IN THE 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.	)	

DEFENDANT DELAUGHTER'S MOTION TO DISMISS COUNTS TWO, THREE, AND 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**, moves the Court under Fed. R. Crim. 12(b)(3)(B) and the provisions of law set out below for an Order dismissing Counts Two, Three, and Four of the indictment for failure to charge an offense. Those counts purport to charge honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346. The honest services counts must be dismissed because:

(1) Those counts fail to allege a state law violation, as required under *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc);

(2) The counts fail to allege either bribery or material nondisclosure, the two theories that courts permit under the honest services statute;

(3) The mailings alleged in the honest services counts – of routine court documents in state court litigation – were required by state law, are not alleged to be unlawful, and thus cannot serve as the basis for a mail fraud charge; and

(4) If construed to apply to the conduct alleged in the indictment, §§ 1341 and 1346 must be held void for vagueness as applied.

INTRODUCTION

This case marks the most extreme effort to date by federal prosecutors to enforce a federal code of ethics against an elected local official under the honest services fraud statute, 18 U.S.C. § 1346. The indictment does not allege that Judge DeLaughter improperly ruled in favor of co-defendant Scruggs in the *Wilson v. Scruggs* litigation,[1] or gave Scruggs *anything* other than access through *ex parte* communications. Similarly, the indictment does not charge that Judge DeLaughter received anything of value from Scruggs. Although the indictment alleges that Judge DeLaughter wanted a federal judgeship, all he received (according to the indictment) was a call from Senator Trent Lott offering him "consideration" for that position – something that *any* qualified lawyer who submitted an application would receive. Indictment at 5, ¶ 12.

It is noteworthy what the indictment does *not* allege concerning the federal judgeship. The indictment does not charge that Senator Lott actually obtained a federal judgeship for Judge DeLaughter, or even that he used (or offered to use) his influence to *help* Judge DeLaughter obtain the judgeship. In fact, Senator Lott did *nothing* to advance Judge DeLaughter's aspiration to become a federal judge; he simply made a courtesy call to acknowledge Judge DeLaughter's interest in the position. And Senator Lott made that courtesy call, the evidence will show, in accordance with his usual practice, shortly after Judge DeLaughter had sent letters to him and to Senator Cochran (without any prompting by Scruggs or anyone associated with Scruggs) requesting consideration for an open judgeship.

[1] The indictment concedes that Judge DeLaughter's rulings in the *Wilson v. Scruggs* litigation were "not plainly unlawful." Indictment at 2, ¶ 7. We take that double negative to mean that his rulings in fact were lawful and that the government will not attempt to show that any of Judge DeLaughter's rulings favoring Scruggs was erroneous. (Judge DeLaughter made a number of rulings favoring Wilson during the indictment period. We assume the government will not contend that those rulings were erroneous.)

The government seeks through this prosecution to turn a judge's ex parte communications into a federal crime. If what Judge DeLaughter allegedly did is a federal crime, then any judge who receives an ex parte communication from an attorney in a case before him and then receives, for example, an endorsement for election or a campaign contribution from that attorney subjects himself to federal prosecution. As this case demonstrates, and as courts and scholars have long recognized, federal honest services prosecutions of local judges and other elected officials threaten fundamental principles of federalism and risk subjecting local officials to prosecution without fair notice.

Justice Scalia, dissenting recently from the denial of *certiorari* in an honest services case, decried the "prospect of federal prosecutors' (or federal courts') creating ethics codes and setting disclosure requirements for local and state officials." *Sorich v. United States*, 2009 U.S. LEXIS 1018, at *5-*6 (U.S. Feb. 23, 2009) (Scalia, J., dissenting). Justice Scalia observed that "[t]here is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct," which he described as "utterly anathema today." *Id*. at *6 (quotation omitted). He declared: "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Id*. at *7. This prosecution could serve as Exhibit A for Justice Scalia's concerns.

Justice Scalia may be the most prominent jurist to highlight the federalism and fair notice concerns that § 1346 presents, but judges and scholars have lamented the statute's flaws since Congress hastily enacted it in 1988. In an effort to remedy the constitutional defects in § 1346, courts have strictly construed the statute, required that the duty of honest services be rooted in state law, and confined honest services prosecutions to two narrow theories: bribery and

material nondisclosure. In addition, courts have refused to permit federal jurisdiction to be premised on mailings that are required by state law and are not inherently unlawful.

