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NEWSLETTER

Second Circuit Vacates Sheldon Silver Corruption Convictions

July 2017

On July 13, 2017, a three-judge panel of the U.S. Court of Appeals for the Second Circuit – applying the circumscribed definition of "official act" adopted by the Supreme Court in its June 2016 *McDonnell* decision – unanimously vacated the conviction of former New York State Assembly Speaker Sheldon Silver on multiple public corruption counts. The case was remanded to the District Court for further appropriate action. Almost immediately after the Court of Appeals issued its decision, the Acting U.S. Attorney for the Southern District of New York, Joon H. Kim, announced that he and his office "look forward to retrying the case."

Following a jury trial, Silver was found guilty in November 2015 of four counts of honest services fraud (18 U.S.C. §§ 1341, 1343, 1346), two counts of Hobbs Act extortion (18 U.S.C. § 1951), and one count of money laundering (18 U.S.C. § 1957). In its opinion vacating these guilty verdicts, the Court summarized the government's charges against former Speaker Silver:

The Government's charges against Silver involve his part-time work as a practicing lawyer. The Government sought to prove that Silver orchestrated two criminal schemes that abused his official positions for unlawful personal gain. Each of these alleged schemes had the same premise: in exchange for official actions, Silver received bribes and kickbacks in the form of referral fees from third-party law firms. In one scheme, Silver performed favors for a doctor in exchange for the doctor's referral of mesothelioma patients to Silver's law firm . . . In the other, Silver performed favors for two real estate developers who had hired, at Silver's request, a law firm that was paying referral fees to Silver . . . Jointly, these alleged schemes produced roughly $4 million in referral fees for Silver. The Government also charged that

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Silver engaged in money laundering by investing the proceeds of the Mesothelioma and Real Estate Schemes into various private investment vehicles . . .

Proof by the government that a public official committed either honest services fraud or Hobbs Act extortion requires proof of a quid pro quo arrangement, that is, proof that the public official performed (or promised to perform) an "official act" (or "official action") in exchange for something of value (or the promise of something of value). The scope and meaning of "official act" in federal public corruption cases is now controlled by the Court's decision in *McDonnell*. As we wrote at the time of that landmark decision:

In rejecting the government's broad interpretation of "official act," the Court embraced a more "bounded interpretation" of the term encompassing only "a decision or action on a question, matter, cause, suit, proceeding or controversy" involving 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. An official act is "something specific and focused that is 'pending' or 'may be brought before a public official." The definition of "official act," the Court ruled, does not include an official's setting up meetings, calling other officials, or hosting an event, "without more" – even if that "more" is limited to exerting pressure on another official to perform an "official act."

Election Law News, June 29, 2016.

The linchpin of Sheldon Silver's appeal of his conviction was that the definition of "official action" with which the District Court charged the jury was overly expansive and inclusive and, therefore, erroneous. In charging the jury, the District Court had essentially adopted the government's proposed definition that an "official action" "includes any action taken under color of official authority." (Silver's defense team had argued for use of a much narrower definition of "official act.") As the Court of Appeals notes in its opinion, this jury charge – given in November 2015, prior to the Supreme Court's decision in *McDonnell* – was consistent with the Second Circuit's precedent at the time. But, by the time the District Court decided Silver's post-conviction motion for bail pending appeal – in August 2016, post-*McDonnell* – the likely success of Silver's argument that the trial jury was erroneously charged on the definition of "official action" was clear, including to the trial judge. In granting Silver's motion for bail pending appeal, Judge Valerie E. Caproni wrote:

Silver's case is factually almost nothing like *McDonnell*; there is no question that Silver took a number of official acts — most obviously, passing legislation and approving state grants and tax-exempt financing — as part of a *quid pro quo* in the Mesothelioma and Real Estate Schemes. Nevertheless, there is a substantial question whether, in light of *McDonnell*, the charge was in error and, if so, whether the error was harmless.

United States v. Silver, 203 F. Supp. 3d 370, 380 (S.D.N.Y.2016).

In vacating Silver's convictions, the Court of Appeals did not determine that – assuming a correctly charged jury – the former Assembly Speaker *could not* be convicted properly based on the actions alleged by the government (or, at least based on some of the actions alleged by the government). Rather, the Court of Appeals held that the District Court's error in charging the jury on the meaning of "official action" "was not harmless because it is not clear beyond a reasonable doubt that a rational jury would have reached the

same conclusion if properly instructed, as is required by law for the verdict to stand."

In his statement following announcement of the Court of Appeals' decision, Acting U.S. Attorney Kim expressed optimism about the outcome of a retrial of the Silver case:

Although this decision puts on hold the justice that New Yorkers got upon Silver's conviction, we look forward to presenting to another jury the evidence of decades-long corruption by one of the most powerful politicians in New York State history. Although it will be delayed, we do not expect justice to be denied.

Kim may be right about the eventual outcome of the Sheldon Silver case. But the *Silver* decision makes clear that – even in public corruption cases where there is evidence of "official actions" by a government official-defendant under the new, narrowed legal standard – *McDonnell* will continue to complicate the government's burden at both the charging and trial stages, and it will continue to provide the basis for legal challenges which defense counsel must explore and exploit.