UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 05 CR 408-2
v.	)	Judge John F. Grady
	)	
P. NICHOLAS HURTGEN	)	

GOVERNMENT'S MOTION TO RECONSIDER THE ORDER DISMISSING DEFENDANT HURTGEN FROM THE SUPERSEDING INDICTMENT

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, the United States Attorney for the Northern District of Illinois, Eastern Division, respectfully moves this Court to reconsider its Memorandum Opinion dated March 20, 2007 ("Opinion"), dismissing the mail fraud, wire fraud, and extortion counts against defendant P. Nicholas Hurtgen as legally insufficient. For the reasons set forth below, we respectfully submit that the Court's legal analysis misapprehends the elements of both an honest services fraud scheme and extortion, and incorrectly requires the government to make certain additional allegations. Accordingly, this Court should reinstate the seven counts against defendant Hurtgen.

I. The Superseding Indictment Sufficiently Alleged a Scheme to Defraud.

The honest services fraud scheme in the superseding indictment alleges that Hurtgen schemed with co-defendant Stuart Levine and Jacob Kiferbaum to misuse Levine's position on the Illinois Health Facilities Planning Board ("Planning Board") to compel Edward Hospital to award Kiferbaum a construction contract to build a proposed facility for Edward Hospital. Count One, ¶¶ 3(e), 8; Counts One through Six. In exchange for Levine's steering of the construction contract to Kiferbaum, Kiferbaum agreed to pay a kickback to Levine. Count One, ¶ 8(a). Hurtgen intended that his assistance to Levine and Kiferbaum in threatening Edward Hospital would result in financing work for Hurtgen's firm, Bear Stearns. Count One, ¶¶ 3(e), 8.

As a member of the Planning Board, Levine was required by statute and regulation to base his decision on whether to issue a "certificate of need" ("CON"), which would authorize an applicant's request to build a hospital, on the pertinent standards set forth in the Planning Act and the Planning Board Rules. Count One, ¶ 1(l). Those standards had absolutely nothing to do with the applicant's selection of a construction company, and thus Levine had no legitimate reason to be involved in any way with Edward Hospital's selection of its construction company.

Nonetheless, the indictment alleges, Levine, Hurtgen, and Kiferbaum agreed to and did attempt to steer Edward Hospital's multi-million dollar construction contract to Kiferbaum by misusing Levine's position with the Planning Board, that is, by threatening Edward Hospital that its application for a CON would be denied unless it gave Kiferbaum the contract. As more fully explained below, that breach of Levine's fiduciary duty to the people and State of Illinois for the attempted multi-million dollar gain to Kiferbaum constituted a scheme to defraud Illinois and its citizens of Levine's honest services.

In dismissing the six fraud counts against Hurtgen on the pleadings, this Court mistakenly focused on the facts alleged against defendants Levine and Kiferbaum, which included the allegation that Levine and Kiferbaum agreed between themselves to a kickback. Opinion at 2-14. The Court's focus on the kickback led it to focus on the absence of an allegation that Hurtgen knew of the kickback, and led the Court to conclude that the scheme allegations did not state an honest services fraud against Hurtgen because (1) such a scheme requires an element of financial gain to Levine, the individual with the fiduciary duty (Opinion at 11), and (2) "to be guilty of a violation of § 1341, Hurtgen would have had to know that a kickback of money to Levine was expected from Kiferbaum." Opinion at 12.

However, under the governing statute and case law, neither the kickback itself nor Hurtgen's knowledge of it is required, as a matter of law, to sufficiently allege an honest services fraud scheme. That is, the breach of Levine's fiduciary duty to steer a multi-million dollar financial gain to Kiferbaum, and Hurtgen's specific intent to defraud, is sufficient *irrespective* of a kickback between Levine and Kiferbaum. In determining that the fraud counts against Hurtgen required Hurtgen to "know that a kickback of money to Levine was expected from Kiferbaum," Opinion at 12, this Court cited *United States v. Bloom*, 149 F.3d 649, 654-57 (7th Cir. 1998), *McNally v. United States*, 483 U.S. 350, 358-60 (1987), and *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004), for the proposition that a scheme to defraud the State of Illinois of its intangible right to Levine's honest services requires that the public official breaching the duty, here Levine, personally reap a financial gain. Opinion at 11.

