

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 3:09 CR 002-2
v.)	Judge Glen H. Davidson
)	Magistrate Judge S. Allan Alexander
BOBBY B. DELAUGHTER)	
)	
Defendant.)	

**COMBINED REBUTTAL IN SUPPORT OF DEFENDANT DELAUGHTER'S
MOTIONS TO DISMISS COUNTS ONE AND TWO THROUGH FOUR
FOR FAILURE TO CHARGE AN OFFENSE**

Defendant, **BOBBY B. DELAUGHTER**, by and through his attorneys, **THOMAS ANTHONY DURKIN, JOHN D. CLINE, and LAWRENCE L. LITTLE**, submits this combined rebuttal in support of his motions (1) to dismiss Count One for failure to charge an offense (Doc. 40) and (2) to dismiss Counts Two, Three, and Four for failure to charge an offense (Doc. 41).¹

INTRODUCTION

The government's oppositions concede (or do not contest) many of the points of law on which Judge DeLaughter's motions to dismiss rest. The main issues remaining in dispute are: (1) whether Counts One through Four allege that Judge DeLaughter agreed to accept a "thing of value" from Scruggs; (2) whether the mailings of court documents alleged in Counts Two through Four can serve as the basis for a mail fraud charge; and (3) whether the statutes at issue,

¹ Judge DeLaughter's initial motions will be cited by document number and page. The government's opposition to the motion to dismiss Count One (Doc. 53) will be cited as "G. Opp. Count One." The government's opposition to the motion to dismiss Counts Two through Four (Doc. 48) will be cited as "G. Opp. Counts Two-Four."

if construed to apply to Judge DeLaughter's alleged conduct, are void for vagueness. As we demonstrate below, each of those points must be resolved in Judge DeLaughter's favor.

ARGUMENT

I. THE INDICTMENT DOES NOT ALLEGE A "THING OF VALUE."

The defense demonstrated in its motions to dismiss that mere "consideration" for a federal judgeship, as alleged in Counts One through Four, is not a "thing of value" under 18 U.S.C. § 666(a)(1)(B), Miss. Code § 97-11-53,² or 18 U.S.C. § 1346. Doc. 40 at 3-4; Doc. 41 at 2, 10-12. The government does not appear to contest this point. Nor does it dispute that *any* qualified lawyer could be considered for a federal judgeship *for free*. It offers instead two different arguments, addressed below. Both rely on allegations the indictment does not make and the evidence will not support.

A. The "Agreement to Accept a Federal Judgeship" Argument.

The government first argues that the "thing of value" at issue in Counts One through Four is the federal judgeship itself, rather than "consideration for" the judgeship. And it characterizes Judge DeLaughter's willingness to accept a federal judgeship as an "agreement" to accept the judgeship. The government asserts, for example, that Senator Lott offered Judge DeLaughter consideration for a federal judgeship, and the "[t]he indictment alleges that Delaughter agreed to accept a thing of value (*that federal judgeship*)." G. Opp. Count One at 3 (emphasis added). And again: Judge DeLaughter "agree[d] to accept and offer[ed] to accept a federal judgeship dangled before him by the Scruggs legal team" G. Opp. Counts Two-Four at 9.

² The government acknowledges, as it must in light of *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), that the honest services mail fraud counts must rest on a violation of state law that prohibits actual corruption, rather than mere "appearances of corruption." *Id.* at 734; *see* Doc. 41 at 7-9. The government identifies that state law as Miss. Code § 97-11-53. G. Opp. Counts Two-Four at 5, 9.

This argument has two main flaws. First, the indictment does not allege that Scruggs (or Senator Lott at Scruggs' behest) offered Judge DeLaughter a federal judgeship or that Judge DeLaughter agreed to accept a federal judgeship. It alleges instead that Scruggs caused Senator Lott to offer "consideration for" a federal judgeship. Indictment at 4, ¶ 9.h.; *see id* at 5-6, ¶ 12.

