

Bridgagate To Reach High Court In McDonnell's Shadow

By **Bill Wichert**

Law360 (January 13, 2020, 7:33 PM EST) -- The U.S. Supreme Court on Tuesday will explore the line where political mischief turns criminal in the wake of its landmark McDonnell decision, with justices examining whether prosecutors in the so-called Bridgagate case overreached in applying federal statutes to a scheme to realign lanes on the George Washington Bridge.

At oral arguments on the convictions of one-time gubernatorial aide Bridget Anne Kelly and former Port Authority of New York and New Jersey executive William E. Baroni Jr., the high court will be looking at such an expansive use of federal law, similar to what the justices did in their unanimous decision to vacate the bribery conviction of ex-Virginia Gov. Bob McDonnell.

"Lurking behind the scenes are concerns by a unanimous Supreme Court about the reach of federal statutes in the anticorruption area that are directed toward state and local political, governmental misconduct," said Robert W. Ray of Zeichner Ellman & Krause LLP.

The Supreme Court ordinarily would find that federal criminal statutes need to sweep broadly to capture different forms of misconduct, but the problem arises when such an expansive interpretation invokes federalism concerns, Ray said.

"That's a power argument ... in our system, and that is one where the usual rules of statutory interpretation in connection with criminal statutes don't really follow," Ray said. "There's another constitutional dimension to this — which is after all why we're in the Supreme Court — and that's the concern about the relative balance of power between federal and state and local authority."

The McDonnell and Bridgagate cases each involve "how far shady politics can go to make it a crime," according to Pace Law School professor Bennett L. Gershman, a former prosecutor with the Manhattan District Attorney's Office.

Whether the bridge scandal amounted to a crime hinges in part on whether Baroni was authorized to realign the lanes when he allegedly conspired with Kelly and ex-Port Authority executive David Wildstein to cause massive gridlock in Fort Lee as retaliation against its mayor for not endorsing Gov. Chris Christie's 2013 reelection bid.

The three conspirators concocted a bogus story that the closure of two of three local access lanes to the bridge was for a traffic study, prosecutors said. At the time, Baroni was the deputy executive director of

the bistate agency.

“In this case, it’s clearly an official act that he did, but the question is whether this official act was authorized,” said Gershman, adding that if one has the authority to commit such an act, then the argument is it’s not fraud.

“It may be politically damaging to you, but it’s not something that you can be charged with criminally under the fraud statute,” Gershman added.

The justices will likely be more focused on whether such political shenanigans may be covered by the federal statutes in question and less focused on federalism concerns, according to Kelly B. Kramer of Mayer Brown LLP. The so-called Section 666 statute, for example, is traditionally associated with the theft or embezzlement of money.

“To me, I don’t think that the court is particularly worked up with whether or not this was conduct committed by a state official versus whether this is conduct committed by a federal official,” said Kramer, co-leader of the firm’s white collar defense and compliance practice. “The starting question is: Is this conduct, regardless of who does it, within the scope of these statutes?”

McDonnell demonstrates how current members of the high court think about applying criminal laws in the governmental context and how they want to be careful that the textual prohibitions of a statute are tied to the conduct at hand, according to Kramer.

“I don’t think that they want the criminal law to micromanage how public officials go about their duties,” Kramer said. “I think they’re trying to reserve the criminal law for places where public officials cross clear lines.”

The issue of Baroni’s authority touches on accusations of prosecutorial overreach in the case and questions of whether jurors were properly instructed before convicting him and Kelly at a 2016 trial. The Third Circuit upheld most of the convictions in a November 2018 precedential opinion.

In fighting their convictions, Baroni and Kelly have argued he had such authority and blasted the government’s theory of the case as improperly turning “routine” political activity into criminal conduct. As Kelly put it in her brief, the basis of the convictions in question was “the concealment of political motives for an otherwise-legitimate official act.”

The government has pushed back on those characterizations by stressing that Baroni lacked authority to realign the lanes. “Lying about a traffic study would not have exposed defendants to prosecution” if Baroni had that authority, but he did not, prosecutors said in a brief.

Randall D. Eliason, a professor at George Washington University Law School, said “the government’s trying to come up with a limiting principle to sort of save the conviction by saying, ‘Well, we’re not saying any time a public employee does something that costs the government money that it could be a fraud. We’re saying that it’s only if they do it outside of their authority.’”

Two problems with that position is that it “leaves the law of fraud to be defined by workplace rules, company regulations,” and “it’s seldom going to be so clear whether or not someone had the authority or not,” according to Eliason, a former federal prosecutor.

But Christopher R. Hall of Saul Ewing Arnstein & Lehr LLP said the evidence shows Baroni didn't have the authority, noting that the Port Authority's executive director reversed the lane realignment after learning about it. Based on the executive director's decision, "I believe you can infer from that that Baroni didn't have the authority," said Hall, a former federal prosecutor.

Hall said that "if you have a well-charged jury and the evidence supports the inferences that they drew, it's lights out ... The conviction stands."

The Supreme Court, however, will be looking at whether jurors were properly instructed with respect to Baroni's authority.

Addressing the jury instruction that fraud involves depriving an organization of the right to control money or property, the Third Circuit concluded that the instruction "forecloses the possibility the jury convicted defendants of fraud without finding Baroni lacked authority to realign the lanes."

Before the high court, Baroni and Kelly noted that they had requested an explicit jury instruction on his authority, but the trial court rejected it.

That proposed instruction stated in part that if Wildstein or Baroni acted within their authority to control the agency resources at issue, "then defendants cannot be found to have obtained by fraud, knowingly converted or intentionally misapplied Port Authority money or property."

The refusal to provide that instruction raises the question of whether Baroni and Kelly were possibly convicted based on the erroneous theory that their convictions were permissible even if jurors found that Baroni had the authority to realign the lanes, according to Ray.

If the Supreme Court finds that the instruction was "a correct statement of the law and it wasn't given over a defense objection, that means — since it's not harmless error — that means that a new trial would be warranted," Ray said.

But if the evidence was overwhelming that Baroni lacked such authority, any mistake in the jury instructions might be considered harmless and not lead to a new trial, according to Gershman.

"And sometimes appellate courts will say that — even though there was a misinstruction, if there's no way that the jury would have done differently, even with a better instruction or a clearer instruction, then there's no harm," Gershman said. "No harm, no foul."

--Editing by Philip Shea.