IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ENTERED
JUN 4 2004
TERESA L. DEPPNER, CLERK
U.S. District & Bankruptcy Courts
Southern District of West Virginia

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL ACTION NO. 2:03-00275

IRA A. MORRIS, M.D.,

Defendant.

ORDER

NOT INTENDED FOR PRINT PUBLICATION.

On April 29, 2004, the government filed the Second Superceding Indictment against the defendant, Dr. Morris [Docket 68]. Pending before the court is the defendant's motion to dismiss Counts Four and Five of this indictment [Docket 84]. Federal Rule of Criminal Procedure 7(c)(1) provides that, "[t]he indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." Further, the Fourth Circuit has held that to be sufficient, "an indictment must contain the elements of the offense charged, fairly inform the defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense." *United States v. Loayza*, 107 F.3d 257, 260 (4th Cir. 1997) (citation omitted).

Count Four is labeled "Honest Services Wire Fraud" and charges the defendant, Dr. Morris, with violating 18 U.S.C. § 1343, which prohibits schemes to defraud using wire communications, and 18 U.S.C. § 1346, which defines a scheme to defraud as including a scheme or artifice to deprive another of an intangible right to honest services. Count Five is also labeled "Honest Services Wire Fraud," but it is clearly mislabeled because it charges the defendant with violating 18 U.S.C. § 1341, which prohibits schemes to defraud using the mails. Count Five also cites to 18 U.S.C. § 1346, defined above.

A review of the relevant paragraphs in the indictment is necessary to explicate that which is missing. The introduction to both counts states that the defendant is a licensed medical doctor, reviews the fiduciary and ethical duties that he is subject to as a medical doctor, and alleges that the defendant was the Second Known Person's medical doctor. Immediately after, the scheme to defraud is set forth as follows: "the defendant IRA A. MORRIS, M.D. knowingly devised a scheme to defraud and to obtain money and property from the Second Known Person by means of materially false and fraudulent pretenses, representations, and promises." The next section, entitled "Manner and Means of the Scheme," describes various ways in which the defendant persuaded the Second Known Person to invest in the defendant's medical practice and loan him money, states that the defendant made false representations regarding the amount of money his medical practice would generate, and states that the defendant used the corporate identity of a business owned by the Second Known Person on various credit applications, claiming the business as his own. The remaining paragraphs allege use of the mails and wire communications and cite the statutory violations charged.

To allege a scheme to deprive another of honest services in the context of a fiduciary relationship, an indictment must state that the defendant owed a fiduciary duty to an individual, that the defendant deprived that individual of an intangible right to honest services flowing from the duty, and that the individual was harmed by the deprivation. A fiduciary relationship exists between a physician and his patients based on the special knowledge a physician has concerning diagnosis and treatment, and thus, a fiduciary relationship exists between Dr. Morris and the Second Known Person.[1] *See generally*, Gregory D. Jones, *Primum Non Nocere: The Expanding "Honest Services" Mail Fraud Statute and the Physician-Patient Fiduciary Relationship*, 51 Vand. L. Rev. 139 (January 1998). Counts Four and Five, however, lack any assertion that the defendant engaged in a scheme to deprive the Second Known Person of an intangible right to honest services and any discussion of the services that Dr. Morris provided or failed to provide to the Second Known Person. Counts Four and Five merely state that the defendant served as the physician to the Second Known Person, and while serving in that capacity, fraudulently deprived him of money. This is not the sort of conduct that § 1346 proscribes.

Section 1346 was enacted to address a deficiency in the mail and wire fraud statutes first perceived by the United States Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987). Sections 1341 and 1343 both begin as follows: "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 . . . ." Prior to *McNally*, the circuit courts interpreted this

[1] There is, however, relatively little case law on the application of honest services fraud to the physician-patient relationship, and the case law available focuses primarily on conflicts arising from undisclosed-kickback schemes. *See United States v. Jain*, 93 F.3d 436 (8th Cir. 1996).

language as providing for two independent types of schemes, schemes "to defraud" and schemes to obtain "money or property." The phrase "scheme to defraud" gave rise to the judicially created "honest services fraud doctrine." Under this doctrine a scheme to defraud could be found where there was a scheme to deprive another of the "intangible right to honest services." Over time, honest services fraud was recognized as applying to four categories of defendants: (1) government officials who defraud the public of honest services; (2) elected officials and campaign workers who defraud the electorate of the right to an honest election; (3) private actors who abuse fiduciary duties; and (4) private actors who defraud others of certain intangible rights. *United States v. Handakas*, 286 F.3d 92, 101-02 (2d Cir. 2002) (citing *McNally*, 483 U.S. at 362-64 n.1-4 (Stevens, J. dissenting)). In *McNally*, the Supreme Court struck down the then-existing honest services fraud doctrine, holding that § 1341 was "limited in scope to the protection of property rights." 483 U.S. at 360. In doing so, the Court stated that "[i]f Congress desires to go further, it must speak more clearly than it has." *See id.*

In response, Congress enacted § 1346, which states, for purposes of the wire and mail fraud statutes, that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The sole purpose of enacting § 1346 was to create a second category of schemes to defraud, in addition to schemes to deprive a person of money or property. This second category of fraud is applicable when the scheme to defraud is intended to deprive another of intangible right to honest *services*.

Simple wire and mail fraud is not converted to honest services fraud by virtue of the fact that it is committed by the victim's physician. To charge a private sector defendant with honest services fraud under § 1346, an indictment must allege more than a breach of loyalty. The breach alleged

must contravene the purpose of the parties' relationship. That is, the defendant must have deprived the victim of an intangible right to honest services that the victim was entitled to receive by virtue of the fiduciary relationship. *See Jain*, 93 F.3d at 442 (declining to find honest services fraud where kickback scheme did not harm patient care). The honest services a patient is entitled to receive from his physician are services relating to medical diagnosis and treatment. Nowhere in Counts Four or Five is a statement suggesting that the defendant compromised the Second Known Person's medical care.

The omission of a statement or description alleging deprivation of an intangible right to honest services is not a mere technical error. An indictment must allege an offense, and a scheme to deprive another of honest services is the *sine qua non* of honest services fraud. Even more significantly, Counts Four and Five as stated do not permit the preparation of an adequate defense to honest services fraud. By referencing honest services fraud, failing to state a deprivation of honest services, and then describing a deprivation of money as the means, the government leaves the defendant unsure of what legal theory he will need to defend against. The defendant cannot know from a review of Counts Four and Five whether to prepare to defend against allegations relating to his medical treatment of the Second Known Person, allegations pertaining to his financial dealings with the Second Known Person, or some combination thereof.

Therefore, the court **FINDS** that, by failing to allege a scheme to deprive another of an intangible right to honest services, in statutory language or through factual description, the indictment fails to allege an element of honest services fraud. Counts 4 and 5, however, properly state the elements of simple fraud, pursuant to §§ 1341 and 1343. The only motion before the court on this issue being a Motion to Dismiss Counts Four and Five, the motion is **DENIED** [Docket 84].

The court will instruct the jury on the charges in accordance with this opinion. The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal, and **DIRECTS** the Clerk to post this unpublished opinion at http://www.wvsd.uscourts.gov.

ENTER: June 4, 2004

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

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