The opinions in *Bloom* and *McNally* simply do not require that the gain be to the public official breaching the duty. As an initial matter, the sole defect identified by *Bloom* was that the

public official, an alderman, had not at all used – let alone misused – his public office to obtain a gain for clients of his separate, private law practice. Here, the allegations clearly set forth Levine's misuse of his public position, and, as the *Bloom* Court held, such allegations are clearly sufficient to state an honest services fraud.

McNally, which of course was overruled by Congress's enactment of § 1346, described the honest services theory as follows: "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." 483 U.S. 350, 356 (1987). Nothing in *McNally* required that the "private gain" be reaped by the public official.

Indeed, no such requirement of gain to the public official is found in the text of the statute or in the case law explicating the meaning of "scheme to defraud." The Seventh Circuit has made clear that the gain need not be reaped by the individual breaching the fiduciary duty. *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1098 (2006). In *Spano*, the Seventh Circuit stated that "[a] participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants." *Id.*; *see also United States v. Warner*, 2005 WL 2367769 *2 (N.D.Ill. 2005)(Pallmeyer, J.)("[t]he government may establish a claim for honest services mail fraud without demonstrating that [the public official] himself received any personal benefit.") To insert a requirement that the defendant reap personal gain would be to insert an additional element not found in § 1346. Here, consistent with *Bloom* and *Spano*, the superseding indictment sufficiently alleged that Levine breached his fiduciary duty, aided and abetted by Hurtgen, to direct a multi-million dollar gain to Kiferbaum. Additionally, the defendants also intended that, once Kiferbaum had the contract, that his construction company would earn millions of dollars and Hurtgen's employer, Bear Stearns, would get the financing work for the Edward Hospital project.

Because the facts alleged in the indictment plead the requisite allegations for a scheme to defraud, this Court should permit the fraud allegations to proceed against Hurtgen. At bottom, because the legal elements of a scheme to defraud have been alleged, it is a question for the jury whether Hurtgen had the specific intent to defraud the people of Illinois by agreeing to aid and abet Levine's misuse of his Planning Board position by attempting to steer the construction contract to Kiferbaum.

II. The Extortion Count Adequately Alleges Both Extortion "Under Color of Official Right" and "Fear of Economic Harm."

The superseding indictment separately alleges that defendants Hurtgen and Levine attempted to extort Edward Hospital and charges both prongs of the extortion statute, that is, that they acted to obtain the construction contract for Kiferbaum by (1) wrongful use of 'fear of economic harm' and (2) 'under color of official right.' The case law is clear that a jury may convict under the fear of economic harm prong where a payment is induced by fear of what the payee might do if payment was not forthcoming, and may convict under the color of official right prong where a public official, and a private person who aids and abets him, conditions the public official's use of official powers on a request that is reasonably understood by the victim to be a threat that if the victim does not comply the official might retaliate. *See United States v. Holzer*, 816 F.3d 304, 310 (7th Cir.), *cert. granted and judgment vacated by* 484 U.S. 807(1987), *on remand*, 840 F.2d 1343 (1988).[1] The

[1]In *Holzer*, the Seventh Circuit summarized the case law in this Circuit, stating that the extortion statute is satisfied where there is "payment...induced either by fear of what the payee might do if payment were not forthcoming ['fear' prong] or by the defendant's office ('color of official right' prong)... [Where the defendant is a public official,] the [fear prong] is based on fear of retribution by the official, wielding his official powers; the [official right] prong is based on a hope of benefit from the exercise of those powers. The [fear prong] covers actual or implied threat to use (or not use) official powers to harm a person if he doesn't pay the official...the [color of official right prong] covers cases where bribes are offered and accepted even without

indictment here adequately alleges both prongs of the statute and thus the extortion count should proceed to trial.

