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Court Weighs Second Retrial Over Flawed Closing Arguments

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A federal appeals court is weighing whether an investment executive should receive a third trial on mail and wire fraud charges on the ground that prosecutors both times botched closing arguments.

The U.S. Court of Appeals for the First Circuit heard oral argument on Thursday in *U.S. v Carpenter*. Daniel Carpenter's case stemmed from his tax-deferred real estate exchange deals between August and December 2000.

Carpenter performed the transactions through his Benistar Property Exchange Trust Co. Inc. His second conviction in June 2008 was on 14 counts of wire fraud and five counts of mail fraud.

"The key to [District of Massachusetts] Judge George O'Toole Jr.'s finding is that the jury, because of these inflammatory remarks, was distracted from judging Mr. Carpenter's state of mind," Carpenter's lawyer Martin Weinberg, a Boston criminal defense lawyer, told the court.

In September 2011, O'Toole denied Carpenter's acquittal motion but granted a new trial on the ground that "the government's repeated emphasis on the defendant's having broken his promises" may have "distracted the jury from their proper inquiry and led them to render a quick verdict that was not based on the necessary conclusions about fraud, most especially specific intent to defraud."

Carpenter's brief argued that O'Toole rightly concluded that the government's closing arguments "poisoned the well" and "repeatedly mischaracterized" the investment marketing materials and contract documents.

The brief also argued that O'Toole correctly concluded that the jurors' brief deliberations showed that they "acted in response to the government's invitation to be outraged" by Carpenter's alleged greed, instead of weighing each count of the indictment.

The government's brief argued that Carpenter should have objected to the closing arguments at the time and that, while the investment materials gave Carpenter discretion to make investment decisions, they also emphasize words like "escrow" and promised 3 percent to 6 percent returns.

The government added that Carpenter continued to take new investments even after losing previous investors' money in a high-risk options-trading strategy.

Chief Judge Sandra Lynch sat on the panel with Judge Jeffrey Howard and Senior Judge Norman Stahl.

"One does worry about whether it was the trial judge's basic disagreement with the theory of the government's case that led to this result," Lynch told Weinberg.

"The trial judge did say the evidence was ample but not overwhelming. … [T]his was a close case. A very close case," Weinberg said.

Howard asked Weinberg whether Carpenter had a responsibility to let investors know he was putting their money in stock options when his investments began to turn sour following the 2000 Nasdaq market crash. "At some point along the way, isn't it incumbent upon the company, the defendant, to make the disclosure about what's happening, where the investments actually are?" he said.

Weinberg said Carpenter never rebuffed any investors who asked how he was generating the returns. Also, he said, the contracts drove Carpenter's responsibilities to investors, because the investors spoke to a sales agent, not him.

"He exercised discretion to invest. If he was wrong, that's a civil matter," Weinberg said.

Carpenter was first indicted in February 2004 and found guilty in July 2005. That December, O'Toole granted a new trial because the government improperly used gambling metaphors in its closing argument.

In July 2007, a divided First Circuit panel upheld O'Toole's order. A jury again found Carpenter guilty on all counts in June 2008.

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