

No. _____

In the Supreme Court of the United States

ALEJANDRO CARRASCO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

APPENDIX

TABLE OF APPENDICES

Appendix A

Order denying Petition for Rehearing,
United States Court of Appeals for the First
Circuit, *United States v. Carrasco*, No. 21-
1396 (Jan. 16, 2024)Appx-1a

Appendix B

Opinion, United States Court of Appeals for
the First Circuit, *United States v. Carrasco*,
No. 21-1396 (Aug. 28, 2023)Appx-2a

Appendix C

Judgment, United States District Court for
the District of Puerto Rico, *United
States v. Carrasco*, No. 14-CR-423-01
(FAB) (Apr. 27, 2021)Appx-21a

Appendix D

Excerpt from Trial Transcript, United
States District Court for the District of
Puerto Rico, *United States v. Carrasco*,
No. 14-CR-423-01 (FAB) (Feb 8, 2022)
.....Appx-28a

Appendix E

Relevant Statutory Provisions,
18 U.S.C.A. § 666Appx-30a

Appendix F

Relevant Statutory Provisions,
18 U.S.C.A. § 201Appx-32a

United States Court of Appeals For the First Circuit

No. 21-1396

UNITED STATES,

Appellee,

v.

ALEJANDRO CARRASCO,

Defendant - Appellant.

Before

Barron, Chief Judge,
Lipez, Kayatta, Gelpí*, Montecalvo, and Rikelman
Circuit Judges.

ORDER OF COURT

Entered: January 16, 2024

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Rachel Brill, Franco L. Pérez-Redondo, Jose A. Ruiz-Santiago, Myriam Y. Fernandez-Gonzalez, Mariana E. Bauzá Almonte, James I. Pearce, Nicole R. Lockhart

* Judge Gelpí is recused and did not participate in the determination of this matter.

2a
Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

153

rate interest of one spouse is subject to rights of the co-owner. By reason of this limitation, we must value the debtor's interest at something less than the interest of a single owner in fee simple absolute."); Town of N. Reading v. Welch, 46 Mass. App.Ct. 818, 711 N.E.2d 603, 605 (1999) (noting, in the context of a tax foreclosure on a property held in a tenancy by the entirety, that "[t]he actuarial value of [the spouse's] survivorship interest . . . is likely to be less than the fair market value of the locus unencumbered").

Bankruptcy courts are in the best position to divine fair market value in any individual case, and we go no further than to reiterate the need to focus on the text of the Code. The task in this appeal is simple enough at this juncture: the stipulation stands, because neither state nor federal law requires a valuation of Minkina's interest as the full value of her home, and the bankruptcy court thus correctly accepted the valuation of no more than \$525,000.⁸ The bankruptcy court's order is therefore affirmed.⁹



8. RPS also urges us to cap Minkina's homestead exemption for the purposes of the § 522(f) formula at 50 percent if we affirm the bankruptcy court's order (as we have done). The firm claims that, because Massachusetts law provides that a homestead exemption "shall remain whole and unallocated" in the case of a tenancy by the entirety or a joint tenancy, but the bankruptcy court's valuation approach ostensibly constitutes "treating each individual as a tenant in common," we should treat the homestead exemption in line with provisions for the latter, as well. Mass. Gen. Laws ch. 188, § 1. However, as explained

UNITED STATES, Appellee,
v.
Alejandro CARRASCO, Defendant,
Appellant.
No. 21-1396

United States Court of Appeals,
First Circuit.

August 28, 2023

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Francisco A. Besosa, J., of theft or bribery concerning programs receiving federal funds and was sentenced to 120 months of imprisonment and 3 years of supervised release. Defendant appealed.

Holdings: The Court of Appeals, Barron, Chief Judge, held that:

- (1) sufficient evidence supported finding that defendant was "agent" of a local government, as element of offense of theft or bribery concerning programs receiving federal funds;
- (2) sufficient evidence supported finding that defendant engaged in an "official act," as element of offense of theft or bribery concerning programs receiving federal funds;
- (3) evidence of company owner's illicit but uncharged payments to defendant was

above, abiding by the no more than \$525,000 valuation does not negate the nature of Minkina and her husband's tenancy by the entirety. RPS's argument is therefore unavailing.

9. Our holding in this case is limited to Massachusetts law and -- as illustrated above -- is intertwined with the SJC's holding in Coraccio that a tenant by the entirety may convey her share in the tenancy. We express no opinion on whether the outcome would be different in a jurisdiction where such a conveyance would not be allowed.

3a

Appendix B

not unduly prejudicial, and thus was admissible;

- (4) any error in admitting company owner's lay witness opinion testimony was harmless;
- (5) application of two-level obstruction of justice sentencing enhancement was warranted;
- (6) application of two-level sentencing enhancement for bribery offenses involving public official was warranted; and
- (7) defendant's 120-month sentence was not substantively unreasonable.

Affirmed.

1. Criminal Law \Leftrightarrow 561(1)

To succeed on sufficiency of evidence challenge, defendant must show that the evidence in the record does not suffice to permit a rational juror to find him guilty beyond a reasonable doubt.

2. Criminal Law \Leftrightarrow 1139, 1144.13(1)

Court of Appeals reviews sufficiency of evidence challenges *de novo*, but reviews the evidence, and makes all inferences and credibility choices, in the government's favor.

3. Bribery \Leftrightarrow 1(1)

Sufficient evidence supported finding that defendant, who was attorney retained by three municipalities, was "agent" of a local government, as element of offense of theft or bribery concerning programs receiving federal funds based on defendant's role in alleged corrupt awarding of municipal contracts to environmental engineering company, where defendant's contracts with municipalities authorized him to provide legal representation to named municipality "in the Courts of Puerto Rico" and "the administrative and investigative agencies." 18 U.S.C.A. § 666(d)(1).

4. Bribery \Leftrightarrow 1(1)

Sufficient evidence supported finding that defendant, who was attorney retained by three municipalities, engaged in an "official act," as element of offense of theft or bribery concerning programs receiving federal funds based on defendant's role in alleged corrupt awarding of municipal contracts to environmental engineering company, where defendant agreed to "advise" mayors of municipalities knowing or intending that such advice would form basis for an "official act" by those municipal officials, namely, awarding of contracts by those municipalities to company, and company's owner made payments to defendant for his access to, and influence over, mayors. 18 U.S.C.A. § 666.

5. Criminal Law \Leftrightarrow 371.16, 371.20

Evidence of environmental engineering company owner's illicit but uncharged payments to defendant was not unduly prejudicial, and thus was admissible in prosecution for theft or bribery concerning programs receiving federal funds based on defendant's role in allegedly corrupt awarding of municipal contracts to company, although defendant argued that evidence flooded jury with evidence about uncharged conduct, where defendant's intent in accepting checks with innocuous explanations in their memo lines, namely, whether he believed those checks to be payments for legitimate services or for steering contracts to company owner, was central issue at trial. 18 U.S.C.A. § 666; Fed. R. Evid. 403, 404(b).

6. Criminal Law \Leftrightarrow 338(7)

Party opposing admission of evidence on grounds that its probative value is substantially outweighed by danger of unfair prejudice bears burden of establishing that probative value of evidence at issue is substantially outweighed by danger of unfair prejudice. Fed. R. Evid. 403.

4a Appendix B

7. Criminal Law \Leftrightarrow 1153.3

Appellate court affords deference to a trial judge's balancing decision regarding whether relevant evidence is unfairly prejudicial, and only rarely, and in extraordinarily compelling circumstances, will appellate court, from the vista of a cold appellate record, reverse a trial court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect. Fed. R. Evid. 403.

8. Criminal Law \Leftrightarrow 1169.1(1)

Admission of improper testimony is harmless if it is highly probable that error did not influence verdict.

9. Criminal Law \Leftrightarrow 1163(3)

Government bears the burden of establishing harmlessness of the admission of improper testimony.

10. Criminal Law \Leftrightarrow 1169.1(1)

To determine whether government has made showing that admission of improper testimony was harmless, court must engage in panoramic, case-specific inquiry that considers multiple factors, including centrality of tainted material, its prejudicial impact, and relative strengths of parties' cases.

11. Criminal Law \Leftrightarrow 1169.2(8)

Any error in admitting environmental engineering company owner's lay witness opinion testimony regarding his years-long corrupt relationship with defendant was harmless, in prosecution for theft or bribery concerning programs receiving federal funds, based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to company, where transcripts of recorded conversations between defendant and owner, showing that defendant and owner discussed defendant receiving "kick-backs" for contracts, were themselves in evidence, and transcripts, on their face,

were plainly incriminating, even setting aside owner's testimony about meaning of what was said in them. 18 U.S.C.A. § 666; Fed. R. Evid. 701.