As we discuss below, Counts Two through Four fail to meet any of these requirements. The Court should, therefore, dismiss those counts for failure to charge an offense. *See, e.g., United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002) ("[F]or purposes of [Fed. R. Crim. P.] 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation."); *United States v. Varbel*, 780 F.2d 758, 762-63 (9th Cir. 1985) (indictment fails to charge offense where alleged conduct does not fall within scope of statute).

Part I addresses the rules of statutory interpretation courts use to place intelligible limits on the honest services and mail fraud statutes. Part II notes that to diminish the federalism concerns the honest services statute presents in prosecutions of local officials, the Fifth Circuit requires the duty of honest services to rest upon state law. Here, the state law provisions the indictment identifies do not support an honest services charge against Judge DeLaughter. Part III shows that even if a state law predicate exists for the alleged honest services, Counts Two through Four do not charge an offense under 18 U.S.C. §§ 1341 and 1346 under either of the theories – bribery and material nondisclosure – that the federal courts have recognized. Part IV establishes that the mailings charged in Counts Two through Four are required under state law, are not fraudulent in themselves, and thus cannot serve as the basis for federal mail fraud charges. And Part V shows that if the Court interprets §§ 1341 and 1346 to apply to Judge DeLaughter's alleged conduct, then those statutes are void for vagueness as applied and the mail fraud charges must be dismissed for that reason.

ARGUMENT

I. THE PRINCIPLES OF STATUTORY INTERPRETATION THAT APPLY TO THE HONEST SERVICES AND MAIL FRAUD STATUTES.

Since the 1970s, when prosecutors first convinced federal courts to interpret the mail and wire fraud statutes to reach deprivations of "honest services," judges have struggled to establish intelligible limits for the honest services theory and for the federal fraud statutes generally.[2] The Supreme Court, the Fifth Circuit, and other courts have turned to settled principles of statutory interpretation to confine the scope of those offenses.

Three such rules compel a narrow reading of §§ 1341 and 1346. First, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see, e.g., Cleveland v. United States*, 531 U.S. 12, 25 (2000) (interpreting mail fraud statute in light of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (quotation omitted)); *United States v. Turner*, 465 F.3d 667, 683 (6th Cir. 2006) (applying rule of lenity to § 1346). Because Congress has not spoken in "clear and definite language" in § 1346 – which the Fifth Circuit has described as "vague and amorphous on its face," *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007) – this Court must, under the rule of lenity, apply the narrowest rational interpretation of the statute.

Second, the Court must not, by giving the language of §§ 1341 and 1346 an expansive interpretation, violate the prohibition on federal common law crimes, "a beastie that many

[2] For a discussion of the development of the honest services theory, see Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 158-70 (1994).

decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998). The Fifth Circuit has noted the danger that courts interpreting § 1346 will "defin[e] an ever-expanding and ever-evolving federal common-law crime." *Brown*, 459 F.3d at 522 n.13; *see also, e.g., United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007) (ambiguities must be "read against the prosecutor, lest the judiciary create, in common-law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared"); Moohr, *supra* note 2, 31 Harv. J. on Legis. at 178-79 ("When the elements of a crime are unfixed and unclear . . . the judge and jury fix the elements, usurping the role properly left to the legislature and violating the separation of powers. . . . Judicial crime creation invites and encourages prosecutors to bring previously undefined conduct to trial in the hope that the court will criminalize it.").

Third, under the doctrine of constitutional avoidance, the Court must interpret §§ 1341 and 1346 to avoid creating grave constitutional questions. "It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotations omitted); *see, e.g., Cheek v. United States*, 498 U.S. 192, 203 (1991) (interpreting criminal statute to avoid constitutional issue). The doctrine of constitutional avoidance has particular force here. If the Court were to uphold the government's honest services theory in this case, it would then have to determine whether §§ 1341 and 1346, as applied, violate principles of federalism and are void for vagueness. As we explain in Part V, those constitutional questions – if the Court were to

reach them – would have to be resolved in Judge DeLaughter's favor.[3] Rather than place the federal judiciary in the position of striking down Acts of Congress, the Court should read the statutes as narrowly as their language permits.