The difference between a judgeship and consideration for a judgeship is more than semantic. As we have noted (and the government does not dispute), any qualified lawyer could receive consideration for a federal judgeship merely by submitting an application either to Senator Lott or Senator Cochran, or both, as Judge DeLaughter had done more than two weeks before the courtesy call from Senator Lott. Thus, "consideration for" a federal judgeship is not a thing of value. By contrast, a federal judgeship undoubtedly *is* a "thing of value" – but the indictment does not allege (and the evidence will not show) that it was either offered or accepted. Allegations in a government brief, like allegations in a bill of particulars, cannot cure deficiencies in the indictment. *See, e.g., Russell v. United States*, 369 U.S. 749, 770 (1962); *United States v. Hoover*, 467 F.3d 496, 498 n.2 (5th Cir. 2006); *Van Liew v. United States*, 321 F.2d 664, 673 (5th Cir. 1963).

Second, in asserting that Judge DeLaughter "agreed to accept" a federal judgeship, the government misuses the word "agree." The "agreement" to accept a bribe to which 18 U.S.C. § 666(a)(1)(B) and Miss. Code § 97-11-53 refer requires a meeting of the minds; the bribe-giver offers the bribe, and the bribe-taker agrees to accept it. *Cf. American Heritage Life Insurance Co. v. Lang*, 321 F.3d 533, 538 (5th Cir. 2003) (under ordinary contract principles, no agreement can exist without a "meeting of the minds"). The "agreement" that the government alleges in its brief is no agreement at all; it is a unilateral expression of interest. There is no doubt that Judge

DeLaughter expressed interest in a federal judgeship, before and after Senator Lott's courtesy call. But that unilateral expression of interest is not an "agreement" to do anything. If Senator Lott had offered Judge DeLaughter a federal judgeship and Judge DeLaughter had accepted the offer, then there would have been an agreement. But the indictment does not allege and the evidence will not show that a federal judgeship was offered or accepted or that Judge DeLaughter ever agreed with anyone to accept a judgeship.³

B. The Money Ed Peters Received.

The indictment alleges that Ed Peters received a total of \$1 million for his role in the *Wilson v. Scruggs* litigation. Indictment at 3, ¶ 9.b.; *id.* at 4, ¶ 9.i.; *id.* at 5, ¶ 12. But the indictment does *not* allege that Judge DeLaughter knew that Peters received the alleged payments. Nonetheless, the government's oppositions make that allegation repeatedly. And the government adds another allegation that does not appear in the indictment: that Judge DeLaughter "should have known" about the Peters money. *E.g.*, G. Opp. Count One at 3 (Judge DeLaughter "knew or should have known" that Peters "was making money influencing him"); *id.* ("Judge DeLaughter knew or should have know[n] that Ed Peters was not doing that free."); *id.* at 4 ("DeLaughter also knew or should have known that Ed Peters wasn't working free."); G. Opp. Two-Four at 9 ("Given that course of conduct, DeLaughter knew or should have known that Ed Peters, his close friend and political mentor, was not doing that for free.").

The government's argument about Peters' \$1 million has two problems. First, as noted, the indictment does not allege that Judge DeLaughter either knew or should have known about

³ To make matters worse for the government's misguided theory, the evidence will also show that Senator Lott did not have the practical authority to "offer" the judgeship in the first place. The decision to send an appointee's name to the President was made *jointly* by both Senators Lott and Cochran – a fact well known to Judge DeLaughter and virtually every lawyer in Mississippi.

the payments to Peters. As with the "federal judgeship" argument, the government tries to supplement an inadequate indictment with allegations the grand jury never found. That is improper under *Russell*, *Hoover*, and *Van Liew*.

Second, the government tries to water down the necessary mens rea from actual knowledge ("knew") to negligence ("should have known"). *See, e.g., Davis v. Monroe County Board of Education*, 526 U.S. 629, 642 (1999) ("should have known" test "amount[s] to a negligence standard"). But serious federal crimes such as those charged here require proof of actual knowledge; negligence is not enough. *See, e.g., United States v. Bader*, 956 F.2d 708, 710 (7th Cir. 1992) ("Knowledge in criminal law is actual consciousness. . . . 'Should have known' is closer to negligence than to knowledge.").