12. Criminal Law \Leftrightarrow 1139, 1156.2, 1158.34

In reviewing reasonableness of sentence, Court of Appeals reviews district court's factual determinations for clear error, its legal interpretation and application of sentencing guidelines *de novo*, and its judgment calls for abuse of discretion. U.S.S.G. § 1B1.1 et seq.

13. Sentencing and Punishment \Leftrightarrow 761

Application of two-level obstruction of justice sentencing enhancement was warranted, in prosecution for theft or bribery concerning programs receiving federal funds, based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to environmental engineering company, where defendant attempted to convince company owner that best strategy to face their problem, namely, investigation by federal authorities, was for them to keep silent and not tell anything to anyone, to invoke attorney-client privilege to cover their scheme, or to lie to the FBI. 18 U.S.C.A. § 666; U.S.S.G. § 3C1.1.

14. Sentencing and Punishment \Leftrightarrow 699

Application of two-level sentencing enhancement for bribery offenses involving any public official was warranted, in prosecution for theft or bribery concerning programs receiving federal funds, based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to environmental engineering company, although defendant argued that he was not a "public official" within meaning of the Guideline, where defendant, through his position and influence over municipalities, participated so substantially in govern-

5a Appendix B

156

79 FEDERAL REPORTER, 4th SERIES

ment operations as to possess de facto authority to make governmental decisions. 18 U.S.C.A. § 666; U.S.S.G. § 2C1.1.

15. Sentencing and Punishment ☞699

Application of four-level sentencing enhancement for offense involving an elected public official or any public official in a high-level decision-making or sensitive position was warranted, in prosecution for theft or bribery concerning programs receiving federal funds, based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to environmental engineering company, where defendant used his influence over and his access to mayors of municipalities, who were elected public officials, to steer contracts to company owner, and defendant himself was a “public official” in high level decision-making or sensitive position. 18 U.S.C.A. § 666; U.S.S.G. § 2C1.1(b)(3).

16. Criminal Law ☞1156.2

In assessing substantive reasonableness of a sentence, Court of Appeals reviews for abuse of discretion, and will uphold a sentence against such a challenge so long as the district court provided a plausible sentencing rationale in support of a defensible result.

17. Bribery ☞16

Sentencing and Punishment ☞55

Defendant’s 120-month sentence for theft or bribery concerning programs receiving federal funds was not substantively unreasonable, even though it was statistically longer than national average, where statistics offered by defendant included sentences imposed upon defendants convicted under a number of federal statutes, not just defendants convicted of defendant’s offense, and thus were overinclusive. 18 U.S.C.A. § 666.

18. Bribery ☞16

Sentencing and Punishment ☞56

Defendant’s 120-month sentence for theft or bribery concerning programs receiving federal funds was not substantively unreasonable, in prosecution based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to environmental engineering company, based on fact that company owner was sentenced only to pretrial diversion program, where defendant and owner were not similarly situated, since owner cooperated with law enforcement and defendant did not. 18 U.S.C.A. § 666.

19. Bribery ☞16

Sentencing and Punishment ☞61

Defendant’s 120-month sentence for theft or bribery concerning programs receiving federal funds was not substantively unreasonable based on fact that defendant was sentenced to statutory maximum, in prosecution based on role of defendant, who was attorney retained by three municipalities, in alleged corrupt awarding of municipal contracts to environmental engineering company, where sentencing court explicitly considered mitigating circumstances, including defendant’s age, family, and multiple medical conditions, but determined that sentence was appropriate punishment pursuant to facts of case and in accordance with statutory factors. 18 U.S.C.A. §§ 666, 3553(a).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Francisco A. Besosa, U.S. District Judge]

Rachel Brill for appellant.

Nicole R. Lockhart, Trial Attorney, with whom Kenneth A. Polite, Assistant Attorney General, Lisa H. Miller, Deputy Assis-

6a
Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

157

tant Attorney General, Corey R. Amundson, Chief, Public Integrity Section, and James I. Pearce, Attorney, Appellate Section, were on brief, for appellee.

Before Barron, Chief Judge, Lipez and Montecalvo, Circuit Judges.

BARRON, Chief Judge.

Alejandro Carrasco Castillo (“Carrasco”) appeals his convictions and sentence for violating 18 U.S.C. § 666. The underlying charges stem from his role in the allegedly corrupt awarding of contracts by various Puerto Rico municipalities. We affirm.

I.

More than a decade ago, federal authorities began investigating allegations that three Puerto Rico municipalities had corruptly awarded contracts to a company owned by Juan Carlos Mercado, who at the time was a contractor and environmental engineer. Federal authorities arrested Mercado in February 2012 in connection with the investigation, and he agreed to cooperate with them by recording his conversations with Eduardo Rivera-Correa, who was the mayor of one of the municipalities, and Carrasco, an attorney retained by each of the three municipalities to provide legal representation.¹

Thereafter, on July 8, 2014, Carrasco was indicted in the United States District Court for the District of Puerto Rico on four counts of violating 18 U.S.C.

1. The criminal complaint against Mercado was dismissed without prejudice in December 2012 pending Mercado’s completion of an eighteen-month pretrial diversion program.
2. The same indictment also charged Rivera-Correa with various offenses related to the alleged scheme.
3. The provisions of 18 U.S.C. § 666(a) apply only “if the circumstance described in subsection (b) of [18 U.S.C. § 666] exists.” Subsec-

§ 666(a)(1)(B).² Section 666(a)(1)(B) provides in relevant part:

[w]hoever . . . being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof . . . corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more . . . shall be fined under this title, imprisoned not more than 10 years, or both.³

Each count alleges that, in violation of § 666, Carrasco took payments from Mercado in connection with the award of contracts to Mercado’s environmental consulting firm by one of the three Puerto Rican municipalities that had retained Carrasco. The first count alleges that Carrasco received payments from July 2009 through August 2009 in connection with contracts awarded by the municipality of Barceloneta. The second count alleges that he received payments from March 2010 to July 2010 in connection with contracts awarded by the municipality of Rio Grande. The third count alleges that he received payments from August 2010 through October 2010 in connection with contracts awarded by the municipality of Juncos. The fourth count alleges that he received payments in

tion (b) provides that “[t]he circumstance referred to in subsection (a) of this section is that the organization, government, or agency 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.” Carrasco accepts that each of the three municipalities met this condition in the relevant years.

7a
Appendix B

July 2011 in connection with contracts awarded by, once again, Barceloneta.

Carrasco was tried on the charges before a jury in December 2019 and was found guilty on all four counts. A judgment of conviction was entered, and the District Court sentenced him on April 27, 2021, to 120 months of imprisonment and 3 years of supervised release. Carrasco then timely filed this appeal.

II.

[1, 2] Carrasco first seeks the reversal of his convictions on the ground that they are not supported by sufficient evidence. To succeed, he must show that the evidence in the record does not suffice to permit a rational juror to find him guilty beyond a reasonable doubt of violating § 666. See United States v. Levin, 13 F.4th 96, 99-100 (1st Cir. 2021). Our review is de novo, but we “review[] the evidence, and mak[e] all inferences and credibility choices, in the government’s favor.” United States v. Rodríguez-Torres, 939 F.3d 16, 23 (1st Cir. 2019).

A.

[3] Carrasco directs our attention initially to what the record shows with respect to the element of the offense --- set forth in § 666(a)(1) -- that requires the government to prove beyond a reasonable doubt that he was an “agent of a[] ... local ... government.” Section 666(d)(1) defines an “agent” of a local government to be “a person authorized to act on behalf of” it and specifies that the definition of

4. Carrasco does point to our prior statement that “there is no more classic government ‘representative’ than a legislative branch officer,” United States v. Fernandez, 722 F.3d 1, 8 (1st Cir. 2013), to argue that he cannot be an “agent” of the municipalities solely because the contracts make him a “representative” of the municipalities. But, our conclu-

the term “includes a servant or employee, and a partner, director, officer, manager, and representative.”

To prove that Carrasco was such an “agent,” the government submitted into evidence his contracts with Barceloneta, Rio Grande, and Juncos. Carrasco does not dispute that the text of each of the contracts authorized him to provide legal representation to the named municipality “in the Courts of Puerto Rico” and “the administrative and investigative agencies.” Therefore, it would appear that the evidence does suffice to support the “agent” element of the offense, as each of the contracts would appear to show that he was “authorized to act on behalf of” the relevant municipality and so that he was an “agent” of that municipality. See Representative, Black’s Law Dictionary (11th ed. 2019) (defining “representative” as “[s]omeone who stands for or acts on behalf of another”).⁴

Carrasco nonetheless contends that the evidence does not suffice to satisfy the “agent” element because no evidence in the record suffices to show that he took any specific action under any of the contracts on behalf of any of the municipalities. But the text of § 666(d)(1) does not support a construction of the statute that would require the government to make that showing to satisfy the “agent” element.