II. THE STATE PROVISIONS CITED IN THE INDICTMENT DO NOT PROVIDE A BASIS FOR THE HONEST SERVICES CHARGES HERE.

The principles of statutory interpretation outlined above address the vagueness of the honest services and mail fraud statutes and their failure to provide fair notice. But those principles do not resolve the federalism concerns that the statute presents when turned against local elected officials. To diminish those concerns, the Fifth Circuit requires the duty of honest services to rest upon state law. The state law provisions the indictment identifies do not support an honest services charge against Judge DeLaughter.

A. The Duty of Honest Services Must Rest on State Law.

Courts recognize that use of the mail fraud statute to prosecute matters of traditionally local concern raises substantial federalism concerns. *See, e.g., Cleveland*, 531 U.S. at 24 (declining to "approve a sweeping expansion of federal criminal jurisdiction [under the mail fraud statute] in the absence of a clear statement by Congress"); *United States v. Ratcliff*, 488 F.3d 639, 648 (5th Cir. 2007) ("In construing the meaning of the terms of the mail fraud statute, we are . . . guided by the principle that unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes") (quotation omitted); *Turner*, 465 F.3d at 683 (interpreting § 1346 narrowly in light of the "requirement that Congress speak clearly when enacting criminal statutes and, to an even greater

[3] *See, e.g., United States v. Handakas*, 286 F.3d 92, 100-12 (2d Cir. 2002) (holding § 1346 void for vagueness as applied), *overruled as unnecessary to holding, United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (en banc); Moohr, *supra* note 2, 31 Harv. J. on Legis. at 188-99 (arguing that § 1346 is void for vagueness to the extent it prohibits schemes to defraud citizens of the honest services of state and local public officials).

degree, when altering the federal-state balance in the prosecutions of crimes"). Justice Scalia's dismay over the "prospect of federal prosecutors' (or federal courts') creating ethics codes and setting disclosure requirements for local and state officials" through the honest services statute, *Sorich*, 2009 U.S. LEXIS 1018, at *5-*6 (Scalia, J., dissenting), is simply the latest such expression of judicial unease.

These federalism concerns are particularly acute when federal prosecutors turn the vague honest services statute against local elected officials. As the en banc Fifth Circuit observed, "We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services – to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure." *Brumley*, 116 F.3d at 734; *see, e.g.*, *McNally*, 483 U.S. at 360 (declining to read mail fraud statute in a way that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials"); Moohr, *supra* note 2, 31 Harv. J. on Legis. at 172 (concluding that "the application of the intangible rights doctrine to state and local political corruption . . . damages the federalist system").

The Fifth Circuit in *Brumley* resolved the federalism problem by requiring a state law predicate for honest services prosecutions of local officials. The court declared that "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law." *Brumley*, 116 F.3d at 734. The state provision at issue must prohibit *actual*

corruption; "a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346." *Id*. Although the Fifth Circuit declined to decide "whether a breach of a duty to perform must violate the criminal law of the state," *id*., the state statutes at issue in that case and in other reported Fifth Circuit public official honest services cases imposed criminal sanctions, *see id*. at 736 (conduct violated state criminal statute prohibiting receipt of gratuities); *United States v. Wyly*, 193 F.3d 289, 295 (5th Cir. 1999) (bribery scheme "in violation of state criminal law"); *United States v. Evans*, 148 F.3d 477, 483 (5th Cir. 1998) (violation of provisions of Texas Penal Code).

B. The Facts Alleged in the Indictment Do Not Establish a Violation of the State Law Provisions on Which the Honest Services Charges Rest.

The indictment cites four potential state law sources on which it predicates Judge DeLaughter's duty of honest services: "[1] the Constitution and [2] laws of the State of Mississippi and pursuant to [3] the Code of Judicial Conduct and [4] his oath." Indictment at 1, ¶ 3 (bracketed numbers added). None of these sources satisfies the *Brumley* requirement that an honest services prosecution rest on violation of a state law that does more than "prohibit[] only appearances of corruption." *Brumley*, 116 F.3d at 734.[4]

Three of the four potential state law sources can be easily dismissed. The Mississippi Code of Judicial Conduct prohibits ex parte communications (with some exceptions), *see* Canon 3B(7), and Miss. Const. Art. 6, § 177A permits the Mississippi Supreme Court and the Mississippi Commission on Judicial Performance to impose sanctions on state and local judges

