



Plea in Major FCPA Case Raises Entrapment Issues

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Government informant Richard Bistrong's recent guilty plea to Foreign Corrupt Practices Act charges will probably fuel arguments that defendants in the largest-ever FCPA case were entrapped. While those arguments may not succeed, they do have merit.

Best known as "Individual 1" in the so-called Africa Sting case, Bistrong helped the FBI build the single largest foreign bribery investigation and prosecution brought against individuals. Prosecutors allege that 22 military and law enforcement equipment industry executives tried to bribe men who posed as representatives of an African defense ministry in order to win contracts to provide arms, including guns, body armor and other related equipment. The alleged defense officials were actually FBI agents.

Bistrong was highly motivated to help the government build the Africa Sting case; his freedom literally depended on it. Under a plea agreement signed several months before he introduced the Africa Sting defendants to the undercover "foreign official," Bistrong faced five years' imprisonment. DOJ agreed to consider recommending less prison time if Bistrong provided "substantial assistance" in the investigation or prosecution of other criminal matters. The key was that Bistrong's "assistance" had to be of such quality and significance to warrant recommending a departure from the Sentencing Guidelines.

Bistrong made this deal in February 2009; several months later he introduced the Africa Sting defendants to an undercover FBI agent posing as a foreign official. This May 2009 introduction is the earliest conduct forming the basis of the criminal charges against the 22 defendants.



Bistrong pleaded guilty to one count of conspiracy to violate the Foreign Corrupt Practices Act and other statutes. The former vice president for international sales pleaded guilty to helping keep \$4.4 million in kickbacks off the books of Armor Holdings between 2001 and 2006. The bribes included \$200,000 to United Nations officials to win \$6 million in contracts to provide body armor to peacekeeping forces. Bistrong also said he authorized payments to a Dutch police officer for a pepper spray contract and a Nigerian elections official for fingerprint ink pads.

Defense attorneys will no doubt argue that the government's use of an admitted criminal to orchestrate the Africa Sting deal amounts to entrapment; assuming they present sufficient evidence from which a reasonable jury could find entrapment, this issue will go to the jury.

Federal courts apply the "subjective test" to the entrapment defense. This is basically a "but for" analysis; to be successful, the defendants' will need to show that "but for" the government's inducement, they would never have pursued such a course of action. The focus is on the defendants' "predisposition," not the government or informant's conduct. Factors that go to predisposition include how much persuasion it took to convince the defendant to act; the defendant's history of committing similar acts, and how hard the defendant resisted. An informant's motivations or his past criminal violations in other matters are considered irrelevant.

Regardless of the technical elements of the defense, a jury will not like Bistrong buying his freedom by ensnaring others in criminal activities; some may be sympathetic to the defense and willing to acquit on the basis of entrapment.

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