By its plain terms, the text of the statute defines an “agent” to be merely “a person authorized to act on behalf of ... a government.” 18 U.S.C. § 666(d)(1) (em-

sion that Carrasco is an “agent” for purposes of § 666(d)(1) relies on the term “represent” as used in the contracts, not on the term “representative” as used in § 666(d)(1). We thus need not address Carrasco’s contention that Fernandez would preclude us from relying on that term.

8a
Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

159

phasis added). It does not define an “agent” to be only a person who “acts” on behalf of a government.

Nor is there any reason to conclude from the text of related provisions that the words “authorized to act” in § 666(d)(1) mean “acts,” such that it is not enough to prove that the person has been merely authorized to act. After all, a separate provision of § 666(d)(1) states that a “person” qualifies as an “agent” if that person is a “representative.” *Id.* Thus, that provision does not state that a “person” so qualifies even if they have only been “authorized to be a . . . representative.”

Reinforcing the conclusion that the words “authorized to act” mean what they say is the fact that the Supreme Court of the United States has explained in construing other parts of § 666 that the statute’s “expansive” and “unqualified language,” *Salinas v. United States*, 522 U.S. 52, 56, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), “reveals Congress’ expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs,” *Fischer v. United States*, 529 U.S. 667, 678, 120 S.Ct. 1780, 146 L.Ed.2d 707 (2000). In addition, both our Circuit and the Supreme Court have “repeatedly rejected constructions of § 666 that would impose limits beyond those set out in the plain meaning of the statute.”⁵ *United States v. Fernandez*, 722 F.3d 1, 10 (1st Cir. 2013); *see also Fischer*, 529 U.S. at 678, 120 S.Ct. 1780.

Carrasco contends that a prior precedent of ours, *United States v. Sotomayor-Vázquez*, 249 F.3d 1 (1st Cir. 2001), as well as two precedents from other circuits, *United States v. Lupton*, 620 F.3d 790,

5. Carrasco’s contention that the government was required to show a nexus between the matters on which Carrasco was authorized to act on behalf of the municipalities and the contracts that he was alleged to have helped

800-01 (7th Cir. 2010); *United States v. Hudson*, 491 F.3d 590, 594-95 (6th Cir. 2007), support his position. We disagree.

Sotomayor-Vázquez did hold that evidence in the record in that case showed that the defendant was an “agent” of the non-profit entity at issue because, although the defendant was formally an independent contractor, the defendant “acted as [the] executive director” of the entity by approving all its organizational decisions, meeting with city officials on the agency’s behalf, and making decisions regarding hiring and firing. 249 F.3d at 8-9. But we made clear in so holding that the definition of “agent” under § 666(d)(1) has two “aspect[s]”: one relating to a person’s having been “authorized to act on behalf of” the covered entity and the other relating to whether the person was an “employee, partner, director, officer, manager, or representative” of that entity. *Id.* at 8. We also made clear that we based our holding only on that second “aspect of the statutory definition.” *Id.* Thus, our decision there in no way indicates either that an “agent” is not merely a person who was “authorized to act on behalf of” the relevant entity or that evidence that suffices to show only that the defendant was so authorized cannot suffice to show that the person qualifies as an “agent.”

Lupton also is no help to Carrasco. The evidence there was deemed sufficient to render the defendant an “agent” based on the activities of the defendant vis-à-vis a state agency. 620 F.3d at 800-01. But the contract between the real estate firm that employed the defendant in that case and the state of Wisconsin expressly provided that the firm was acting as “an indepen-

Mercado obtain fails for the same reason: Carrasco does not identify, nor can we discern, any textual basis for such a limitation on the reach of § 666(d)(1).

9a
Appendix B

dent contractor and not as an officer, employee, or agent of the state.” *Id.* at 800. Thus, while the court in *Lupton* looked beyond the terms of the contract to determine that the defendant was an “agent” for purposes of § 666, the court did not thereby suggest that contracts like those at issue in Carrasco’s case are inadequate on their own to supportably show that a defendant is an “agent” of a local government.

Finally, in *Hudson*, the Sixth Circuit determined that the evidence sufficed to satisfy the “agent” element based on both contract terms that “gave [the defendant] broad authority to set up a television station in the high school” and testimony that the defendant exercised that authority. 491 F.3d at 594-95. But, once again, nothing in that case suggests that a contract’s terms, standing alone, are insufficient to support a jury’s finding that a defendant was an “agent” in the relevant sense when those terms authorize the defendant to act on behalf of the relevant entity.

Carrasco does also argue that he is similarly situated to the defendant in *United States v. Pinson*, 860 F.3d 152 (4th Cir. 2017). There, the defendant was convicted of aiding and abetting -- in violation of § 666 -- theft carried out by an employee of a company that had been hired by a county in South Carolina. *Id.* The Fourth Circuit concluded that the employee was not an “agent” under § 666(d)(1) because of the limited nature of the tasks that he performed for his employer. *Id.* at 165-66. As the court explained, the employee “had no actual or implied authority to act on [the county’s] behalf in any capacity.” *Id.* at 166. Rather, because the employee’s only relevant duty was “receiving and packaging invoices from the company’s contractors and submitting them to [the county] for payment,” the employee “acted

solely on behalf of the” corporate entity, not the county. *Id.* at 165.

Carrasco contends that, for all the record shows in his case, he could have been tasked with carrying out only the same sort of limited tasks that were determined to be insufficient in *Pinson* to permit the employee there to be deemed an agent under § 666. Carrasco thus contends that the contracts alone cannot suffice to permit a factfinder to find that he was an “agent” under § 666.

But, while the Fourth Circuit’s conclusion in *Pinson* hinged on the evidence presented to show the employee’s relationship with the county, there is no suggestion in *Pinson* that any evidence was presented to show that, notwithstanding the employee’s actual duties, the employee was formally authorized to act on the county’s behalf. In Carrasco’s case, by contrast, a rational jury could conclude based on the contracts between him and the municipalities that he was authorized to act on behalf of those municipalities, given the express authorization in each contract for him to “represent” the relevant municipality. We thus do not see how *Pinson* supports Carrasco’s position any more than the other readily distinguishable precedents on which he relies and so reject his sufficiency challenge insofar as it takes aim at the record support for the “agent” element of the offense that underlies his convictions.

B.

Carrasco’s other ground for challenging his § 666 convictions on sufficiency grounds is that the government failed to supportably show that he engaged in any “official act.” Here, he contends that the government was required to prove that he received funds in exchange for taking “an official act” to prove that he violated § 666. He then goes on to contend that we must apply the definition of “official act” that

10a

Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

161

the Supreme Court set forth in construing the “official act” element of 18 U.S.C. § 201(a)(3) in McDonnell v. United States, 579 U.S. 550, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016), and that there is no evidence in the record that could suffice to show that he received the funds from Mercado in exchange for taking such an “official act.”

The Court explained in McDonnell that an “official act” occurs when a “public official . . . make[s]” (or agrees to make) “a decision or take[s]” (or agrees to take) “an action on [a] ‘question, matter, cause, suit, proceeding, or controversy.’” 579 U.S. at 574, 136 S.Ct. 2355 (quoting 18 U.S.C. § 201(a)(3)). The Court further explained that § 201(a)(3) required that the “question, matter, cause, suit, proceeding or controversy,” § 201(a)(3), must be one which is, or which may at a future time be, “pending” before the official. 579 U.S. at 570, 136 S.Ct. 2355 (quoting 18 U.S.C. § 201(a)(3)). The Court also explained that an “official act” occurs for purposes of § 201 when a public official “us[es] his official position to exert pressure on another official to perform an ‘official act,’ or to advise another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official.” Id. at 574, 136 S.Ct. 2355.

The necessary premise of this ground of Carrasco’s sufficiency challenge is that § 666 has an “official act” element. But the text of § 666, unlike the text of § 201 that the Supreme Court construed in McDonnell, does not include the phrase “official act.” And, as the government points out, several circuits have held that the government need not show that a defendant engaged in an “official act” to secure a conviction under § 666. See United States v.

Lindberg, 39 F.4th 151, 165-169 (4th Cir. 2022); United States v. Roberson, 998 F.3d 1237, 1246-47 (11th Cir. 2021); United States v. Ng Lap Seng, 934 F.3d 110, 131-34 (2d Cir. 2019); United States v. Porter, 886 F.3d 562, 565-66 (6th Cir. 2018).

