

McDonnell Creates New But Difficult Path For Menendez

By **Bill Wichert**

Law360, Newark (March 31, 2017, 5:02 PM EDT) -- The U.S. Supreme Court's landmark McDonnell decision last year creates an opening for U.S. Sen. Bob Menendez, D-N.J., to challenge his corruption charges over the meaning of "official acts," but such an argument may prove difficult because the senator allegedly took on a substantial advocacy role for his benefactor, attorneys say.

Facing charges that include using meetings with government officials to illegally assist a Florida eye doctor who gave him gifts and political donations, Menendez could invoke the justices' finding that former Virginia Gov. Bob McDonnell's practice of setting up meetings to benefit a political supporter did not meet the high court's revised definition of what constitutes an official act for purposes of a federal bribery case.

Since arranging a meeting doesn't represent an official act in and of itself, prosecutors must show what officials acts were sought via the meetings in exchange for the alleged bribes, but Menendez will likely assert that he "really wasn't asking for anything other than just careful review," according to Robert W. Ray, a partner with Thompson & Knight LLP.

"I just set up a meeting," Ray, a former federal prosecutor, said of Menendez's potential arguments. "There's nothing wrong with that. That's not illegal."

The McDonnell decision draws a line between legal and illegal behavior and suggests that "criminalizing mere meetings would sweep too much innocent conduct into the criminal category," according to Ray.

"I think that offers him not only comfort about ... where the line is drawn, but also he's gonna have the benefit of favorable jury instructions to that effect," Ray said, referring to Menendez.

But Menendez allegedly played a greater role with respect to meetings than McDonnell did, making it more difficult for the senator to argue that his conduct did not represent official acts, attorneys said.

While McDonnell allegedly arranged meetings for his supporter with government officials, Menendez is accused of attending meetings himself and otherwise actively working to persuade or pressure government officials to resolve particular disputes in the physician's favor, according to Randall D. Eliason, a former federal prosecutor and a professor at George Washington University Law School.

"The stuff that Menendez did is far more substantial than anything McDonnell ever did," Eliason told Law360.

“These are much clearer examples of Menendez taking an 'action' on a particular 'question, matter, cause, suit, proceeding or controversy' by directly intervening in that matter and attempting to influence the outcome — which is what the 'official act' definition requires,” Eliason added in an email.

Menendez, who has been a senator since 2006 after several terms as a congressman, is accused of accepting but never publicly disclosing a range of “lavish” gifts worth close to \$1 million that he received from prominent Democratic Party donor Dr. Salomon Melgen, who is facing a separate Medicare fraud case in Florida federal court.

In exchange, Menendez tried to influence a government action targeting Melgen for \$8.9 million in alleged Medicare overbillings, visa matters for Melgen's girlfriends and a dispute between Melgen and the government of the Dominican Republic over a contract for screening containers coming through its port, prosecutors said.

Given that Menendez allegedly advocated that government officials take certain actions, claiming that he did not perform official acts might be an uphill battle, said Kelly B. Kramer of Mayer Brown LLP.

That scenario is different than McDonnell's position, which is that “I didn't tell anybody to do anything. I simply set up meetings as courtesies, but I didn't weigh in one way or the other on what policy decisions to take,” said Kramer, a partner and a co-leader of the firm's white collar defense and compliance practice.

“To me, it's harder to make the McDonnell argument,” he said, referring to Menendez possibly asserting that his conduct did not constitute official acts.

The senator has claimed that he is shielded from prosecution over certain legislative acts under the speech or debate clause of the U.S. Constitution, but the Third Circuit on July 29 rejected that argument and affirmed a New Jersey federal court ruling upholding most of the charges. The Supreme Court on March 20 denied Menendez's petition to review the circuit panel decision.

About a month before the Third Circuit's opinion, the Supreme Court on June 27 handed down the McDonnell decision in which the high court vacated and remanded the former governor's corruption conviction, rebuffing the government's broad definition of an official act that can support a bribery charge.

In the unanimous decision, the justices said that an official act is a decision or action on a “question, matter, cause, suit, proceeding or controversy” that must involve a formal exercise of governmental power and has to be something specific that is pending or may be brought before a public official.

Arranging a meeting, talking to another government official or organizing an event, without more action, does not fit that definition, the opinion said. The court also found that an “official act” includes a public official trying to influence another official to perform an official act.

Based on the justices' interpretation of official acts, they concluded that jury instructions in McDonnell's trial were erroneous.

As a result of the narrow definition of official acts under the McDonnell decision, the government faces a tougher feat in making its case against Menendez, according to Patrick J. Egan, a partner with Fox

Rothschild LLP who is a former co-chair of the firm's white collar compliance and defense practice.

“It used to be that pretty much just the handing of the money was enough or the favor. ... If any government action was taken whatsoever at all, then that would be enough,” Egan said. “The question now becomes: Where does the conduct fit?”

Referring to prosecutors in Menendez's case, Egan added, “They're going to have to present more specific evidence of exactly what the act was and if indeed it qualifies as an official act.”

Prosecutors also have the difficult task of proving a link between the gifts provided by Melgen and the official acts he was allegedly seeking, according to Ray. The more specific the official act, the more specific the proof must be to establish that connection, he said.

The government will have to prove Menendez knew that, in exchange for a gift provided, he was expected to act favorably toward Melgen with regard to a specific official act, he added.

“When you draw the proof down into that level of specificity, ... that's a harder thing to show as far as intent is concerned,” Ray said. “It's all about what's inside Sen. Menendez's head as the jury would have to find.”

One of Menendez's attorneys, Abbe David Lowell, indicated Friday that the defense intended to pursue motions based on the McDonnell decision but declined to comment further.

Representatives of the U.S. Department of Justice told Law360 on Friday that the agency declined to comment.

The government is represented by Noel J. Francisco, Kenneth A. Blanco and John-Alex Romano of the U.S. Department of Justice.

Menendez is represented by Abbe David Lowell, Christopher D. Man and Scott W. Coyle of Chadbourne & Parke LLP and Paul D. Clement, Viet D. Dinh and Kevin M. Neylan Jr. of Kirkland & Ellis LLP.

The case is U.S. v. Menendez et al., case number 2:15-cr-00155, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Stewart Bishop. Editing by Martin Bricketto and Christine Chun.