[4] The Fifth Circuit has suggested that "the state-law source of the right to honest services" need not be alleged in the indictment, as long as the government proves at trial that the defendant deprived the government or its citizens of such a right. *United States v. Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002). Here, however, the government chose to allege the state-law sources on which it relies, *see* Indictment at 1, ¶ 3, and this Court has the power to determine whether the conduct charged in the indictment amounts to an offense under those Mississippi provisions.

for violation of that prohibition under certain circumstances, *see, e.g.*, *Mississippi Commission on Judicial Performance v. Fowlkes*, 967 So. 2d 12 (Miss. 2007). But neither of these provisions imposes criminal sanctions. Indeed, the Preamble to the Code of Judicial Conduct declares that it is "not designed or intended as a basis for civil liability *or criminal prosecution*." (Emphasis added.) These provisions, at most, "prohibit[] only appearances of corruption." The judicial oath, set out in Miss. Const. Art. 6, § 155, commits a judge to "faithfully and impartially discharge and perform all the duties incumbent upon me," but it does not add to the duties imposed by the Constitution and laws of Mississippi and the Code of Judicial Conduct.

That leaves Mississippi statutory law. Two provisions appear relevant here – Miss. Code §§ 97-11-13 and 97-11-53. Section 97-11-13 prohibits public officials from "accept[ing] any gift, offer or promise, prohibited by Section 97-11-11." Section 97-11-11, in turn, makes it a felony to "promise, offer or give" to any public official "any money, goods, chattels, right in action, or other property, real or personal, with intent to influence his vote, opinion, action or judgment on any question, matter, cause or proceeding which may then be pending." *Id.* § 97-11-11.

Counts Two, Three, and Four do not allege facts that constitute a violation of § 97-11-13. In particular, those counts do not charge that Scruggs, Peters, or anyone else promised, offered, or gave Judge DeLaughter "any money, goods, chattels, rights in action, or other property, real or personal." The mail fraud counts charge that *Peters* received $1 million, but those counts do not allege that he gave or offered any of that money to Judge DeLaughter or that Judge DeLaughter even knew that Peters had received it. And the mail fraud counts allege that Scruggs "prevailed upon [Senator Lott] to offer Judge Delaughter consideration for a federal district judgeship then

open in the Southern District of Mississippi." Indictment at 5-6, ¶ 12. A federal judgeship might well constitute "money . . . or other property, real or personal," but the indictment does not allege that Senator Lott, or Scruggs, or anyone else offered Judge DeLaughter a federal judgeship. Mere "consideration" for a federal judgeship – something any qualified lawyer can obtain – plainly does *not* constitute "money . . . or other property, real or personal." Just as (for example) unissued licenses and tax credits have no value and do not constitute money or property, *see, e.g., Cleveland*, 531 U.S. at 24-25; *United States v. Griffin*, 324 F.3d 330, 354-55 (5th Cir. 2003), an unissued judgeship has no value and does not constitute money or property.

Nor do the facts alleged in the indictment constitute an offense under Miss. Code § 97-11-53. That provision makes it a felony for any "public official" to "directly or indirectly accept, receive, offer to receive or agree to receive any gift, offer, or promise of any money, property or other tangible or intangible thing of value as an inducement or incentive for . . . the accomplishment of any official act or purpose involving public funds or public trust." The scope of § 97-11-53 is unclear. No court has determined, for example, whether a judge's conduct of litigation constitutes an "official act . . . involving . . . public trust." It is clear, however, that the only thing the mail fraud counts allege Judge DeLaughter accepted or received – a telephone call from Senator Lott offering him "consideration" for a federal judgeship – does not constitute an "intangible thing of value" under § 97-11-53.[5] The phrase "thing of value" may be broadly construed in some contexts, *e.g., United States v. Marmolejo*, 89 F.3d 1185, 1192 (5th Cir. 1996) (sexual favors), *aff'd on other grounds*, 522 U.S. 52 (1997); *United States v. Gordon*, 638 F.2d 886, 889 (5th Cir. 1981) (contraband marijuana), but there must at least be "value" – and mere

[5] The one reported decision that has interpreted § 97-11-53 in its quarter-century of existence – *Edmonson v. State*, 906 So. 2d 73 (Miss. App. 2004) – upheld the conviction of a city council president who accepted $7500 in return for securing the approval of a construction project. That decision sheds no light on the application of the statute to the facts alleged in the honest services counts.