Moreover, although our Circuit has proceeded in some cases on the understanding that § 666 does contain an “official act” element, we have done so only in cases in which the government did not dispute the point and in which the jury had been instructed that the offense does contain an “official act” element, see, e.g., United States v. Martinez, 994 F.3d 1, 6-7 (1st Cir. 2021). We thus have not held that § 666 does have an “official act” element.

Against this precedential backdrop, it is potentially significant both that the District Court did not instruct the jury in Carrasco’s case that § 666 has an “official act” element⁶ and that in this case the government contests whether § 666 has such an element. But we need not decide whether § 666 has the element in question because Carrasco has failed to show that the government did not present sufficient evidence for a rational juror to conclude that element was met.

[4] The record supportably shows that Carrasco agreed to “advise” the mayors of the relevant municipalities “knowing or intending that such advice w[ould] form the basis for an ‘official act’” by those municipal officials -- namely, the awarding of contracts by those municipalities to a company associated with Mercado. McDonnell, 579 U.S. at 574, 136 S.Ct. 2355. That evidence takes the form chiefly of testimony from Mercado himself.

6. Carrasco’s briefing does at points assert that “[t]he jury should . . . have been instructed in conjunction with McDonnell’s two-part test” and thus instructed to identify an official act

taken by Carrasco, but Carrasco’s counsel clarified during oral argument that no challenge was being made on appeal to the jury instructions given by the District Court.

11a
Appendix B

Mercado testified that his environmental consulting firm had contracts with the municipalities of Barceloneta, Juncos, and Rio Grande. He further testified that the contracts were not awarded pursuant to a bidding process but instead after a negotiation with the municipal government. He then testified that he made payments to Carrasco in exchange for Carrasco providing “[a]ccess, protection, watch my back,” while explaining that the basis for his belief in Carrasco’s ability to deliver the agreed-upon “[a]ccess,” “protection,” and back-watching was Mercado’s belief that Carrasco had “[t]otal access” and held “[t]otal influence” over the mayors in the three municipalities. Mercado further testified that he understood Carrasco would, in exchange for the payments, ensure that Mercado would receive municipal contracts. And, finally, Mercado testified that he understood Carrasco to be soliciting these payments by asking for “loose change” in connection with Mercado’s receipt of municipal contracts.

In addition, the record shows both that the government submitted into evidence certain checks that Mercado made out to Carrasco and that Mercado testified that those checks were paid in connection with the specific contracts identified in the indictment. So, there is evidence that at least partly corroborates Mercado’s testimony.

Notwithstanding this collection of evidence, Carrasco contends that the evidence in the record does not suffice to satisfy the “official act” element. He does so by focusing on Mercado’s description of Carrasco’s alleged provision of “[a]ccess, protection,” and watching Mercado’s back. Carrasco argues that these services are too “speculative and nebulously-described” to meet the McDonnell standard for what constitutes an “official act.” Carrasco then contends that the payments Mercado made

to him were not bribes but rather were akin to the speculative gift-giving at issue in United States v. Sun-Diamond Growers of California, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999), which the Supreme Court concluded was not in exchange for an “official act.”

But Mercado’s testimony, as we have explained, provides a basis for finding more than that Carrasco had provided Mercado with merely “access” or “protection.” It also suffices to permit a finding that Carrasco “advise[d]” the mayors “knowing or intending that [his] advice w[ould] form the basis for an ‘official act’” taken by the mayors -- namely, the award of the contracts to Mercado. McDonnell, 579 U.S. at 574, 136 S.Ct. 2355. And because Carrasco makes no argument as to why such advice would not for that reason qualify as an “official act,” we reject his contention that the evidence does not suffice under McDonnell to allow a rational jury to conclude that he had undertaken such an act.

III.

We still must consider Carrasco’s two evidentiary challenges, each of which was preserved below, and each of which he contends supports our vacating his convictions. We reject these challenges as well.

A.

Carrasco first argues that the District Court erred in admitting evidence of municipal contracts and related payments made by Mercado to Carrasco that went beyond the specific contracts and related payments that ground the specific § 666 charges for which Carrasco was indicted. The relevant facts are as follows.

Carrasco’s indictment charged him with receiving approximately \$72,300 in payments from Mercado related to seven mu-

nicipal contracts. The evidence of these payments at trial took the form of checks that were made out from Mercado to Carrasco. The memo field on each check stated that the check was paid for “legal services” or some other seemingly legitimate service that Carrasco had provided or was to provide to Mercado. But the government did not submit into evidence only checks from Mercado to Carrasco that the government contended were payments to Carrasco in return for influencing the award of the contracts that form the predicate for the § 666 charges against Carrasco. The government also submitted into evidence additional checks that Mercado testified were kickbacks from Mercado to Carrasco in exchange for Carrasco agreeing to steer to Mercado contracts beyond the contracts mentioned in the indictment.⁷

Carrasco contends that the District Court erred in admitting into evidence these additional checks as well as Mercado’s related testimony. In his view, that evidence constituted propensity evidence of the type prohibited by Federal Rule of Evidence 404(b).

To make out this contention, Carrasco first argues that the evidence was not admissible under Rule 404(b) as evidence “intrinsic” to the conduct for which Carrasco was indicted. He contends that is so because this evidence was relevant only to other, uncharged conduct -- that is, the evidence was “extrinsic to the crime charged.” United States v. Gonyer, 761 F.3d 157, 162 (1st Cir. 2014) (quoting United States v. Roszkowski, 700 F.3d 50, 56 (1st Cir. 2012)).

7. In total, the government submitted into evidence forty-one checks representing approximately \$195,000 in payments from Mercado to Carrasco. Mercado testified that three of those checks, totaling \$2,989, were for legitimate legal services. It appears that Mercado was not asked to testify as to whether four of

The government responds that even if the evidence regarding the additional checks is “extrinsic,” it is admissible because it has a “special relevance” under Rule 404(b). United States v. Henry, 848 F.3d 1, 8 (1st Cir. 2017) (citing United States v. Hicks, 575 F.3d 130, 142 (1st Cir. 2009)). In particular, the government argues that the evidence is specially relevant because it shows not only Carrasco’s intent in accepting the payments for which he was charged but also his modus operandi for receiving payments in connection with his agreement with Mercado to influence the mayors to steer contracts to Mercado’s firm in exchange for his receiving payments from Mercado. See id. (quoting Fed. R. Evid. 404(b)(2)) (noting that “special relevance under Rule 404(b)” includes “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”). And, notably, Carrasco does not dispute that the evidence was of this specially relevant sort.

[5-7] Thus, in the end, Carrasco’s challenge boils down to his contention that this evidence was not admissible because the evidence was unduly prejudicial and thus violative of Rule 403. See id. (“If prior crime evidence has special relevance under Rule 404(b), the court must move on to consider whether the evidence should nevertheless be excluded under Rule 403.”). But, as the party opposing the admission of evidence on Rule 403 grounds, Carrasco bears the burden of establishing “that the probative value” of the evidence at issue “is substantially outweighed by the danger of unfair prejudice.” United States v. Tse, 375 F.3d 148, 162 (1st Cir. 2004). And,

the checks, totaling \$5,850, were payments for legitimate services provided by Carrasco or payments related to the steering of contracts to Mercado. Mercado testified that the remaining thirty-four checks were payments made in exchange for Carrasco agreeing to steer contracts to Mercado.

13a
Appendix B

given that “we afford deference to a [district court]’s balancing decision, and ‘[o]nly rarely -- and in extraordinarily compelling circumstances -- will we, from the vista of a cold appellate record, reverse a district court’s on-the-spot judgment concerning the relative weighing of probative value and unfair effect,’” United States v. Doe, 741 F.3d 217, 229 (1st Cir. 2013) (alteration in original) (internal quotation omitted) (quoting United States v. Li, 206 F.3d 78, 84-85 (1st Cir. 2000)), we conclude that Carrasco has not carried that burden here.

Carrasco’s only argument as to why the admission of the challenged evidence was unduly prejudicial is that “[f]looding the jury” with that evidence “about uncharged conduct practically guaranteed that the jury would be unduly influenced” and thus unable to disentangle the acceptable non-propensity inference from the forbidden propensity inference. And Carrasco relies for this argument solely on United States v. Gilbert, 229 F.3d 15, 21-25 (1st Cir. 2000).

But, in Gilbert, we affirmed, in an interlocutory appeal brought by the government, a district court’s decision to exclude evidence, id. at 20. Here, by contrast, we are reviewing a defendant’s challenge to a district court’s decision to admit evidence.