A. Under Color of Official Right

In discussing the under color of official right prong, the Court expressed considerable doubt that the Levine/Hurtgen demand that Edward Hospital give the contract to Kiferbaum is sufficient to allege extortion. The Court focused on the issue of fiduciary duty and therein considered the public official's intent:

> [T]he government's extortion theory is similar to its honest services theory of mail and wire fraud: the misconduct of the public official can consist solely of the breach of his fiduciary duty to be objective and impartial in his decision making, and the benefit he receives as a result of the breach might be nothing more than the satisfactions of knowing he has done a favor for a friend. The 'fiduciary duty' aspect of the government's theory strikes us as difficult to apply. It seems to us that the factual situations will always involve the extremes: the public official will always base his decision strictly on the merits, in which case he is not guilty of extortion; or he will intentionally ignore the merits and base his decision entirely on extraneous factors, such as a desire to do a favor for a friend. But what of the official who has mixed motives - who truly regards his friend as deserving of the contract or other governmental benefit, but still bases his decision, in part, on the fact that the recipient is his friend? [Or breaks a tie between equally qualified competitors with the fact of friendship with one.] Would this support a conviction for extortion? Assuming that the government would have the burden of proving the degree to which favoritism, as opposed to the merits, controlled the decision, what degree would that be? ... How would the jury be instructed?

Opinion at 17-18. The Court then concluded that the alleged actions of Levine and Hurtgen in steering the contract to Kiferbaum were not sufficient to charge extortion without an allegation that Hurtgen knew that Levine was steering the contract on the basis of favoritism rather than on the merits:

> Nothing in the indictment, as far as Hurtgen is concerned, is inconsistent with the possibility that Hurtgen might have thought Levine was insisting on the Kiferbaum precisely because, on the merits, Levine thought Kiferbaum was the best choice.

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having been solicited."

Opinion at 20.

Neither the Court's analysis of fiduciary duty nor its conclusion that the government must plead details about the specifics of Hurtgen's knowledge are relevant to whether the indictment sufficiently pleads *extortion* – as distinct from the honest services fraud scheme – under color of official right. Put simply, to charge this extortion, the government is not required to plead or prove a breach of a fiduciary duty. Rather, the color of official right prong simply requires the government to plead and prove that a public official attempted to obtain property to which he was not entitled, believing that the property would be given to him in return for the taking or influencing of official action. *See Holzer,* 816 F.3d at 310; see also Seventh Circuit Pattern Jury Instruction at p. 296 (1999). That is what is charged here and the official right extortion should proceed to trial.

Moreover, in the extortion context, several cases make clear that it is for a jury to assess – and that a jury can assess – a defendant's contention that because his motives were mixed, the government has failed to prove the extortion charge. *See, e.g., United States v. Biaggi,* 909 F.2d 662, 682-681 (2nd Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). In *Biaggi,* certain defendants argued that a $50,000 payment to a law firm was a legitimate payment and not an extortion. The jury convicted these defendants of the related extortion count and the Second Circuit affirmed. In so ruling, the Second Circuit concluded that "the jury was entitled to find that the $50,000 payment had two purposes. It was sought in part as compensation for legal services rendered by the law firm. But in part it was also a payment demanded by [defendant Congressman] Biaggi (and directed to his son's firm) to obtain his assistance as a public official in securing favorable action from other public officials. Biaggi...obtained the payment, at least in part, by virtue of the action he could be expected to take as a Congressman, thereby satisfying the inducement element of extortion." *See also United*

States v. Middlemiss, 217 F.3d 112, 119 (2nd Cir. 2000)(evidence was sufficient for jury to convict defendant attorney of extortion despite defendant's contention that he did nothing more than act as attorney for co-defendants and help them obtain money to which they were entitled; jury rationally could infer that co-defendants were not entitled to the money they were paid and that defendant played an active role in the extortion scheme, writing demand letters and collecting cash payments.)