"consideration" for a federal judgeship, something to which Judge DeLaughter would have been entitled in any event, has none, as *Cleveland* and *Griffin* suggest. Put differently, because any qualified lawyer can obtain "consideration" for a federal judgeship for free, no rational lawyer would pay money for (and thereby assign "value" to) such "consideration."

Because the facts alleged in Counts Two through Four do not establish a violation of any state law prohibiting actual corruption – rather than mere "appearances of corruption," *Brumley*, 116 F.3d at 734 – those counts fail to charge an offense and must be dismissed.

III. COUNTS TWO, THREE, AND FOUR DO NOT ALLEGE EITHER A "BRIBERY" OR A "NONDISCLOSURE" VIOLATION OF THE HONEST SERVICES STATUTE.

The preceding analysis demonstrates that Counts Two, Three, and Four do not allege a violation of any of the state law provisions on which they rely. But even if those counts could be read to charge a state law violation, they would still not charge an honest services violation. Federal courts hold that a public official's violation of state law, "even though it relates to public office, does not by itself (or, *per se*) establish honest services fraud." *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996). As the First Circuit explained, "[t]o allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced." *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (quotation omitted).

Applying the rules of interpretation outlined in Part I above, courts have required honest services prosecutions of state and local officials to proceed under either or both of two theories: "(1) bribery, where a public official was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain." *United States v. Kemp*, 500 F.3d 257,

279 (3d Cir. 2007) (quotation and brackets omitted), *cert. denied*, 128 S. Ct. 1329 (2008); *see, e.g., United States v. Kincaid-Chauncey*, 2009 U.S. App. LEXIS 3591, at *50-*52 (9th Cir. Feb. 20, 2009). The Fifth Circuit similarly has recognized that honest services prosecutions "can be generally categorized in terms of either bribery and kickbacks or self-dealing." *Brown*, 459 F.3d at 521. As we discuss below, Counts Two, Three, and Four fail to allege an offense under either the bribery or the nondisclosure theories that courts recognize under 18 U.S.C. § 1346 for prosecutions of state and local officials.

A. Counts Two, Three, and Four Do Not Allege That Judge DeLaughter Was Bribed.

An honest services bribery charge "may not be founded on a mere intent to curry favor. . . . [T]here is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill." *Kemp*, 500 F.3d at 281; *see, e.g., Sawyer*, 85 F.3d at 728-30 (violation of state gift and gratuity statutes, without intent to influence or otherwise improperly affect the official's performance of his duties, insufficient for honest services violation). The Third Circuit has emphasized the necessity for a quid pro quo to establish honest services bribery:

> The Supreme Court has explained, in interpreting the federal bribery and gratuity statute, 18 U.S.C. § 201, that bribery requires a *quid pro quo*, which includes an "intent to influence an official act or to be influenced in an official act." . . . This may be contrasted to both a gratuity, which "may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken," and to a noncriminal gift extended to a public official merely "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." . . . This discussion is equally applicable to bribery in the honest services fraud context, and we thus conclude that bribery requires "a specific intent to give or receive something of value *in exchange* for an official act."

Kemp, 500 F.3d at 281 (quoting *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (emphasis added by *Kemp*)); *see also, e.g.*, *Kincaid-Chauncey*, 2009 U.S. App. LEXIS 3591, at *50-*52 (at least implicit quid pro quo necessary for bribery theory of honest services fraud).

Counts Two, Three, and Four allege that Scruggs "prevailed upon" Senator Lott "to offer Judge Delaughter consideration for a federal judgeship then open in the Southern District of Mississippi," and "[i]n return, Judge Delaughter afforded the Scruggs legal team secret access to the court by way of Ed Peters . . . ." Indictment at 5-6, ¶ 12. The phrase "[i]n return" may adequately allege the "exchange" or quid pro quo element of bribery. But the honest services counts nonetheless fail (among other reasons) because those counts do not allege that Judge DeLaughter intended to "receive *something of value* in exchange for an official act." *Kemp*, 500 F.3d at 281 (quotation omitted; emphasis added). As discussed above in connection with the Mississippi bribery and gratuity statutes, "consideration" for a federal judgeship – something any qualified lawyer can obtain for free – does not amount to "something of value" for purposes of the honest services bribery theory.