Moreover, in affirming the district court’s decision not to admit the evidence in Gilbert, we concluded that the non-propensity purpose of admitting the evidence was of only marginal relevance to the government’s case. Id. at 24. By contrast, Carrasco’s intent in accepting checks with innocuous explanations in their memo lines -- namely, whether he believed those checks to be payments for legitimate ser-

vices or for steering contracts to Mercado -- was a central issue at trial.

To be sure, we have acknowledged that evidence admissible for a special purpose under Rule 404(b) may be unfairly prejudicial when other evidence that carries less risk of being unduly prejudicial could have been used to prove the fact in question. See United States v. Varoudakis, 233 F.3d 113, 122 (1st Cir. 2000). But in Varoudakis, we noted that the record was replete with compelling, alternative evidence already before the jury that spoke to the same issue, thereby lessening any probative value of the proffered “other acts” evidence. Here, by contrast, the evidence of the additional checks and Mercado’s related testimony were central to establishing Carrasco’s intent. And, although Carrasco claims that the admission of the other checks and accompanying testimony risked “[f]looding the jury” with evidence of uncharged bad acts and thus that the jury would make an improper propensity inference,⁸ it is unclear how many of the checks might have been admitted without creating that risk. Moreover, we have in similar circumstances found no error in the admission of repetitive evidence of prior bad acts with special relevance when “the repetition of the conduct was itself distinctly probative.” United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989); see id. at 155-56 (affirming, in a case where defendant was charged with twenty counts of embezzlement for misappropriating twenty weekly expense allowances, the admission under Rule 404(b) of thirty-one checks the government argued represented thirty-one identical but uncharged misappropriations of weekly allowances). We thus conclude that the District Court did not abuse its

8. To the extent Carrasco challenges the illustrative charts the government used to summarize the evidence of payments, both charged and uncharged, that Mercado made to Carrasco, he has failed to develop the argument and thus has waived it. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

14a

Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

165

discretion in admitting evidence of Mercado's illicit but uncharged payments to Carrasco.⁹

B.

Carrasco's second evidentiary challenge concerns portions of Mercado's testimony in which Mercado characterized the content of certain interactions he recounted and certain recorded conversations that were played for the jury. Carrasco contends that Mercado's characterizations of these conversations contravened Federal Rule of Evidence 701 and so were improperly admitted into evidence. We need not decide whether that is so, however, because we agree with the government that any error on this score was harmless.

[8–10] The admission of improper testimony is harmless if it is “highly probable that the error did not influence the verdict.” United States v. Flores-De-Jesus, 569 F.3d 8, 27 (1st Cir. 2009) (quoting United States v. Casas, 356 F.3d 104, 121 (1st Cir. 2004)). The government bears the burden of making that showing. See id. (quoting United States v. Rodriguez-Marrero, 390 F.3d 1, 18 (1st Cir. 2004)). To determine whether the government has made that showing, we must engage in “a panoramic, case-specific inquiry” that considers multiple factors, including “the centrality of the tainted material,” its “prejudicial impact,” and “the relative strengths

9. Carrasco contends that the District Court erred in failing to give the jury a limiting instruction concerning the purpose for which the jury could consider the evidence of the prior payments he had accepted from Mercado. But Carrasco “may not complain about the absence of a limiting instruction because he never requested one.” United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008) (citing Huddleston v. United States, 485 U.S. 681, 691–92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)) (explaining that Huddleston “not[ed] that Federal Rule of Evidence 105 provides protection from unfair prejudice by requiring

of the parties’ cases.” Id. (quoting United States v. Sepúlveda, 15 F.3d 1161, 1182 (1st Cir. 1993)). We conclude that the government has made the necessary showing.

[11] As the government points out, the testimony by Mercado that is at issue formed only one part of Mercado’s testimony, and that testimony was itself only part of the government’s case. Specifically, in testifying, Mercado did more than address his understanding of the meaning of words that appeared in the transcripts of his conversations with Carrasco. He also testified, without objection from Carrasco, about the yearslong corrupt relationship between the two of them, with specific reference to the bribes and contracts charged in the indictment.

The evidence also included the many checks that Mercado paid to Carrasco and Mercado’s testimony about those checks. Mercado testified in that respect that he made payments to Carrasco for “[a]ccess” and “protection” due to his belief that Carrasco had “[t]otal access” and “[t]otal influence” over the mayors in the three municipalities at issue and that Mercado understood by making those payments that Carrasco would ensure that Mercado received municipal contracts.

Finally, as the government notes, the transcripts of the recorded conversations were themselves in evidence. And the tran-

the trial court, upon request, to instruct the jury that the evidence of other acts is to be considered only for the proper purpose for which it was admitted”). The District Court therefore “did not err by failing to issue, sua sponte, the limiting instruction that [Carrasco] now claims was essential.” Id. (citing United States v. Cartagena-Carrasquillo, 70 F.3d 706, 713 (1st Cir. 1995)) (explaining that Cartagena-Carrasquillo “refus[ed] to impose obligation on court to give, sua sponte, a limiting instruction because that decision is ‘within the ken of counsel and part of litigation strategy and judgment’”).

15a

Appendix B

scripts on their face are plainly incriminating even setting aside Mercado's testimony about the meaning of what was said in them. For example, the transcript of one of the recorded conversations shows that Mercado mentioned explicitly to Carrasco that investigators would be asking Mercado questions regarding whether Mercado received "kickbacks" for "contracts" and that Mercado could not "lie" about it. That transcript also shows that Mercado then stated repeatedly, speaking only to Carrasco, that he did not "have a way to justify that money" and that "out of the checks we had, there were many . . . very close to . . . your clients' contracts without any justification." Soon after, according to the transcript, Carrasco stated: "If you at least get me the information on the date and amount I could find out what sort of things happened during, during those dates, because we may have some sort of explanation. It's the only thing . . . if not . . . we're screwed." (Emphasis added).

The government argues based on this evidence that the recorded conversations themselves, in combination with the other evidence, are enough to establish Carrasco's guilt even without Mercado's commentary interpreting them. Yet Carrasco offers no explanation for why the plain meaning of these comments does not reflect a corrupt relationship between Mercado and Carrasco. He thus offers no explanation for why the admission of Mercado's interpretations of those conversations would not have been harmless. And without any such explanation from Carrasco, we must conclude that the record in this case "offers every assurance that the [challenged testimony] did not affect the trial's outcome" and so was "harmless." Sepúlveda, 15 F.3d at 1182.

IV.

Carrasco separately challenges his 120-month prison sentence as procedurally and

substantively unreasonable. He does so by advancing three preserved challenges to the District Court's application of the Guidelines, as well as claims regarding the disparity between his sentence and both the sentences imposed for similar offenses nationwide and the sentence received by Mercado.

A.

[12] We begin with Carrasco's claims that his sentence is procedurally unreasonable. We review the District Court's factual determinations for clear error, its legal interpretation and application of the sentencing guidelines *de novo*, and its judgment calls for abuse of discretion. United States v. Ouellette, 985 F.3d 107, 110 (1st Cir. 2021).

1.

[13] Carrasco first challenges the District Court's application of the two-level enhancement that U.S.S.G. § 3C1.1 sets forth if:

the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and [if] the obstructive conduct related to . . . the defendant's offense of conviction and any relevant conduct; or . . . a closely related offense.

The District Court determined that the enhancement applied to Carrasco because Carrasco "attempt[ed] to convince . . . Mercado . . . that the best strategy to face their problem was for them to keep silent and not tell anything to anyone, to invoke the attorney-client privilege to cover their scheme, or to lie to the Federal Bureau of Investigation." The District Court based the predicate determination on, among

16a
Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

167

other things, a conversation that Mercado recorded between himself and Carrasco at the behest of law enforcement.¹⁰

To the extent that Carrasco contends that the District Court clearly erred in determining that Carrasco had attempted to convince Mercado that Mercado should invoke attorney-client privilege, we cannot agree. The District Court's reading of the transcript is certainly a plausible one. See United States v. Rivera, 51 F.4th 47, 53 (1st Cir. 2022) ("[W]here there is more than one plausible view of the circumstances, the sentencing court's choice among supportable alternatives cannot be clearly erroneous." (quoting United States v. Ilaraza, 963 F.3d 1, 14 (1st Cir. 2020))).

Carrasco separately contends that, even if he engaged in the conduct described above, the District Court erred by applying the enhancement to him. He notes that Application Note 5 to § 3C1.1 lays out "a non-exhaustive list" of certain conduct which "ordinarily do[es] not warrant application" of the enhancement. He goes on to point out that Section B of that Note explains that one type of conduct which "ordinarily" is insufficient to trigger the enhancement is "making false statements,

10. That conversation went as follows:

Mercado: And what about when they ask you, why was he your client?