The logical consequence of this Court's dismissal of the extortion count due to the concern about mixed motives of public officials is that § 1951 as applied to public officials is effectively nugatory. In *every* case, a public official who extorts a benefit for a favored friend or company would claim that he "truly regards his friend as deserving of the contract or other governmental benefit," and thereby claim that the jury cannot sit in judgment of his state of mind. But Congress could not possibly have intended that public officials could avoid extortion prosecutions by simply claiming "mixed motives" for wielding public power for private gain.

As to the Court's determination that the indictment must plead details about the scope of Hurtgen's knowledge, neither the extortion statute nor any case law requires that detail. As to the official right prong, all that is required is the allegation that Levine and Hurtgen did attempt to obtain property, here the construction contract, with the property holder's consent induced under the color of official right. That is precisely what Count 24 alleges.

Because Hurtgen is charged with aiding and abetting extortion under the official right prong, to convict Hurtgen the government must prove (in the words of the pattern jury instruction) that Hurtgen "knowingly aided, counseled, commanded, induced, procured, or authorized the commission of that extortion [and] that Hurtgen must have knowingly associated with the criminal activity, participated in that activity, and tried to make it succeed." *See, e.g., United States v.*

Clemente, 640 F.2d 1069, 1078-1080 (2nd Cir. 1981) and Seventh Circuit Pattern Jury Instruction 5.06; *cf. Biaggi,* 909 F.2d at 679-681 (son's conviction for aiding and abetting a bribery and gratuity to his father-congressman is reversed in absence of evidence that son knew that his father received certain corporate stock as a bribe and gratuity). These decisions make clear that it is for the jury to determine whether or not Hurtgen, Levine, and Kiferbaum were simply 'conditioning' Levine's vote in some lawful manner or giving 'information' in a proper way or, instead, whether Edward Hospital reasonably understood that Levine was demanding the steering of the contract – the threat delivered by Hurtgen – to cause the Hospital to think that if it did not comply, Levine would retaliate by blocking approval of Edward Hospital's CON. The jury should decide whether "the purpose and effect [of defendants' actions] are the wrongful use of a valid power to intimidate others, forcing them to pay." *United States v. Demet*, 486 F.2d 816, 819-20 (7th Cir. 1973, *cert. denied*, 416 U.S. 969 (1974).

B. Economic Fear

In dismissing the extortion count as legally insufficient, this Court repeatedly referred to public official Levine, apparently focusing its analysis on the color of official right prong. *See* Order at 17-20. The Court did not analyze the separately charged prong concerning fear of economic harm. As we previously argued, Count 24 adequately alleges the elements of fear of economic harm. *See* Government's Memorandum (2/19/07) at 7-11 and Government's Cross-Memorandum (2/26/07).[2]

[2]Assuming, arguendo, that the Court should apply the analysis in its Opinion to this other prong, we submit that fear of economic harm does not require the government to prove a breach of a fiduciary duty. Rather, in pertinent part, the government must prove wrongful use of threatened fear of economic loss to obtain property, and "wrongful" means that the defendant had no lawful right to obtain property in that way. *See United States v. Arambasich*, 597 F.2d 609, 611-612 (7th Cir. 1979)(approving this Court's fear of economic harm jury instructions), *see also* Seventh Circuit Pattern Jury Instruction at p. 297 (1999). It is for the jury to assess the demands

CONCLUSION

The government respectfully moves this Court to reconsider its order dated March 20, 2007, dismissing the seven counts of the superseding indictment against defendant Hurtgen. For the reasons set forth above, we submit that the Court erred in its analysis and urge the to Court vacate its order and reinstate the seven counts of that indictment against Hurtgen.

Respectfully submitted,

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made by Levine and Hurtgen under this fear of economic harm prong.

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the

GOVERNMENT'S FOR RECONSIDERATION OF THE ORDER DISMISSING DEFENDANT HURTGEN FROM THE SUPERCEDING INDICTMENT

was served on April 19 , 2007, in accordance with Fed. R. Crim.P.49, Fed R. Civ.P.5,LR5.5, and the General Order on Electronic Case filing (ECF), pursuant to the district court's system as to ECF filers:

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