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Bravo-Fernandez: Did The Court Incentivize Overcharging?

By **Justin Shur and Lisa Bohl, MoloLamken LLP**

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On Nov. 29, the U.S. Supreme Court in Juan Bravo-Fernandez and Hector Martinez-Maldonado v. U.S. unanimously decided that a businessman and former politician can be retried on federal bribery charges. The Supreme Court held that a retrial would not violate the issue preclusion prong of the double jeopardy clause, even though the jury had previously acquitted the defendants of other offenses based on the same allegations underlying the bribery charges.[1] The case appears to be a setback for criminal defendants, potentially providing prosecutors with another incentive to charge overlapping counts based on a single predicate offense. But how much the case will actually affect the dynamic of charging decisions is uncertain.

Bravo-Fernandez v. United States

The long saga behind the case began in 2005, when Juan Bravo-Fernandez, the president of a private security firm, treated Hector Martinez-Maldonado, a member of the Puerto Rican Senate, to a Las Vegas trip that included tickets to a boxing match.[2] In return, Martinez-Maldonado supposedly supported legislation that would benefit Bravo-Fernandez's security business. The U.S. Department of Justice indicted the pair for allegedly conspiring to give and accept a bribe in connection with a federal program, traveling across state lines to do so, and exchanging the bribe itself.

At trial, the jury convicted the defendants of the substantive bribery charges under 18 U.S.C. §666 but acquitted them of the related conspiracy and interstate travel charges. The First Circuit then vacated the convictions based on flawed jury instructions. Section 666's prohibition on corrupt payments, according to the First Circuit, only applies to quid pro quo bribery and thus the instructions that permitted the jury to find the defendants guilty based on a gratuity theory — which does not require a quid pro quo — were improper. The case went back to the trial court, but the two men sought to block a further trial on the substantive bribery charges.

Defendants argued that a retrial of the §666 charges would violate the issue preclusion principles of the double jeopardy clause. Under that doctrine, when a factual issue has been decided by a valid and final judgment, that issue cannot be relitigated. At trial, there was no dispute that Bravo-Fernandez and Martinez-Maldonado had agreed to the trip and in fact traveled to Las Vegas. The only contested issue was whether they had engaged in bribery. Defendants argued — first before the First Circuit and then the Supreme Court — that the conspiracy and interstate travel acquittals, which were based on the underlying quid pro quo, had necessarily rested upon the jury's determination that they did not engage in bribery. Thus, a retrial should be prohibited.

The Supreme Court's Ruling

The court decided the case based on a straightforward application of double jeopardy precedents. In Ashe v. Swenson, the court established that where there is an acquittal, the double jeopardy clause bars later prosecutions of not just those same charges, but also of the same factual issues previously decided by the acquittal. For this issue preclusion doctrine to apply, a defendant must prove that the issue on retrial was actually decided by a jury's prior verdict.[3] Then, in a case called Powell, the Supreme Court said that a jury acts irrationally when it renders inconsistent verdicts — a conviction on one count and an acquittal on another count involving the same issue — so it is impossible to determine what the jury "really meant." An acquittal in that scenario therefore has no preclusive effect and does not prohibit retrial on the disputed issue.[4] The last case was Yeager, which held that when a jury acquits on one count and hangs on another count involving the same facts, issue preclusion prevents the government from retrying the hung count. As the reasoning goes, a hung count is not an actual decision on anything but rather a failure to come to a decision. There is no decision, hence no inconsistency, and so the acquittal controls.[5]

The Supreme Court held that Bravo-Fernandez was more like an inconsistent verdict in Powell than a hung verdict in Yeager. Because the convictions on §666 were irreconcilable with the acquittals on the conspiracy and interstate travel counts, the acquittals had no issue preclusive effect. What's more, the vacated convictions did not change this calculus. The convictions were vacated as a result of an unrelated trial error, which did not resolve the apparent inconsistency in the jury's verdicts. According to the court, the vacatur simply meant that criminal proceedings had not yet closed and required a new trial to fix the error, but it did not affect what the jury actually decided (or did not decide).

Potential Impact on Charging Decisions

The court's opinion shied away from the controversial policy implications discussed in the briefs. The petitioners and several amici argued that affirmance of the First Circuit's decision would invite prosecutors to bring multiple overlapping charges. The criminal code is full of offenses that cover nearly identical conduct.[6] As prosecutors have discretion to pick and choose from those offenses, the concern is that the government will simply tack on overlapping charges as an "insurance policy" against issue preclusion in the event there is an inconsistent verdict.[7]

At the same time, it is difficult to measure how much marginal incentive to overcharge Bravo-Fernandez really adds. Powell already allows the government to retry previously litigated issues where there is an acquittal in an inconsistent verdict. And, as the petitioners noted in their briefs, many of the incentives to overcharge stem from factors unrelated to double jeopardy issues, such as "charge bargaining."[8] The petitioners also cite troubling statistics showing that juries are more likely to convict where there are more charges.[9] But many of those incentives would remain the same even if Bravo-Fernandez went the other way.

Some also predict that the decision would encourage prosecutors to treat the first trial as a "full-scale dress rehearsal" in preparation for the second round.[10] But charging decisions are complicated. Prosecutors might not base those decisions on what might happen on a distant appeal several years in the future, in the event of an inconsistent verdict. And aside from high-profile or otherwise significant cases, the government is not always keen to try a case multiple times, especially when years have passed, memories have faded, evidence becomes less reliable, and retrial becomes riskier and more expensive.

In addition, the court's opinion noted two potential safeguards in which double jeopardy would apply, even when guilty verdicts are returned but subsequently vacated on appeal. Where the conviction in a hypothetical split verdict is later overturned because of a lack of evidence, the government cannot retry the case. Nor would retrial be possible if the trial error, which was the basis for the vacatur, could resolve the apparent inconsistency in the jury's verdict. There may also be ways to prevent or resolve such inconsistencies earlier — for example by using, when appropriate, special verdict forms that require the jury to articulate their factual findings.

Nevertheless, there are real problems with overcharging and the proliferation of redundant criminal statutes. On balance, Bravo-Fernandez aggravates those concerns.

Justin V. Shur is a partner in the New York and Washington, D.C., offices of MoloLamken LLP. He is a former deputy chief of the U.S. Department of Justice's Public Integrity Section of the Criminal Division.

Lisa W. Bohl is an associate with MoloLamken in the firm's Chicago office.

[1] Bravo-Fernandez v. United States, – S. Ct. –, 2016 WL 6952648 (U.S. Nov. 29, 2016).

[2] United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013).

[3] Ashe v. Swenson, 397 U.S. 436 (1970).

[4] United States v. Powell, 469 U.S. 57 (1984).

[5] Yeager v. United States, 557 U.S. 110 (2009).

[6] See, e.g., Brief of Petitioners at 44-45, Bravo-Fernandez v. United States, – S. Ct. –, 2016 WL 6952648 (U.S. Nov. 29, 2016) (No. 15-537); Brief of Criminal Law Professors as Amici Curiae Supporting Petitioners at 15-19, Bravo-Fernandez v. United States, – S. Ct. –, 2016 WL 6952648 (U.S. Nov. 29, 2016) (No. 15-537).

[7] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioners at 13, Bravo-Fernandez v. United States, – S. Ct. –, 2016 WL 6952648 (U.S. Nov. 29, 2016) (No. 15-537).

[8] Brief of Petitioners at 46.

[9] Id.

[10] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 9; Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 21, Bravo-Fernandez v. United States, – S. Ct. –, 2016 WL 6952648 (U.S. Nov. 29, 2016) (No. 15-537).