Carrasco: I cannot give out any details.

Mercado: You know, they are going to ask that to me. And I am going to tell them, "Yes, he was my attorney." "What for?"

Carrasco: For everything.

Mercado: For this... Well, that would be lying to them.

Carrasco: For everything, you understand.

Mercado: You would say for everything?

Carrasco: Yes, for everything.

Mercado: But, but I will earn myself eight years.

Carrasco: No, no, wait a minute, I am not telling you to—

Mercado: [Crosstalk] I mean, I don't have ... What evidence do I have?

not under oath, to law enforcement officers, unless Application Note 4(G) above applies." And, finally, he emphasizes that Application Note 4 lays out "a non-exhaustive list of examples of the types of conduct" that justifies application of the enhancement, including Section G, which provides that the enhancement applies if the defendant "provid[ed] a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." See U.S.S.G. § 3C1.1 n.4 & n.5. Carrasco then pulls the argument together by contending that his conduct is properly categorized as an unsworn false statement to law enforcement under Application Note 5(B) rather than as a "materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution" under Application Note 4(G).¹¹

In support of this contention, Carrasco argues that his suggestion that Mercado lie to law enforcement could not have created the necessary significant obstruction or impediment under Note 4(G), given that

Carrasco: Listen to me. I am telling you about me, what I would say, "For everything."

11. To the extent Carrasco argues that the enhancement does not apply to him at all because he made the statements in question to Mercado and Mercado was not a member of law enforcement, Carrasco misapprehends the reach of the enhancement. Under Application Note 9, Carrasco would be accountable both for his "own conduct and for conduct that [he] aided or abetted, counseled, commanded, induced, procured, or willfully caused." U.S.S.G. § 3C1.1 n.9. Because Carrasco advised Mercado to make a false claim of attorney-client privilege to law enforcement, the fact that Mercado rather than Carrasco would have actually lied to law enforcement would be no defense to the application of the enhancement to Carrasco.

17a
Appendix B

Mercado was already cooperating with law enforcement. He further notes that, even if Mercado had not been cooperating with law enforcement at the time, Application Note 4(G) applies only if the obstructive conduct “significantly obstructed or impeded” an investigation or prosecution. For that reason, Carrasco contends that the enhancement could not apply to him because the District Court made no finding that his suggestion to Mercado would have had such an impact if Mercado had not already been cooperating with law enforcement and had instead, at Carrasco’s suggestion, claimed a nonexistent lawyer-client confidentiality.

Carrasco ignores, however, the import of Application Note 4(A), which makes the enhancement applicable when a defendant “threaten[s], intimidat[es], or otherwise unlawfully influenc[es] a . . . witness . . . directly or indirectly, or attempt[s] to do so.” U.S.S.G. § 3C1.1 n.4(A) (emphasis added). While Carrasco contends that he did not attempt to “threaten[]” or “intimidat[e]” Mercado, we have previously explained that simply asking a potential witness to lie to law enforcement “plainly constitutes an attempt to ‘unlawfully influence[] a . . . witness.’” United States v. Coffin, 946 F.3d 1, 8 (1st Cir. 2019); see also United States v. Batchu, 724 F.3d 1, 12 (1st Cir. 2013); cf. United States v. O’Brien, 870 F.3d 11, 18 (1st Cir. 2017). Because Carrasco does not explain why our reasoning in such cases is not applicable here, we reject his challenge to the application of the obstruction of justice enhancement to him.

2.

[14] Carrasco next contends that the District Court erred in applying a two-level enhancement based on § 2C1.1(a)(1) of the Guidelines. He does so on the ground that the District Court was wrong

to treat him as a “public official” within the meaning of that Guideline.

In applying the enhancement, the District Court relied on the first Application Note to § 2C1.1. The District Court noted that the Application Note provides that the term “‘public official’ shall be construed broadly.” U.S.S.G. § 2C1.1 n.1. It also noted that Section C of that Application Note provides that the term “public official” includes:

[a]n officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.

Id. § 2C1.1 n.1(C).

The District Court also noted that Section E of that Application Note provides in relevant part that a “public official” includes:

[a]n individual who . . . (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).

Id. § 2C1.1 n.1(E).

In contending that the District Court was wrong to apply the enhancement, Carrasco argues that the record indisputably shows that he was never appointed or elected to any office, that he was not employed by the municipalities for whom he performed contract services, and that “his contractual relationship was not shown to afford him decision-making authority or

18a
Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

169

any other indicia of public trust.” He thus contends that there was no basis for applying the enhancement set forth in the Guideline to him.

But the District Court explained that its determination that Carrasco was a “public official” was based on “the duties that [he] assumed and performed under his contracts with the [m]unicipalities of Barceloneta, Rio Grande, and Juncos” and that, in the District Court’s view, Carrasco “was in a position of public trust that infused him with enough *de facto* authority to act for or on behalf of those municipalities and influence the decision-making process, particularly as it relate[d] to ensuring that the municipalities awarded contracts to . . . Mercado.” Moreover, shortly before denying Carrasco’s objection to the application of the sentence enhancement to him, the District Court had denied Carrasco’s objection to the presentence report’s description of Carrasco as “the main advisor/attorney for the mayors of Barceloneta, Rio Grande, and Juncos” and, in doing so, had pointed to Mercado’s testimony that Carrasco had close relationships with all three mayors and had “total influence” over each of them.

We thus conclude that the District Court determined, albeit implicitly, that Mercado’s testimony detailing Carrasco’s relationships with the mayors supported a finding that, by a preponderance of the evidence, Carrasco “participate[d] so substantially in government operations as to possess *de facto* authority to make governmental decisions.” U.S.S.G. § 2C1.1 n.1(E)(iii). Carrasco’s only argument for why the District Court would have been wrong to so conclude, however, is that Carrasco was, at most, only an “advisor” to the mayors. Yet this argument fails to grapple with Mercado’s testimony that Carrasco had “total influence” over the mayors, as it is difficult to see how Carras-

co could be understood to have “total influence” over the mayors if he did not have “*de facto* authority to make . . . decisions” regarding to whom the contracts would be awarded. We thus see no error in the District Court’s application of this enhancement to Carrasco.

3.

[15] Carrasco’s final Guidelines-related contention is that the District Court erred by applying a four-level enhancement to him under § 2C1.1(b)(3). That guideline provides that the enhancement applies when the “offense involved an elected public official or any public official in a high-level decision-making or sensitive position.” *Id.* Carrasco argues that the guideline has no application to him because he “was not convicted of bribing an elected official or with joining with Mercado to do so.”

Carrasco misapprehends the basis for the District Court’s application of the enhancement. The District Court did not apply the enhancement because Carrasco was found to be part of a scheme to pay the mayors in exchange for the award of contracts. It did so because it determined that Carrasco “used his influence over and his access to the mayors of the [m]unicipalities of Barceloneta, Rio Grande, and Juncos, who are elected public officials,” to steer contracts to Mercado and because Carrasco himself was a “public official” in a “high level decision-making or sensitive position.”

Carrasco makes no argument that the District Court’s determination on either point was incorrect. And even if we were to disregard the former determination, Carrasco makes no argument that the latter determination -- that Carrasco himself was a “public official in a high-level decision-making or sensitive position” -- would not have alone been sufficient to justify the

19a
Appendix B

170

79 FEDERAL REPORTER, 4th SERIES

application of the enhancement. See United States v. Hill, 645 F.3d 900, 908 (7th Cir. 2011) (affirming application of § 2C1.1(b)(3) enhancement to defendant based on finding that defendant “held a sensitive position”).

Nor can we see how the determination that Carrasco was a “public official in a high-level decision-making or sensitive position” was incorrect. We explained above that the District Court was not wrong to find that Carrasco had “de facto authority to make governmental decisions” when applying an enhancement to him for being a “public official.” We also conclude that the District Court was not wrong to determine on this same basis that Carrasco occupied a “high-level decision-making position,” given that such a position is “characterized by a direct authority to make decisions” for the municipalities. We thus see no mistake in the District Court’s application of this enhancement to Carrasco.

B.

[16] Finally, we address Carrasco’s challenges to the substantive reasonableness of his sentence. Our review is for abuse of discretion, United States v. Reyes-Torres, 979 F.3d 1, 9 (1st Cir. 2020), and we uphold a sentence against such a challenge so long as the district court provided “a plausible sentencing rationale” in support of “a defensible result,” United States v. Contreras-Delgado, 913 F.3d 232, 243 (1st Cir. 2019) (quoting United States v. Zapata-Vázquez, 778 F.3d 21, 24 (1st Cir. 2015)).

