HONEST SERVICES AND MISUSE OF OFFICE

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I. Background.

The concept of "honest services" is derived from 18 U.S.C. Chapter 63 on Mail Fraud. Under 18 U.S.C. § 1341 (Frauds and swindles),

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

And, pursuant to 18 U.S.C. § 1343 (Fraud by wire, radio, or television):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The phrase utilized in both §§ 1341 and 1343, "scheme or artifice to defraud," was defined by Congress in 1988 as "a scheme or artifice to deprive another of the intangible right of *honest services*." 18 U.S.C. § 1346. (Emphasis supplied.)

Congress specifically enacted 18 U.S.C. § 1346 (Definition of "scheme or artifice to defraud") in 1988 in reaction to the U.S. Supreme Court decision rendered one year earlier in the case of McNally v. United States, 483 U.S. 350 (1987). In the McNally decision, the U.S. Supreme Court overruled a long line of lower court decisions when it determined that a former public official in the Commonwealth of Kentucky and a private citizen could not be convicted of mail fraud concerning a scheme to require an insurance agent, which provided insurance for the state, to share commissions with certain agencies in which the defendants had an interest, because 18 U.S.C. § 1341 did not prohibit schemes to defraud citizens of their intangible rights to honest and impartial government. However, in enacting 18 U.S.C. § 1346, it was explained by members of Congress that the purpose of the legislation was to overturn the McNally decision and restore the "honest services" mail fraud provision which existed prior to McNally. See Joshua A Kobrin, Note, "Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346," 61 N.Y.U. ANN. SURV. AM. L. 779, 814 (2006**)**. See also United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) ("We have recognized that § 1346 was intended to overturn McNally"); United States v. Walker, 490 F.3d 1282, 1297 n. 16 (11th Cir. 2007) (the honest services amendment was enacted to override McNally).

II. What Constitutes Honest Services Fraud?

Although the term "honest services" is broad and undefined, the federal statute (18 U.S.C. § 1346) has nevertheless withstood numerous challenges for unconstitutional vagueness. In the case of United States v. ReBrook, 837 F. Supp. 162, 171 (S.D.W.Va. 1993), aff'd in part,

rev. in part, 58 F.3d 961 (4th Cir. 1995), cert. den. 516 U.S. 970 (1995), the Court reasoned as follows:

> Concrete parameters outlining the duty of honest service should not be necessary in order for a person to be charged with violating this duty. The concept of the duty of honest service sufficiently conveys warning of the proscribed conduct when measured in terms of common understanding and practice. The Constitution requires no more.

(Citations omitted.)

As stated in United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997), cert. den. 118 S.Ct. 625 (1997):

> "[H]onest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer-or that he consciously contemplated or intended such actions. For example, something close to bribery. If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.

As further stated in United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007) (citations in text):

> The term "honest services" is not defined in the statute, but we have found that "when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest." *United States v. Lopez-Lukis,* 102 F.3d 1164, 1169 (11th Cir.1997). "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. deVegter,* 198 F.3d 1324, 1328 (11th Cir.1999). "If an official instead secretly makes his decision based on his own personal interests-as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest," the official has deprived the public of his honest services. *Lopez-Lukis,* 102 F.3d at 1169.

In the case of United States v. Rybicki, 354 F.3d 124, 139 (2d Cir. 2003), the Second Circuit found that in the private sector, honest services fraud cases fell into the two groups: (a) cases involving bribes or kickbacks, and (b) cases involving self-dealing. Self dealing involves a situation where an employee causes his or her employer to do business with an enterprise in which the employee has a secret interest, which is undisclosed to the employer. 354 F.3d at 140. There are four elements to the crime of honest services fraud:

> (1) a scheme or artifice to defraud; (2) for the purpose of knowingly and intentionally depriving another of the intangible right of honest services as thus defined; (3) where the misrepresentations (or omissions) made by the defendants are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior; and (4) use of the mails or wires in furtherance of the scheme.

354 F.3d at 147. It should be noted that the use of mail or wire communications in the fraudulent scheme can be an "incidental" or "reasonably foreseeable" part of the scheme. See United States v. Sawyer, 85 F.3d 713, 723 n. 6 (1st Cir. 1996).

In the public sector, honest services cases typically involve "serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision-makers to disclose certain conflicts of interest." United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). As set forth in the case of United States v. Mangiardi, 962 F. Supp. 49, 51 (M.D. Penn. 1997), aff'd 202 F.3d 255 (3rd Cir. 1999), cert. den. 529 U.S. 1060 (2000):

> The typical case of honest services fraud is that the public is not getting what it deserves: honest, faithful, disinterested service from a public official. This concept applies whether the official is bribed or fails to disclose a conflict of interest. Finally, the scheme or artifice must lead to actual or intended actual injury. That is, the official must be performing a discretionary function which the scheme or artifice is intended to influence because it is the exercise of a discretionary function (the "service") which must be the target of the scheme.

(Citations omitted.)

However, "[t]he broad scope of the mail fraud statute… does not encompass every instance of official misconduct that results in the official's personal gain." United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996). In addition, "the right to honest services is not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing." United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003). Finally, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." Sawyer, 85 F.3d at 725.

III. Examples.

Below is a sampling of honest services fraud cases rendered within the past five years. The listing is illustrative and not exhaustive.