B. Counts Two, Three, and Four Do Not Allege Material Nondisclosure.

An honest services violation based on material nondisclosure exists "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law." *Panarella*, 277 F.3d at 691; *see id*. at 694. Counts Two, Three, and Four allege that Judge DeLaughter took various "discretionary action[s]" in the *Wilson v. Scruggs* litigation, but those counts do not allege that Judge DeLaughter knew that those actions would directly benefit any "financial interest" of his,

or that he "concealed" such a financial interest "in violation of a state criminal law." Thus, the honest services counts fail to allege the material nondisclosure theory.

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

In federal mail fraud prosecutions of local officials, only the fact of the mailing turns what would otherwise be matter for local authorities into a federal offense, with a claim on the time and resources of this Court. As the Fifth Circuit has pointed out, the 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 other law." *United States v. Ingles*, 445 F.3d 830, 837 (5th Cir. 2006) (quotation and brackets omitted); *see, e.g., Evans*, 148 F.3d at 483 (same). Thus, it is necessary to examine at the outset whether the mailings alleged in the honest services counts are sufficient to establish federal jurisdiction. The mailings charged here – of an entry of appearance and two court orders – do not satisfy 18 U.S.C. § 1341.

Section 1341 requires proof of (among other elements) use of the mails "for the purpose of executing" or attempting to execute the alleged scheme or artifice to defraud. To ensure that the mail fraud statute stays within proper bounds, the Supreme Court and other federal courts have held that mailings that are (1) required under state law, and (2) consist of material that is not itself fraudulent, do not satisfy the "for the purpose of executing" requirement. *See, e.g., Parr v. United States*, 363 U.S. 370, 391 (1960) (reversing conviction); *United States v. Lake*, 472 F.3d 1247, 1255-60 (10th Cir. 2007) (reversing conviction). As the Fifth Circuit explained, "[M]ailings of documents which are required by law to be mailed, and which are not themselves

false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme." *United States v. Curry*, 681 F.2d 406, 412 (5th Cir. 1982).

The three mailings alleged in this case fall squarely within the rule that required, non-fraudulent mailings do not further a scheme to defraud. The mailings consist of an entry of appearance by two counsel for Scruggs in the *Wilson* litigation (Count Two); Judge DeLaughter's "Memorandum Opinion and Order Adopting in Part and Rejecting in Part Special Master's Report and Recommendation of January 9, 2006" (Count Three); and Judge DeLaughter's "Order Quantifying Moneys Due Plaintiffs from Defendants" (Count Four). Indictment at 6-7, ¶¶ 13, 15, 17.

Each of the mailings was "required" under state law. *Curry*, 681 F.2d at 412. The Mississippi Rules of Civil Procedure direct that all pleadings – including the entry of appearance at issue in Count Two – "*shall* be filed with the court." Rule 5(d), M.R.C.P. (emphasis added). Filing may be made by "delivering the pleadings . . . to the clerk of the court," including delivery by mail. Rule 5(e), M.R.C.P. Similarly, the Mississippi rules require service of orders, including the orders at issue in Counts Three and Four. Rule 77(d), M.R.C.P. provides that "[i]mmediately upon the entry of an order or judgment the clerk *shall* serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear." (Emphasis added.) Rule 5(b), M.R.C.P. declares that service "*shall* be made" through one of several alternative means, including "by mailing [the order] to [the attorney or party] at his last known address." (Emphasis added.)

The court documents at issue in Counts Two through Four "are not themselves false and fraudulent." *Curry*, 681 F.2d at 412. The indictment makes no such allegation and even

concedes that Judge DeLaughter's orders in the *Wilson* litigation were "not plainly unlawful." Indictment at 2, ¶ 7. Thus, both prongs of the *Currie* standard are satisfied; the pleading and orders at issue in Counts Two through Four were required to be mailed, and they are not alleged to be unlawful. The mailings alleged in the honest services fraud counts are thus insufficient to charge an offense under § 1341.