12. Carrasco also challenges the procedural reasonableness of his sentence based on what he contends was an inappropriate reference by the District Court to other sentences handed down for violations of § 666 in the District of Puerto Rico. But, the District Court made clear that it was not “purport[ing] to hold [Carrasco] responsible for all of the wrongs caused by corruption in Puerto Rico” and

1.

[17] Carrasco’s first substantive-reasonableness-based challenge is that the District Court created an unjustified disparity between his sentence and the sentences imposed on similarly situated defendants nationally. This disparity argument rests on the contention that the District Court erred in declining to credit statistics showing that the average sentence in the United States for a bribery-related offense was twenty-five months in 2019. Carrasco, relying on these statistics, contends that the District Court should have sentenced him to a comparable period of incarceration.

But a claim of national disparity relies on “apples . . . being compared to apples,” United States v. Joubert, 778 F.3d 247, 256 (1st Cir. 2015). And, as the District Court correctly noted, various statistical measures of the average sentences imposed upon defendants convicted of bribery offenses include sentences imposed upon defendants convicted under a number of federal statutes, not just defendants who, like Carrasco, were convicted for violating 18 U.S.C. § 666. Thus, the District Court committed no error in finding that Carrasco’s statistics were over-inclusive and thus provided no basis for a claim of national disparity.¹²

2.

[18] Carrasco’s second challenge to the substantive reasonableness of his sentence

that the District Court was “required to impose a sentence that is commensurate” to his “offenses” and “personal characteristics” as well as the sentence’s deterrent effect. Carrasco does not explain why, despite these statements by the District Court, we must understand the District Court to have impermissibly relied on community characteristics in determining his sentence.

20a Appendix B

U.S. v. CARRASCO
Cite as 79 F.4th 153 (1st Cir. 2023)

171

is another disparity-based challenge. Here, he contends that the District Court erred in sentencing him to 120 months of imprisonment when Mercado was sentenced only to a pretrial diversion program. But, as with his claim of national disparity, Carrasco must convince us that he and Mercado were similarly situated. United States v. Gonzalez, 981 F.3d 11, 23 (1st Cir. 2020). Yet Carrasco cannot do so given the substantial differences between Mercado and Carrasco, which include the fact that Mercado cooperated with law enforcement and Carrasco did not. Cf. United States v. Mateo-Espejo, 426 F.3d 508, 514 (1st Cir. 2005) (rejecting sentencing disparity claim in light of “appellant’s belated and grudging cooperation” compared to codefendant’s “prompt and full cooperation”).¹³

3.

[19] Carrasco’s final substantive-reasonableness challenge to his sentence is that the District Court erred in sentencing him to the statutory maximum. As Carrasco himself acknowledges, the statutory maximum for the offenses of which he was convicted is one month below the lower end of the calculated Guidelines range. Nonetheless, Carrasco objects to the District Court’s refusal to vary even further downward in light of what he characterizes as “the overwhelmingly mitigating personal considerations” present in his case.

But the District Court at the sentencing hearing explicitly considered the mitigating circumstances to which Carrasco directs our attention. Indeed, after taking note of Carrasco’s age, family, and multiple medical conditions, the District Court

13. To the extent Carrasco claims that the District Court imposed a penalty upon him for not pleading guilty, the claim fails for similar reasons: Carrasco cannot show that any similarly situated codefendant received a lesser sentence simply because he went to trial rather than pleading guilty, particularly given

also noted that Carrasco had worked as an attorney “for more than 30 years” and that Carrasco had submitted “many letters of recommendation” that spoke to his “good moral character and values” and that “describe[d] him as an exemplary son, father, and friend, and as an honorable citizen and consummate professional . . . who still has much to offer.” The District Court then noted, however, that none of those letters mentioned Carrasco’s corruption convictions and that “it would not be honest or show integrity” for an attorney to “do what [Carrasco] was convicted of doing in this case over five years,” such as “accept[ing] bribes, cover[ing] up a scheme involving paying bribes, or telling someone to lie concerning the bribe scheme.” The District Court therefore concluded that the 120-month guideline sentence was “the appropriate punishment pursuant to the facts of this case and in accordance with the [§] 3553(a) factors.” We cannot conclude that the District Court’s conclusion on this score was predicated on implausible reasoning or yielded an indefensible result. We thus reject Carrasco’s challenge.

V.

For the above reasons, we affirm Carrasco’s convictions and his sentence.



that, in handing down Carrasco’s sentence, the District Court noted that the mayor of Barceloneta received the same sentence “even though he pled guilty and less money was involved” in the crimes to which the mayor pled guilty than the crimes of which Carrasco was found guilty.

21a
Appendix C

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA

v.

Alejandro CARRASCO

) **JUDGMENT IN A CRIMINAL CASE**
)
)
) Case Number: 3:14-CR-423-01 (FAB)
)
) USM Number: 44511-069
)
) Lydia Lizarribar, Esq. and Ruben Morales, Esq.
)
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) One (1), Two (2), Three (3), and Four (4) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Counts</u>
18 USC § 666(a)(1)(B) & (b)	Bribery concerning programs receiving Federal Funds.	7/31/2011	1 through 4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/27/2021

Date of Imposition of Judgment

/S/ FRANCISCO A. BESOSA

Signature of Judge

FRANCISCO A. BESOSA, U.S. DISTRICT JUDGE

Name and Title of Judge

4/27/2021

Date

22a
Appendix C

Judgment — Page 2 of 7

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
One Hundred and Twenty (120) months as to each counts one (1) through four (4) to be served concurrently to each other.

The court makes the following recommendations to the Bureau of Prisons:
--That defendant be allowed to serve the term of imprisonment at FPC Pensacola.
-- That defendant while incarcerated be provided medical treatments for his glaucoma, high blood pressure and asthma as well as any other medical condition, psychological treatment for depression, the 500 hours drug/alcohol treatment, and vocational training. Finally, the defendant be allowed to provide legal counsel to other inmates.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:
 at 12:00 a.m. p.m. on 5/3/2021.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

23a
Appendix C

Judgment—Page 3 of 7

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years as to each counts one (1) through four (4) to be served concurrently to each other, under the following mandatory, standard, and Special/Additional Conditions of Supervision.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

ADDITIONAL SUPERVISED RELEASE TERMS

1. He shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. He shall not commit another federal, state, or local crime.
3. He shall not possess firearms, destructive devices, or other dangerous weapons.
4. He shall not unlawfully possess controlled substances.
5. He shall submit himself and his property, house, residence, vehicles, papers and effects, computers and other electronic communication or data storage devices or media to a search, at any time, with or without a warrant, by the Probation Officer, and if necessary, with the assistance of any other law enforcement officer (in the lawful discharge of the supervision functions of the Probation Officer) with reasonable suspicion of unlawful conduct or of a violation of a condition of supervised release. The probation officer may seize any electronic communication or electronic device or medium which will be subject to further forensic investigation or analysis. Failure to submit to a search and seizure may be grounds for revocation of supervised release. Mr. Carrasco shall warn any other resident or occupant that the premises may be subject to searches pursuant to this condition.
6. He shall provide the U.S. Probation Officer complete access to any financial information upon request.
7. He shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements 18 U.S.C. § 3563(a)(9).
8. He shall perform 150 hours of unpaid community service work during the supervision period, at a private non-profit or public facility to be selected under the arrangements that the U.S. Probation Officer may determine.

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 400.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Alejandro CARRASCO
CASE NUMBER: 3:14-CR-423-01 (FAB)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 400.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
---	--------------	-----------------------------	--

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

28a

1 A Yes.

Appendix D

2 Q Focusing on the years after that, 2009 until your arrest
3 in 2012, did you receive additional contracts from Rio
4 Grande?

5 A Yes.

6 Q And what about the municipalities of Barceloneta and
7 Juncos in the period of 2009 to 2012, did you receive
8 contracts from those municipalities between those dates,
9 2009-2012?

10 A Yes.

11 Q Multiple contracts with each municipality?

12 A Yes.

13 Q And what was the Defendant's role, if any, in those
14 municipalities during that 2009 up to 2012 time period?

15 A He was the attorney for the municipalities.

16 Q Legal adviser to the mayors?

17 A Yes.

18 Q Did the Defendant offer to help you get those additional
19 contracts or at least some of those additional contracts in
20 Barceloneta, Rio Grande, Juncos between 2009 and 2012?