The statutory language confirms that the government's "should have known" standard understates the required mens rea.⁴ For example, Judge DeLaughter could not have "agree[d] to accept" the \$1 million to Peters, as § 666(a)(1)(B) requires, if he did not actually know that Peters received it. In plain terms, a person cannot agree to accept something of which he is unaware. Nor could Judge DeLaughter have "intend[ed] to be influenced or rewarded" by the \$1 million paid to Peters if he did not know about it. A person cannot be "influenced" or "rewarded" by something of which he is not *actually* aware, even if he *should* be aware of it. Permitting the elimination of specific intent with a mere negligence standard would truly stand the law on its head and give unfettered discretion to federal prosecutors in an area already rife with serious federalism concerns.

⁴ Count One requires proof that Judge DeLaughter "inten[ded] to further the unlawful purpose" of the alleged conspiracy and "corruptly . . . intend[ed] to be influenced or rewarded." Fifth Circuit Pattern Jury Instructions (Criminal) 2.20; 18 U.S.C. § 666(a)(1)(B). Counts Two through Four require proof (at least) that Judge DeLaughter had the "specific intent to defraud." Fifth Circuit Pattern Jury Instructions (Criminal) 2.59.

For both of these reasons, the allegations in the indictment concerning the \$1 million paid to Ed Peters do not satisfy the "thing of value" requirement.

C. Summary.

The government's struggle to describe the "thing of value" that Judge DeLaughter allegedly agreed to receive signals a fatal flaw in its theory on Counts One through Four. If this case boils down to a judge who received ex parte contacts on one hand and a litigant who arranged a meaningless courtesy call on the other, there is no crime at all, much less a federal felony offense. To have a federal crime, the government must have bribery – the exchange of (or an agreement to exchange) official action for something of value. The indictment contains no such allegation, and the evidence will not establish such an exchange. The government cannot use allegations in its pleadings to bridge the gap between what the indictment *actually* alleges and what the indictment *needs* to allege to charge an offense. Counts One through Four must be dismissed.

II. THE MAILINGS ALLEGED IN COUNTS TWO, THREE, AND FOUR ARE INSUFFICIENT AS A MATTER OF LAW.

Judge DeLaughter demonstrated in his initial motion that the mailings alleged in Counts Two through Four are insufficient under the "required mailings" doctrine set out in cases such as *Parr v. United States*, 363 U.S. 370 (1960), *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007), *United States v. Cross*, 128 F.3d 145 (3d Cir. 1997), and *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982). Doc. 41 at 15-19. The government does not dispute that the Mississippi Rules of Civil Procedure required the mailings, but it insists that they do not fall within the "required mailings" doctrine. G. Opp. Two-Four at 7-8.

Inexplicably, the government ignores *Lake*, *Cross*, and *Curry* and mentions *Parr* only in passing. Instead of addressing these critical decisions, the government relies on three other cases: *Schmuck v. United States*, 489 U.S. 705 (1989), *United States v. Bright*, 588 F.2d 504 (5th Cir. 1979), and *United States v. Krenning*, 93 F.3d 1257 (5th Cir. 1996). Those cases do not support the government's position.

Schmuck begins with a point the government ignores: that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 489 U.S. at 710 (quotation omitted); see, e.g., *United States v. Ingles*, 445 F.3d 830, 837 (5th Cir. 2006) (same).⁵ The defendant in *Schmuck* turned back odometers and then sold the cars to dealers. The dealers resold the cars to consumers and mailed title applications to the state. Those mailings served as the predicate for the mail fraud charges.