Parr underscores the inadequacy of the mailings alleged in Counts Two through Four. The defendants in *Parr* were charged with scheming to defraud the local school district by collecting tax money on behalf of the district and then diverting that money to themselves. *See Parr*, 363 U.S. at 373-76. The mailings at issue consisted of tax notices and other tax documents that the school board mailed to district property owners and tax payments that the owners mailed back in response. *See id.* at 376 nn. 9 & 10. As the Supreme Court framed the issue:

> There can be no doubt that the indictment charged and the evidence tended strongly to show that petitioners devised and practiced a brazen scheme to defraud by misappropriating, converting and embezzling the District's moneys and property. Counsel for petitioners concede this is so. But, as they correctly say, these were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used "for the purpose of executing such scheme." Hence, the question is whether the uses of the mails that were charged in the indictment and shown by the evidence may properly be said to have been "for the purpose of executing such scheme," in violation of § 1341.

Id. at 385 (footnote omitted).

The Court found that "the School Board was under an express constitutional mandate to levy and collect taxes" to support the district schools "and was required by statute to issue statements for such taxes and to deliver receipts upon payment." *Id*. at 387. It noted that "the Board, to collect the District's taxes (largely from nonresident property owners), was required by the state law to use the mails," *id*. at 388, and that the various tax documents mailed were "not

charged or shown to have been unlawful," *id*. at 389. Under these circumstances, the Court held that the mailings were not "for the purpose of executing such scheme" as required for conviction under § 1341. *See id*. at 391. Similarly here, the Mississippi Rules require service of pleadings and orders, and the indictment does not allege that the particular pleadings and orders at issue in Counts Two through Four are unlawful in any respect.

United States v. Cross, 128 F.3d 145 (3d Cir. 1997), follows *Parr* on facts analogous to these. The indictment charged the defendants – two employees at the Statutory Appeals Court of the Allegheny County, Pennsylvania, Court of Common Pleas – with conspiracy to commit mail fraud, based on a scheme to fix cases before the court. The alleged mailings consisted of "(1) notices of dismissals, (2) notices of convictions, and (3) notices of favorable disposition." *Id*. at 150 (quotation omitted). The Third Circuit found the case "indistinguishable from *Parr*." *Id*. at 151. It explained: "The Statutory Appeals Court was charged by law with adjudicating specified cases, just as the school district in *Parr* was charged with running a school system. Its mailings to the parties and the DOT, like the tax mailing in *Parr*, were required by law [citing Pennsylvania provisions]. Given the volume of business that the court conducted, it had little choice but to transmit these required notifications by mail." *Id*.

In addition to being required by law, the court documents mailed in *Cross* were not fraudulent. "The notices of dispositions dispatched by the court, like the tax mailings in *Parr*, performed precisely the function they were intended by law to perform: they faithfully reported the court's disposition of the case." *Id*. The court concluded: "The scope of the federal mail fraud statute is limited. The Supreme Court has clearly held that legally required mailings in circumstances like those in this case cannot be deemed to have been made 'for the purpose of

executing' a fraudulent scheme. We therefore reverse the mail fraud conspiracy conviction." *Id*. at 152.

The *Cross* reasoning compels dismissal of the mail fraud counts. The Circuit Court of Hinds County, like the Statutory Appeals Court in *Cross*, "was charged by law with adjudicating specified cases," including the *Wilson v. Scruggs* case. The mailings of the entry of appearance and the two court orders alleged in Counts Two, Three, and Four were every bit as "required by law" as the mailings of the court notices at issue in *Cross*. And here, as in *Cross*, there is no allegation – and there will be no proof – that the court documents at issue were fraudulent. The notice of appearance and the two orders – like the notices in *Cross* – "performed precisely the function they were intended by law to perform: they faithfully reported" the entry of two attorneys into the case on Scruggs' behalf and Judge DeLaughter's resolution of certain issues in the case. *Id*. at 151. And here, as in *Cross*, the charged mailings "cannot be deemed to have been made 'for the purpose of executing' a fraudulent scheme." *Id*. at 152. For this reason as well, Counts Two through Four must be dismissed.

V. IF CONSTRUED TO APPLY TO THE CONDUCT ALLEGED IN COUNTS TWO THROUGH FOUR, THE HONEST SERVICES STATUTE IS VOID FOR VAGUENESS.

If the Court concludes – contrary to the arguments set out above – that §§ 1341 and 1346 apply to Judge DeLaughter's alleged conduct as a matter of statutory interpretation, then it should hold that those statutes are void for vagueness as applied in this case.[6]

[6] We recognize, of course, that the Fifth Circuit has previously rejected an "as applied" vagueness challenge to § 1346. *See United States v. Gray*, 96 F.3d 769, 776-77 (5th Cir. 1996). The court emphasized, however, that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Id*. at 776 (quotation omitted). On the facts of *this* unprecedented case, the honest services and mail fraud statutes must be held void for vagueness.