21 MS. LIZARRIBAR-MASINI: Objection, Your Honor.

22 Leading.

23 THE COURT: Overruled.

24 THE WITNESS: Yes.

1 BY MR. PEARCE:

Appendix D

2 Q How?

3 A Well, he kept me up to date as to the opportunities that
4 would come up in Rio Grande.5 In Barceloneta, he would take me to the mayor to
6 help him solve multiple problems that were coming up with
7 multiple agencies.8 And in Juncos, the same thing. There was a big
9 problem at the Federal level with the landfill. And so he
10 took me to meet Papo, and we worked from then.11 Q By helping you get those contracts, was the Defendant
12 serving as your attorney?

13 A No.

14 Q Whose attorney was he?

15 A Of the municipalities and mayors.

16 Q Did you Defendant ask for payment in exchange for that
17 help?

18 A Yes.

19 Q How would he ask you -- how did he ask you?

20 A The same methodology. "How much is in there for me?"

21 In the case of Barceloneta, he then wanted some
22 specific amounts.23 Q Let's talk about that shortly. I want to ask if you are
24 familiar with a specific term.25 Have you heard the term "*misas sueltas*"?

30a
Appendix E

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 31. Embezzlement and Theft (Refs & Annos)

18 U.S.C.A. § 666

§ 666. Theft or bribery concerning programs receiving Federal funds

Currentness

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at \$5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency 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.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

31a

Appendix E

(1) the term “agent” means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term “government agency” means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term “local” means of or pertaining to a political subdivision within a State;

(4) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term “in any one-year period” means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

CREDIT(S)

(Added [Pub.L. 98-473, Title II, § 1104\(a\)](#), Oct. 12, 1984, 98 Stat. 2143; amended [Pub.L. 99-646, § 59\(a\)](#), Nov. 10, 1986, 100 Stat. 3612; [Pub.L. 101-647, Title XII, §§ 1205\(d\)](#), 1209, Nov. 29, 1990, 104 Stat. 4831, 4832; [Pub.L. 103-322, Title XXXIII, § 330003\(c\)](#), Sept. 13, 1994, 108 Stat. 2140.)

U.S. SUPREME COURT OCTOBER TERM 2023

<U.S. Supreme Court, Oct. Term 2023, Oral Argument - Question Presented: Whether section 666 criminalizes gratuities, i.e., payments in recognition of actions the official has already taken or committed to take, without any quid pro quo agreement to take those actions. [United States v. Snyder, 71 F.4th 555 \(7th Cir.\)](#), cert. granted, [144 S. Ct. 536, 217 L. Ed. 2d 284 \(2023\)](#).>

[Notes of Decisions \(386\)](#)

18 U.S.C.A. § 666, 18 USCA § 666

Current through P.L. 118-62. Some statute sections may be more current, see credits for details.

32a
Appendix F

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 11. Bribery, Graft, and Conflicts of Interest (Refs & Annos)

18 U.S.C.A. § 201

§ 201. Bribery of public officials and witnesses

Effective: December 22, 2023

Currentness

(a) For the purpose of this section--

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed;

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit;

(4) the term “foreign official” means--

(A)(i) any official or employee of a foreign government or any department, agency, or instrumentality thereof; or

(ii) any senior foreign political figure, as defined in section 1010.605 of title 31, Code of Federal Regulations, or any successor regulation;

(B) any official or employee of a public international organization;

(C) any person acting in an official capacity for or on behalf of--

(i) a government, department, agency, or instrumentality described in subparagraph (A)(i); or

(ii) a public international organization; or

33a
Appendix F

(D) any person acting in an unofficial capacity for or on behalf of--

(i) a government, department, agency, or instrumentality described in subparagraph (A)(i); or

(ii) a public international organization; and

(5) the term “public international organization” means--

(A) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(B) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(b) Whoever--

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

34a
Appendix F

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever--

(1) otherwise than as provided by law for the proper discharge of official duty--

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance

Appendix F

at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

(f) Prohibition of demand for a bribe.--

(1) Offense.--It shall be unlawful for any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value personally or for any other person or nongovernmental entity, by making use of the mails or any means or instrumentality of interstate commerce, from any person (as defined in section 104A of the Foreign Corrupt Practices Act of 1977 ([15 U.S.C. 78dd-3](#))), except that that definition shall be applied without regard to whether the person is an offender) while in the territory of the United States, from an issuer (as defined in section 3(a) of the Securities Exchange Act of 1934 ([15 U.S.C. 78c\(a\)](#))), or from a domestic concern (as defined in section 104 of the Foreign Corrupt Practices Act of 1977 ([15 U.S.C. 78dd-2](#))), in return for--

(A) being influenced in the performance of any official act;

(B) being induced to do or omit to do any act in violation of the official duty of such foreign official or person; or

(C) conferring any improper advantage,

in connection with obtaining or retaining business for or with, or directing business to, any person.

(2) Penalties.--Any person who violates paragraph (1) shall be fined not more than \$250,000 or 3 times the monetary equivalent of the thing of value, imprisoned for not more than 15 years, or both.

(3) Jurisdiction.--An offense under paragraph (1) shall be subject to extraterritorial Federal jurisdiction.

(4) Report.--Not later than 1 year after the date of enactment of the Foreign Extortion Prevention Act, and annually thereafter, the Attorney General, in consultation with the Secretary of State as relevant, shall submit to the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on Foreign Affairs of the House of Representatives, and post on the publicly available website of the Department of Justice, a report--

(A) focusing, in part, on demands by foreign officials for bribes from entities domiciled or incorporated in the United States, and the efforts of foreign governments to prosecute such cases;

(B) addressing United States diplomatic efforts to protect entities domiciled or incorporated in the United States from foreign bribery, and the effectiveness of those efforts in protecting such entities;

36a

Appendix F

(C) summarizing major actions taken under this section in the previous year, including enforcement actions taken and penalties imposed;

(D) evaluating the effectiveness of the Department of Justice in enforcing this section; and

(E) detailing what resources or legislative action the Department of Justice needs to ensure adequate enforcement of this section.

(5) Rule of construction.--This subsection shall not be construed as encompassing conduct that would violate section 30A of the Securities Exchange Act of 1934 ([15 U.S.C. 78dd-1](#)) or section 104 or 104A of the Foreign Corrupt Practices Act of 1977 ([15 U.S.C. 78dd-2](#); [15 U.S.C. 78dd-3](#)) whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise.

CREDIT(S)

(Added [Pub.L. 87-849](#), § 1(a), Oct. 23, 1962, 76 Stat. 1119; amended [Pub.L. 91-405](#), Title II, § 204(d)(1), Sept. 22, 1970, 84 Stat. 853; [Pub.L. 99-646](#), § 46(a) to (l), Nov. 10, 1986, 100 Stat. 3601; [Pub.L. 103-322](#), Title XXXIII, §§ 330011(b), 330016(2) (D), Sept. 13, 1994, 108 Stat. 2144, 2148; [Pub.L. 118-31](#), Div. E, Title LI, § 5101, Dec. 22, 2023, 137 Stat. 931.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11222

[Ex. Ord. No. 11222](#), May 8, 1965, 30 F.R. 6469, as amended [Ex. Ord. No. 11590](#), Apr. 23, 1971, 36 F.R. 7831; [Ex. Ord. 12107](#), Dec. 28, 1978, 44 F.R. 1055; [Ex. Ord. No. 12565](#), Sept. 25, 1986, 51 F.R. 34437, which related to standards of ethical conduct for government officers and employees, was revoked by [Ex. Ord. No. 12674](#), Apr. 12, 1989, 54 F.R. 15159, as amended set out as a note under [section 7301 of Title 5](#), Government Organization and Employees. [Ex. Ord. No. 12565](#), which amended [Ex. Ord. No. 11222](#), was also revoked by [Ex. Ord. No. 12674](#).

MEMORANDUM OF ATTORNEY GENERAL REGARDING CONFLICT OF INTEREST PROVISIONS OF PUBLIC LAW 87-849

<Feb. 1, 1963, 28 F.R. 985>

<January 28, 1963>

Public Law 87-849, "To strengthen the criminal laws relating to bribery, graft, and conflicts of interest, and for other purposes," came into force January 21, 1963. A number of departments and agencies of the Government have suggested that the Department of Justice prepare and distribute a memorandum analyzing the conflict of interest provisions contained in the new act. I am therefore distributing the attached memorandum.

One of the main purposes of the new legislation merits specific mention. That purpose is to help the Government obtain the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government. For the most part the conflict of interest statutes superseded by [Public Law 87-849](#) imposed the same restraints on a person serving the Government temporarily or intermittently as on a full-time employee, and those statutes often had an unnecessarily severe impact on the former. As a result, they impeded the departments and agencies in the recruitment of