

Court queries legal teams in appeal of probation case

By [Shelley Murphy](#) | GLOBE STAFF JULY 25, 2016

A federal appeals court grilled the Justice Department Monday about whether it had overreached by using federal mail fraud and racketeering laws to target former state probation commissioner John “Jack” O’Brien and his two deputies for rigging the Probation Department’s hiring process to favor politically connected candidates.

But the US Court of Appeals for the First Circuit also pressed defense lawyers about whether O’Brien and his deputies, Elizabeth Tavares and William Burke III, thought it was legal to use “a patronage pool” to fill probation jobs — making it difficult to predict whether the court will overturn their convictions. A decision is not expected for several months.

“Why is the federal government enforcing what is basically Massachusetts personnel law?” asked Judge Juan R. Torruella, part of the three-judge appeals court panel.

Justice Department attorney Stephan E. Oestreicher Jr. said the Probation Department was plagued by a 10-year conspiracy in which O’Brien and his staff hired applicants based on political connections, rather than merit, then falsely certified they had followed procedures and sent rejection letters to losing candidates suggesting they had been given a fair shot at the jobs.

“At some point the federal government can come in and say it is a corrupt use of the US mail,” said Oestreicher, defending the government’s use of the mail fraud statute to build its racketeering case against the trio.

In 2014, a jury convicted O’Brien and Tavares, both now 59, of racketeering, racketeering conspiracy, and mail fraud. Burke, 73, was convicted of racketeering conspiracy. O’Brien was sentenced to 18 months in prison, Tavares was sentenced to three months, and Burke was placed on probation for a year. The sentences were stayed pending a ruling by the appeals court.

O’Brien’s attorney, Judith Mizner, argued Monday that there was no evidence that any of the people O’Brien hired were not qualified for their jobs and argued that the case was about political influence in hiring, not federal fraud.

“It’s not a crime,” said Mizner, adding that any concerns about the Probation Department hiring process should be dealt with by the state.

However, Judge William J. Kayatta Jr. said evidence suggested it was a case of “old-fashioned fraud” when O’Brien sent letters to Robert A. Mulligan, then head of administration for the state courts, falsely certifying that he had followed proper policies and procedures in making the appointments.

Mizner argued that even if someone was sponsored for a job by a politician, it didn’t mean that they weren’t qualified.

“Sure they’re all qualified, but some are more qualified than others,” Kayatta said. “That’s the whole problem. That’s why you have a selection process.”

Referring to the state personnel policies and procedures manual, which requires a merit-based hiring system, Kayatta said, “I don’t see how you read this and think it’s just going to be a patronage pool.”

Tavares's attorney, Martin G. Weinberg, argued Monday that the judge who presided over the trial committed reversible error by allowing jurors to ask an unprecedented number of questions of witnesses. The jury submitted 281 questions to US District Judge William G. Young during 35 days of testimony and Young allowed 180 of those questions to be asked of witnesses.

Weinberg said jurors became "an inquisitorial body," which assisted the prosecution with its questions and "disrupted the delicate dynamic of a criminal trial."

But the appeals judges noted that the court has previously ruled that it's not improper for jurors to ask questions and raised concerns about trying to set limits on how many questions are appropriate.

Lawyers for both Tavares and Burke argued that there was insufficient evidence to convict their clients.

The case against O'Brien and his deputies was based in large part on [a 2010 Globe Spotlight Team series on patronage hiring in the Probation Department.](#)

The jury found that O'Brien and his deputies created a fraudulent system to make it look as though they were following proper hiring protocol. Witnesses testified that legislators would pass names of preferred candidates to O'Brien, who created a "sponsor list." When the department was hiring, he consulted the list and gave those names to his representatives who served on hiring panels to make sure the preferred candidates advanced in the process.

Several of the representatives testified that they fudged the scores of preferred applicants to make sure they advanced over more qualified candidates.

O'Brien then certified documents attesting that his candidates were the best suited for the job.