1. United States v. Kemp, 379 F. Supp. 2d 690 (E.D. Penn. 2005), aff'd 500 F.3d 257 (3rd Cir. 2007), cert. den. 128 S.Ct. 1329 (2008). In this case, a jury convicted the former treasurer of the City of Philadelphia, former bank executives, and others for various offenses, including honest services mail/wire fraud. In essence, the then city treasurer received payments and gifts (such as NBA All-Star game tickets, Super Bowl tickets and accommodations, trips, construction of a deck, personal loans, loans for relatives, and a loan to his church) in exchange for City business. The District Court found that the evidence presented proved both prongs of honest services fraud, as follows:

> (1) bribery, in which a benefit is given in exchange for a particular act or series of acts; and (2) failure to disclose, in which a public official accepts benefits which he is required by law to disclose, fails to make the

> disclosure, and then takes discretionary action to favor the giver of the benefit.

The former city treasurer was given a 10-year sentence, and the two bank executives each received 2-year sentences. On appeal, the United States Court of Appeal, Third Circuit, affirmed the convictions.

2. United States v. Sorich, 523 F.3d 702 (7th Cir. 2008). Two of the defendants in this case were high level employees in the Office of Intergovernmental Affairs (an office of the mayor of the City of Chicago), and two others were department officials. Three of the four defendants were convicted by a jury of mail fraud, wherein the defendants were found to have doled out thousands of city civil service jobs based on political patronage and nepotism. The scheme, which had apparently been going on for years, included filling out sham interview forms to assure certain persons would be hired. The defendants were convicted by a jury and sentenced, the longest sentence being 46 months.

The defendants appealed their convictions, contending that their behavior, while dubious, was not criminal, and that the honest services mail fraud statute was unconstitutionally vague. The defendants also argued that they did not make any money from the scheme, nor did they deprive the city or the people of Chicago of any money or property. However, the Seventh Circuit Court of Appeals affirmed the convictions and sentences, concluding that the defendants' actions did constitute mail fraud, that the mail fraud statute was not unconstitutionally vague as applied to the facts of the case, and that the jobs which were doled out by the defendants were indeed a kind of property.

3. United States v. Woodward, 459 F.3d 1078 (11th Cir. 2006). In this case, a 29-year veteran of the Atlanta Police Department and his wife were convicted of mail fraud, conspiracy to commit mail fraud, and deprivation of honest services, and sentenced for three

years and two years, respectively, plus ordered to pay restitution, for operating a business that charged persons a fee to recover money and property held at the police department. The police officer would use confidential information obtained through his position with the police department to locate potential clients, and after locating the clients, the defendants would then lead the clients to believe that the only way the money and property could be reclaimed was through their business operation, which charged a substantial fee (the property can actually be reclaimed directly at the police department for no charge). The defendants also falsified powers of attorney in order to reclaim money and property. On appeal, the Eleventh Circuit Court of Appeals affirmed the convictions and sentences.

4. United States v. Walker, 490 F.3d 1282 (11th Cir. 2007). This case involved a former Georgia state legislator who was convicted of 127 counts of conspiracy, mail fraud, and income tax evasion, and sentenced to over 10 years in prison. Among other things, the defendant, who owned a personnel agency that provided temporary workers for hospitals and other businesses, used his influence to get legislation passed to benefit Grady Hospital in Atlanta, and in return received business favors from Grady Hospital, relating to the utilization of his personnel agency. The defendant's personnel agency also provided personnel services to Medical College of Georgia, which he failed to disclose.

5. United States v. Thompson, 484 F.3d 877 (7th Cir. 2007). In this case, the federal Appeals Court found that a public servant's actions did not constitute mail fraud. The defendant, a section chief in the State of Wisconsin's Bureau of Procurement, presided over the selection of a travel agent for the state. During the bid process, two travel agencies emerged as the top contenders. One agency was based in the state and the other based out of state. The evaluation team selected the out of state agency, and the section chief requested a delay, apparently

believing that her boss would not approve of the selection. It was then agreed by the evaluation team that the matter would be re-bid on a best and final basis, as allowed by state law. Ultimately, the in-state travel agency got the bid. Three months later the section chief received a $1,000 raise. The defendant was subsequently convicted in the United States District Court, Eastern District of Wisconsin, of mail fraud with regard to the selection of the state's travel agent. The defendant appealed, and the Seventh Circuit Court of Appeals reversed the conviction, ordered an acquittal, and stated as follows:

> [The subject federal statutes] have an open-ended quality that makes it possible for prosecutors to believe, and public employees to deny, that a crime has occurred, and for both sides to act in good faith with support in the case law. Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

484 F.3d at 884.

6. Palm Beach County, Florida. Last year, the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, was sentenced to five years in prison for public corruption conspiracy for misusing his official position to promote a series of land deals which netted him millions. He also accepted significant travel gratuities from a developer in return for voting favorably on a measure for the developer. As part of his sentence, he was ordered to forfeit two parcels of real estate worth approximately $9 million and $175,000 in cash. In addition, his ex-wife had to forfeit $400,000.

Earlier this year, another former Palm Beach County commissioner was sentenced to five years in prison for honest services fraud. Warren H. Newell concealed

his financial interest in a "success fee contract" relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately $366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, the defendant concealed that he docked his boat at the yacht center and owed significant boat dockage fees ($40,000), later receiving forgiveness of his dockage fees as a kickback. Finally, he concealed his financial interest in another land deal which came before the commission.

7. Alabama Governor. Two years ago, former Alabama governor, Don Siegelman, was convicted of bribery, conspiracy to commit mail fraud, mail fraud and obstruction of justice for receiving a $500,000 donation to his campaign to establish a state lottery, in exchange for appointing the donor of the funds to a board which regulated hospital construction. He was sentenced to a seven-year prison term, which he began immediately upon conviction.

At the present time, Siegelman is out of prison pending the appeal of his case. This case has been receiving significant national press coverage, including a segment on *60 Minutes*.