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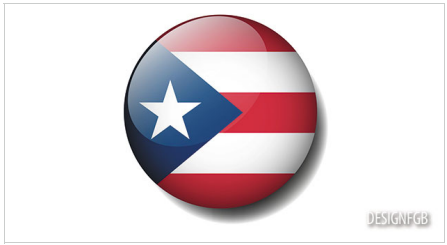
Federal prosecutors fail to close 'gaping hole,' lose pair of bribery convictions

By: Kris Olson January 31, 2019



The 1st U.S. Circuit Court of Appeals recently served up a harsh lesson to federal prosecutors, overturning for a second time the bribery convictions of a pair of defendants. That lesson? If defense counsel is shining a spotlight on a "gaping hole" in your case, you might want to grab a shovel.

The defendants, Juan Bravo-Fernandez and Hector Martinez-Maldonado, were twice tried and convicted of federal program bribery under 18 U.S.C. §666.

At issue in their recent appeal was whether the government had met its burden to show that the entity Martinez represented as an agent, the commonwealth of Puerto Rico, had received at least $10,000 in federal "benefits," as that term is defined in the statute.

Back in 2005, Bravo invited Martinez, then a Puerto Rico senator, on a trip to Las Vegas. Bravo was hoping to secure Martinez's support for pending legislation that would benefit Bravo's local security company, the government alleged.

Bravo and Martinez's original 2011 convictions were overturned because the 1st Circuit determined that the evidence and jury instructions left open the possibility that jurors improperly believed they could convict on a theory that Martinez had received a "gratuity" rather than a bribe.

In their second trial, in May 2017, the jury once again found the defendants guilty of federal program bribery. Among the grounds on which Bravo and Martinez challenged the convictions this time was that the government had not satisfied the so-called "jurisdictional element" of the statute, which requires that the party receiving the bribe was an agent of an entity that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

The U.S. Supreme Court in its 2000 decision in *Fischer v. United States* had limited the definition of "benefits" to federal funds that "promote well-being," such as those that provide individuals with "financial help in time of sickness, old age, or unemployment," the 1st Circuit noted.

In Bravo and Martinez's first trial, the government met that burden by having an employee of the Puerto Rico Treasury Department testify about the $20,000 in funding received annually by the Senate of Puerto Rico child care program from the U.S. government.

But in the second trial, the parties merely stipulated to the fact that, from Oct. 1, 2004, to Sept. 30, 2005, Puerto Rico had received over $4.7 billion in federal *funds*.

Defense counsel highlighted the distinction between "benefits" and "funds" during a conference on the first day of trial. The District Court judge asked counsel whether the stipulation allowed him to inform jurors that the jurisdictional element of §666 had been met.

Defense counsel essentially replied "absolutely not," pointing out there had been no concession that the jurisdictional element had been met.

"Incredibly, this clear warning of things to come went unattended and the government proceeded to present its case in chief without introducing any evidence to cover this gaping hole in its case," the 1st Circuit wrote.

The trial judge hadn't seen the "gaping hole," either, declining to give the jury any instruction on what constituted a "benefit" and denying the defendants' motion for a verdict of acquittal on the basis that the government had failed to meet its burden, the 1st Circuit noted.

But the 1st Circuit explained that it was worried about the slippery slope of essentially allowing jurors to use "common sense" and general knowledge of federal funding to fill in the gaps of the government's proof.

"Under the government's approach, the jurisdictional element in many federal criminal cases could be satisfied by similar reliance on jurors' extra-judicial knowledge," Judge Juan R. Torruella wrote for the panel. "For example, one could claim that any juror would know that all banks are engaged in, or at least affect, interstate commerce, or that a bank is likely FDIC insured. Yet, the failure to offer any actual proof of these relatively obvious jurisdictional facts has repeatedly proved fatal to criminal prosecutions."

The 1st Circuit decided that Bravo and Martinez's convictions were similarly fatally flawed.

The decision is important, given the way §666 has become the government's "go-to statute" in the aftermath of the Supreme Court narrowing the definition of honest services fraud to bribery and kickback schemes with its 2010 decision in *Skilling v. United States*, notes Bravo's attorney, Martin G. Weinberg of Boston.

Weinberg says the 1st Circuit wisely rebuffed the attempt to expand §666 into, as Torruella writes, "the general bribery statute the *Fischer* court warned against."

Weinberg also draws a parallel to U.S. District Court Judge Leo T. Sorokin's decision to dismiss the corruption charges against Boston officials Ken Brissette and Tim Sullivan related to their efforts to lean on organizers of the Boston Calling music festival to hire union workers.

According to Weinberg, the *Bravo* decision reinforces a message that Sorokin seemingly had already gotten: that the elements of federal criminal law should be taken very strictly and not expanded cavalierly.

Weinberg hopes that the decision also encourages his fellow members of the defense bar to put the prosecution's theories to the test rather than plead cases out, as happens 96 percent of the time.

"It's on the defense bar to hold the government to its burden of proof," he says.

Holland & Knight's Daniel I. Small, who successfully represented former Virginia Gov. Robert F. McDonnell and his wife in their Supreme Court challenge of federal corruption convictions, is less sure the government was attempting to broaden the statute, though he believes the 1st Circuit's decision has value.

"It is a clear lesson on the importance of understanding — and proving — each and every element of your case," the Boston lawyer says.

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