A vague statute creates two principal dangers. "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see, e.g., United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.").

Sections 1341 and 1346, if interpreted to apply to Judge DeLaughter's alleged conduct, present both of these dangers in acute form. First, the statutes did not give him fair notice that his conduct would violate their terms. The Fifth Circuit has recognized that § 1346 "is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases." *Brown*, 459 F.3d at 523; *see, e.g., United States v. Rybicki*, 354 F.3d 124, 135-38 (2d Cir. 2003) (en banc) (looking to case law to determine the meaning of § 1346 because neither its language nor the "sparse" legislative history provides adequate guidance). If Judge DeLaughter had surveyed the "jumble of disparate cases" in the Fifth Circuit and elsewhere during the alleged scheme, he would not have found a single decision upholding an honest services prosecution on facts anything like these: a judge receiving ex parte contacts, without rendering unlawful rulings or receiving anything of value in return, and mailings consisting solely of lawful court documents required by law. Nothing in the existing case law gave Judge DeLaughter fair notice that his alleged conduct violated §§ 1341 and 1346.[7]

[7] The previous honest services prosecutions of state and local judges appear to have involved bribery – the payment of money in exchange for favorable treatment by the judge. *See, e.g., United States v. Frega*, 179 F.3d 793, 798 (9th Cir. 1999); *United States v. Holzer*, 816 F.2d 304, 306-08 (7th Cir.),

Second, if the honest services and mail fraud statutes are interpreted to apply to Judge DeLaughter's alleged conduct, then federal prosecutors will have virtually unlimited power to turn any judicial act that they deem inappropriate or unethical into a federal crime. Federal prosecutors will no doubt "pledge[] to use prosecutorial discretion wisely," but, as the Seventh Circuit has noted, "[m]any people will find this position unnerving (what if the prosecutor's policy changes, or [a potential target] is politically unpopular and the prosecutor is looking for a way to nail him?)." *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993). The "standardless sweep" of §§ 1341 and 1346, if interpreted to reach Judge DeLaughter's alleged conduct, would "allow[] policemen, prosecutors, and juries to pursue their personal predilections," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quotation omitted). As Justice Scalia recently reminded us in *Sorich*, conferring such extraordinary discretion on federal prosecutors and juries raises particular concern in the context of prosecutions of state and local officials. Thus, if the Court concludes that §§ 1341 and 1346 apply to Judge DeLaughter's alleged conduct, it should hold those statutes unconstitutionally vague as applied.

CONCLUSION

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

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vacated, 484 U.S. 807 (1987); *United States v. LeFevour*, 798 F.2d 977, 979 (7th Cir. 1986); *United States v. Qaoud*, 777 F.2d 1105, 1107 (6th Cir. 1985); *United States v. Murphy*, 768 F.2d 1518, 1524 (7th Cir. 1985). Nothing in these cases would put Judge DeLaughter on notice that his alleged conduct violated the mail fraud and honest services statutes.

Respectfully submitted,

/s/ Thomas Anthony Durkin
THOMAS ANTHONY DURKIN,

/s/ John D. Cline
JOHN D. CLINE,

/s/ Lawrence L. Little
LAWRENCE L. LITTLE, Attorneys for the Defendant, Bobby B. DeLaughter.

DURKIN & ROBERTS
53 West Jackson Boulevard, Suite 615
Chicago, IL 60604
(312) 913-9300
tdurkin@durkinroberts.com

JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
(415) 875-5812
jcline@jonesday.com

LAWRENCE L. LITTLE & ASSOCIATES, PA
829 North Lamar Boulevard, Suite 6
Oxford, Mississippi 38655
(662) 236-9396
larry@larrylittlelaw.com

CERTIFICATE OF SERVICE

Thomas Anthony Durkin, Attorney at Law, hereby certifies that the foregoing Defendant DeLaughter's Motion To Dismiss Counts Two, Three, And Four For Failure To Charge An Offense was served on March 26, 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.

/s/ Thomas Anthony Durkin
THOMAS ANTHONY DURKIN
53 West Jackson Boulevard, Suite 615
Chicago, IL 60604
(312) 913-9300