Schmuck distinguished the mailing of the tax notices and other tax documents in *Parr* on the ground that those mailings were "'made or caused to be made under the imperative command of duty imposed by state law,'" while "[n]o such legal duty is at issue here." *Schmuck*, 489 U.S. at 713 n.7 (quoting *Parr*, 363 U.S. at 391). The Court noted as well that the mailings in *Parr* "would have been made regardless of the defendants' fraudulent scheme," while the mailings in

⁵ The government turns this preference for state law primacy in criminal law enforcement upside down. It notes that by bringing this case it has "relieve[d] the Hinds County District Attorney of the unenviable task of prosecuting his own circuit judge." G. Opp. Counts Two-Four at 7. But in a federalist system, it is the role of the locally elected prosecutor to determine which potential crimes against the state or its citizens are worthy of prosecution; and mechanisms are available under state law in instances where the locally elected prosecutor may have a conflict and a prosecutor from another district is appointed. See, MISS. CODE ANN., Section 25-31-21. In any event, it is not the role of an unelected federal prosecutor, answerable solely to the federal Department of Justice in Washington, D.C., to make that determination.

Schmuck "were derivative of Schmuck's scheme to sell 'doctored' cars and would not have occurred but for that scheme." *Id.*

This case falls squarely on the *Parr* side of the line drawn in *Schmuck*. The mailings here, unlike the mailings in *Schmuck*, indisputably were made "under the imperative command of duty imposed by" Rules 5 and 77(d), M.R.C.P. And the mailings – of an entry of appearance and two orders – would have occurred regardless of the alleged scheme; the *Wilson v. Scruggs* case, which was pending long before the alleged scheme began, had to be resolved, and for that to happen attorneys had to enter appearances and orders had to be entered and served.

The real question, as cases before and after *Schmuck* make clear, is whether the required mailings "are . . . themselves false and fraudulent." *Curry*, 681 F.2d at 412; *see, e.g., Cross*, 128 F.3d at 151. No such allegation appears in the indictment. Here, as in *Cross*, the documents at issue "performed precisely the function they were intended by law to perform": the January 19, 2006 entry of appearance alleged in Count Two accurately reported the appearance of attorneys Langston and Balducci on behalf of Scruggs, and the two orders alleged in Counts Three and Four "faithfully reported the court's disposition of the case." *Id.* As *Cross* (which was decided after *Schmuck*) confirms, nothing in *Schmuck* supports the use of the mailings alleged here as the predicate for mail fraud charges.

Bright is off point for similar reasons. The defendants in that case forged a will and submitted it to probate. The mailings at issue consisted of issues of the magazine in which the probate court published notice to the estate's creditors. *See* 588 F.2d at 509-10. The court of appeals distinguished *Parr* as follows: "Under state law, the mailings in *Parr* would have occurred irrespective of the defendants' embezzlement; the school district regularly used the

mails to send tax notices and receive payments. Here, by contrast, Mississippi's requirement of notice to the estate's creditors was triggered by the fraudulent scheme. If [defendants] had not decided to defraud the estate of their late cousin, they would not have had to comply with the state law requiring them to file the creditors' notice." *Id.* at 509-10.

The distinction on which *Bright* turns undercuts the government's position. The probate proceeding that produced the mailings in that case would not have existed but for the defendants' fraudulent scheme. The initiation of the probate proceeding was an essential step in the fraud. Here, on the other hand, the alleged victim – Wilson – initiated the *Wilson v. Scruggs* litigation, and he did so years before the alleged scheme began. *See* Indictment at 1, ¶ 4 (Wilson sued Scruggs; case had been pending for a decade when Judge DeLaughter was assigned); *id.* at 5, ¶ 11 (alleged scheme began in July 2005). Judge DeLaughter would have decided the case, and mailed the orders by which he did so, "irrespective of" the alleged scheme to defraud. *Bright*, 588 F.2d at 509; *see, e.g., Cross*, 128 F.3d at 151 ("As in *Parr*, the required mailings [of court documents relating to 'fixed' cases] would, of necessity, have been made whether or not the conspiracy existed, and they would have performed precisely the same function in the absence of the conspiracy that they performed during its continuance.").

