Menendez took several actions on Dr. Melgen's behalf. Senator Menendez (1) interceded with State Department officials in 2007 and 2008 to secure favorable consideration of visa applications for friends of Dr. Melgen; (2) urged senior Department of Health and Human Services (HHS) officials in 2009, 2011 and 2012 to change a policy that could resolve a pending Medicare-billing dispute in favor of Dr. Melgen; (3) pressured State Department officials in 2012 to take action to benefit Melgen in a dispute over a port security contract; and (4) opposed the gift of security scanning equipment to the Dominican Republic in 2013. Id. at *6.

> The result in 'Menendez'—acquittal on some counts, followed by the government's dismissal of the remaining counts—illustrates the challenges of translating concern over public corruption into a successful criminal prosecution.

The government argued at trial that Dr. Melgen's gifts and contributions were part of an arrangement under which Senator Menendez had agreed to intercede with government officials for Dr. Melgen on an as needed basis over many years, and that in order to conceal his wrongdoing Senator Menendez purposely failed to disclose the value of personal gifts from Dr. Melgen on financial disclosure forms. Both defendants argued, in sum and substance, that Dr. Melgen's personal gifts and political contributions grew out of a long friendship, not an illegal agreement; and that Senator Menendez interceded with executive branch officials on account of friendship and on policy grounds,

not in exchange for things of value from Dr. Melgen.

Dismissal of the Campaign Contribution Counts

In a case charging bribery of a public official, the government must establish a quid pro quo—that is, that the public official agreed to perform an official act in exchange for something of value. Ordinarily, the "agreement 'need not be explicit," and "the public official need not specify the means that he will use to perform his end of the bargain." *Menendez*, 2018 WL 526746, at *2 (citing *McDonnell*, 136 S.Ct. at 2371). The key is that "the public official 'understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise.'" 2018 WL 526746, at *2 (citing *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017)).

The district court granted the defendants' motions to dismiss the bribery and honest services fraud counts based on campaign contributions, but denied the defense motions to dismiss counts based on personal gifts to the Senator. Central to the district court's analysis was the distinction in the law, grounded in the First Amendment, between campaign contributions and other things of value. In *McCormick v. United States*, 500 U.S. 257, 273 (1991), the Supreme Court held that when the thing of value is a campaign contribution, an "explicit" quid pro quo is required to prevent prosecution of "conduct that has long been thought to be well within the law [and] also conduct that is in a very real sense unavoidable" in a political system financed by private contributions. *McCormick*, 500 U.S. at 272. Put simply, the government must prove a quid pro quo in any prosecution premised on bribery of a public official, but in the case of bribery based on campaign contributions, the government must prove something more: an "explicit" quid pro quo, which requires evidence "connecting the *quid* and the *quo*." *Menendez*, 2018 WL 526746, at *2.

Judge Walls emphasized that an "explicit" quid pro quo does not mean that the agreement between the donor and the public official needs to be "express"—that is, "political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud" because "explicit" refers "not to the form of the agreement between the payor and payee, but the degree to which the payor and payee were aware of its terms." Id. at *12 (internal quotations marks omitted). Beyond this general formulation, Judge Walls elaborated on the meaning of "explicit" chiefly by analyzing several other cases in which the facts did, and did not, establish an "explicit" quid pro quo. Id. at *14, 16.

Of particular importance was the Seventh Circuit's opinion in *Empress Casino Joliet v. Johnston*, 763 F.3d 723 (7th Cir. 2014), which addressed civil RICO claims arising from campaign contributions made by racetrack owners to Governor Rod Blagojevich in exchange for his approval of certain legislation. Two pieces of legislation were at issue. As to one, the court held that when the donors sent Blagojevich a "thank you" note and a $125,000 campaign contribution the day after he signed the bill, the facts were not sufficient to prove an explicit *quid pro quo*. As to the other bill, when the donors asked Blagojevich's staff member if "they needed to 'put a stronger bit in [the Governor's] mouth!?!" (alteration in original), and Blagojevich instructed his staff (before signing the bill) to tell the racetrack owners that "'once [they] made the contribution, the act would be signed,'" id. at *14 (quoting *Empress Casino*, 763 F.3d at 726, 725), the court held the facts to be sufficient to make out an explicit quid pro quo. The Seventh Circuit concluded that, in regard to the second bill, a "rational juror could find that the Governor was aware of the terms of th[at] agreement: a $100,000 contribution in exchange for a signature." Id. (citing *Empress Casino*, 763 F.3d at 732).

Space does not permit a full description of Judge Walls's application of the law to the evidence at

trial, but two aspects of his detailed analysis stand out. First, in response to government timelines seeking to establish a relationship between campaign contributions and official acts, the district court emphasized that "chronology alone," or simply a close temporal relationship between a political contribution and official acts, is not a legally sufficient basis on which to find an explicit quid pro quo; additional evidence linking the two is required. Id. at *11, 12. Second, the district court rejected the government's argument that an explicit quid pro quo could be based on "escalation" to more senior officials after an initial meeting proved unsuccessful. Id. at *15. The court acknowledged that "unusual official action" can be evidence of an explicit quid pro quo in some situations. See *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013) (judge ruled on two summary judgment motions despite lack of familiarity with the cases). But "more than strong advocacy" is required, particularly when the acts are not unusual, as when a legislator advocates a public policy position that is consistent with one he previously had taken. *Menendez*, 2018 WL 526746, at *15.

Interpretation of 'McDonnell'

In addition to rejecting certain government arguments, Judge Walls also did not accept several defense arguments which were premised on a narrow reading of the *McDonnell* decision. We note two of the district court's rulings below.

First, Senator Menendez and Dr. Melgen argued that the *McDonnell* decision invalidated the "stream of benefits" theory, by which the government has sought to establish the required *quo* in a quid pro quo through official action taken "as specific opportunities arise," not through specific action identified at the time the benefit was received. Id. at *2, 3. Judge Walls held that *McDonnell* did not invalidate the "stream of benefits" theory of prosecution, explaining that *McDonnell* did not impose a temporal requirement on official action: *McDonnell* "merely narrowed the definition of 'official act'" and "says nothing new about what nexus must be shown between a thing of value and an official act. In other words, *McDonnell* is about the *quo* not the *pro*." Id. at *4.

Second, the defendants argued that the sort of advocacy and support given by Senator Menendez to executive branch officials on behalf of Dr. Melgen did not meet the requirements of *McDonnell*. Judge Walls rejected the argument, holding that the Senator's conduct could reasonably be viewed as "exert[ing] pressure" on an agency staff member to take official action, or "provid[ing] advice" with the knowledge or intent that the advice yield an official act. Each of these grounds for finding official action was contemplated in the *McDonnell* decision. Judge Walls explained that the Chief Justice in *McDonnell* "carefully drew the line" between inter-branch advocacy that could constitute "official action" and "advocacy that could not." *Menendez*, 2018 WL 526746, at *7 (citing *McDonnell*, 136 S.Ct at 2371-72).

Conclusion

The result in *Menendez*—acquittal on some counts, followed by the government's dismissal of the remaining counts—illustrates the challenges of translating concern over public corruption into a successful criminal prosecution. What Judge Walls's decision makes clear is that campaign contributions may still be the basis for public corruption charges, but the evidentiary hurdles for the government in such a case are particularly high. The district court also makes clear that, notwithstanding the limitations of *McDonnell*, official acts may still be found when officials exert "pressure" and provide "advice" directed to achieving official acts. But the path to a successful prosecution is not an easy one, and the issues addressed in *Menendez* are likely to play out in future prosecutions.