Krenning is distinguishable on the same basis as *Bright*. The defendants in *Krenning* ran an insurance company. They devised a scheme to disguise the company's reserve deficiency. The mailings at issue were insurance policies and related documents sent to new customers. The court of appeals rejected defendants' contention that the mailings fell within the *Parr* "required mailings" doctrine. *See* 93 F.3d at 1263-64. It concluded that, absent the fraudulent scheme, the state insurance commissioner would have closed the insurance company before the mailings

occurred, because its insolvency would have been apparent. Thus, the mailings in *Krenning* would not have occurred but for the scheme. Here, as noted above, the *Wilson v. Scruggs* litigation existed long before the alleged scheme, and the need to mail entries of appearance, orders, and other court documents as part of the litigation would have existed regardless of the scheme. *See, e.g., Cross*, 128 F.3d at 151.

For these reasons, the mailings alleged in Counts Two through Four provide no basis to include this case among "those limited instances in which the use of the mails is a part of the execution of the fraud." In keeping with the federalism concerns that courts have repeatedly emphasized concerning § 1346 (Doc. 41 at 7-9) and that Justice Scalia highlighted in his recent dissent in *Sorich*, this case should be "dealt with by appropriate state law." *Schmuck*, 489 U.S. at 710 (quotation omitted).

III. IF CONSTRUED TO APPLY TO THE CONDUCT ALLEGED IN COUNTS ONE THROUGH FOUR, THE UNDERLYING STATUTES ARE VOID FOR VAGUENESS.

Judge DeLaughter demonstrated in his initial motions that if 18 U.S.C. §§ 666, 1341, and 1346 are construed to apply to his alleged conduct, those statutes must be found void for vagueness. Doc. 40 at 4; Doc. 41 at 19-21. He showed that in the "jumble of disparate cases" on which the constitutionality of § 1346 depends, *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007), there is no case finding that statute applicable on alleged facts remotely similar to these.

The government does not claim to have found such a case. Although it cites *Brumley* and *United States v. Holzer*, 816 F.2d 304 (7th Cir.), *vacated*, 484 U.S. 807 (1987), those cases involve classic bribery: in each case the public official received cash – obviously a thing of

value – in exchange for official acts. *See Brumley*, 116 F.3d at 731, 735 (It was not, as the government contends, “the cozy relationship that Brumley enjoyed with Cely and his associates” that the Fifth Circuit found to constitute the necessary *quid pro quo*; instead, it was the fact that Brumley received \$112,156 from lawyers with cases before the Texas Industrial Accident Board and in return showed various forms of favoritism); *Holzer*, 816 F.2d at 305-07 (judge received tens of thousands of dollars from attorneys appearing before him, including attorneys he appointed to lucrative receiverships; judge also convicted of extortion). No honest services mail fraud case the government cites (or that we have found) has involved a judge receiving ex parte contacts, without rendering unlawful rulings or receiving anything of value, and mailings consisting solely of lawful court documents required by law.

Perhaps recognizing that no reported honest services mail fraud case has involved facts remotely like these, the government insists that Judge DeLaughter's "oath, the Mississippi Code of Judicial Conduct and Miss. Code Ann. Section 97-11-53" put him on notice "of what conduct was prohibited by law." G. Opp. Counts Two-Four at 9. We have shown previously that Miss. Code § 97-11-53 does not apply to Judge DeLaughter's alleged conduct, because he did not accept or agree to accept a "thing of value." Doc. 41 at 11-12. The issue in any event is not whether Judge DeLaughter had notice that his alleged conduct violated his state law ethical obligations, or even a state criminal statute; he is not being prosecuted under those provisions. The issue is whether, had Judge DeLaughter studied the language of §§ 666, 1341, and 1346 and the cases interpreting those provisions, he would have had fair notice that *those statutes* prohibited his conduct. As the government's inability to cite a case remotely on point demonstrates, the answer is no.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the initial motions, the Court should dismiss Counts One, Two, Three, and Four for failure to charge an offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that foregoing Combined Rebuttal In Support Of Defendant DeLaughter's Motions To Dismiss Counts One And Two Through Four For Failure To Charge An Offense was served on April 14, 2009, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the District Court's system as to ECF filers.

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