Not Reported in F.Supp., 1988 WL 15564 (E.D.La.)
(Cite as: 1988 WL 15564 (E.D.La.))

United States District Court, E.D. Louisiana.
UNITED STATES of America
v.
Carlos MARCELLO, et al.

Crim. A. No. 80–274.
Feb. 19, 1988.

MINUTE ENTRY
SEAR, District Judge.

***1** Following the United States Supreme Court's decision in *McNally v. United States*, 483 U.S. ——, 107 S.Ct. 2875 (1987), the defendants, Carlos Marcello and Charles E. Roemer II, moved for relief from their August 1981 convictions for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO). More particularly, the defendants were convicted for conspiring to associate as an enterprise in fact for the purpose of obtaining insurance contracts through a pattern of racketeering activity, specifically, public bribery, interstate travel with the intent to commit public bribery, wire fraud and mail fraud, all in violation of 18 U.S.C. sec. 1962(d). *United States v. Marcello*, 537 F.Supp. 1364 (E.D.La.1982), *aff'd, United States v. Roemer*, 703 F.2d 805 (5th Cir.1983), *cert. denied*, 464 U.S. 935.

The defendant Marcello was sentenced on January 13, 1982 to seven years imprisonment.[FN1] He is presently serving that sentence and brings this motion to vacate his sentence pursuant to 28 U.S.C. sec. 2255.

The defendant Roemer was sentenced to three years imprisonment. Subsequently, his sentence was reduced to two years. Roemer has completed his period of incarceration and seeks relief through a writ of coram nobis pursuant to 28 U.S.C. sec. 1651.

The gravamen of the defendants' collateral attack is that their convictions are based on an indictment and jury charges that permitted the jury to convict the defendants for RICO conspiracy on the basis of an agreement to commit mail fraud and wire fraud through a scheme to defraud Louisiana citizens of intangible rights. In *McNally*, the Supreme Court held that the mail fraud statute does not protect citizens' intangible right to good government but that the statute is limited in scope to the protection of property rights. *Id.* at 2879, 2881. The Fifth Circuit Court of Appeals recently found the wire fraud statute similarly restricted in scope in *United States v. Herron*, 825 F.2d 50 (5th Cir.1987). The defendants argue that *McNally* and *Herron* invalidated the mail and wire fraud predicate acts of the RICO conspiracy for which they were convicted. They focus their attack on the indictment and jury charges. The defendants contend both are deficient under *McNally* because they rely on a scheme to defraud citizens of non-property rights. Consequently, they contend, their convictions must be vacated.

In *McNally*, a former Kentucky state official, Gray, and a private citizen, McNally, were convicted for mail fraud. The fraud involved a scheme in which Gray, McNally and a third individual, Howard P. “Sonny” Hunt, obtained kickbacks in the form of commissions from certain insurance agencies in return for awarding those agencies state insurance contracts. Hunt controlled the selection of insurance agencies from which the state would purchase its policies. From 1975 to 1979, over $200,000 was funnelled to Gray, Hunt and McNally. As a result, Hunt was charged with and pleaded guilty to mail and tax fraud. Gray and McNally were charged with conspiracy and mail fraud.

The mail fraud count of the indictment charged in Count 4:

***2** [T]hat petitioners [Gray and McNally] had devised a scheme (1) to defraud the citizens and

government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts.

The judge summarized the charge in Count 4 as follows:

Count 4 of the Indictment charges in part that the defendants devised a scheme or artifice to:

(a)(1) defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and,

(2) obtain (directly or indirectly) money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

And for the purpose of executing the aforesaid scheme, the defendants, James E. Gray and Charles J. McNally, and Howard P. “Sonny” Hunt, Jr., and others, did place and cause to be placed in a post office or authorized deposit for mail matter, matters and things to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom such matters and things and did knowingly cause to be delivered thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

(b) Defraud the United States by impeding, impairing, and obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States of America in the ascertainment, computation, assessment and collection of federal taxes.

McNally, 107 S.Ct. at 2878, n. 4. The defendants' convictions were affirmed by the Court of Appeals. The Supreme Court, however, reversed and held that the mail fraud statute proscribed only schemes to defraud persons of property interests and that a citizen's right to honest and impartial government described in the indictment and jury charge was not such a property interest. Because the jury was not instructed that the mail fraud violation required a finding that the Commonwealth was defrauded of money or property or that the Commonwealth was deprived of control over how its money was spent, the Court reasoned that the instructions permitted a conviction for conduct not within the reach of the mail fraud statute. *Id.* at 2881–82.

This case is inapposite to *McNally* and *Herron* because the jury charge is substantially different from *McNally.* Although the indictment in the mail and wire fraud counts sets forth a scheme to defraud Louisiana citizens of both property and non-property interests, the government's prosecution of the case and the evidence at trial in fact established a scheme to defraud the state of Louisiana of property rights. More importantly, the jury instruction defining and explaining the conduct charged in the mail and wire fraud counts differed substantially from the charge in *McNally* because it required a finding of a scheme to deprive or defraud the persons deceived of money or property. Examination of both the indictment and the jury charge establishes that the defendants' contentions lack merit.

In determining the legal sufficiency of the challenged convictions, *McNally* focused its inquiry on the judge's instructions to the jury. The Court also noted that the prosecution's principal theory of the case was “that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain ‘intangible rights,’ such as the right to have the Commonwealth's affairs conducted honestly.” *McNally*, 107 S.Ct. at 2877.

***3** The indictment in this case followed a long-standing investigation known as Brilab. The thrust of the indictment, the evidence and the instructions

to the jury were that Marcello and Roemer had conspired to bribe public officials for the purpose of obtaining state insurance contracts, and, consequently, had schemed to defraud the citizens of Louisiana through the bribery of public officials.

The defendants were convicted only on Count 1 of the indictment, which charged them and others with a conspiracy in violation of 18 U.S.C. sec. 1962(d) for their part in an attempt to gain control of the awarding of public insurance contracts at the state and local levels of government. Specifically, the indictment charged that the defendants knowingly and willfully conspired and were associated together in fact as an enterprise:

[F]or the purpose of obtaining insurance contracts through the commission of various criminal acts, including: (1) public bribery, in violation of Title 14, Louisiana Revised Statutes, Section 118; (2) interstate travel with the intent to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of an unlawful activity, to wit: public bribery in violation of Title 14, Louisiana Revised Statutes, Section 118, in violation of Title 18, United States Code, Sections 1952 and 2; (3) use of interstate wire facilities in furtherance of a scheme and artifice to defraud, in violation of Title 18, United States Code, Sections 1343 and 2; and (4) use of the mails in furtherance of a scheme and artifice to defraud, in violation of Title 18, United States Code, Sections 1341 and 2.

Indictment, Court Record, Document 139 at 3706–07. The pattern of racketeering activity alleged in Count 1 consisted of acts alleged in Counts 2 through 12.[FN2] They included public bribery in violation of Louisiana law; interstate travel for the purpose of committing public bribery (Count 8); and the use of interstate wire facilities and the mails "in furtherance of a scheme and artifice to defraud the citizens of Jefferson Parish, the City of New Orleans, and the State of Louisiana of their right to the honest and faithful services of their elected and appointed officials." (Counts 3–7, 9–12) *Id.* at 3708. The indictment charged sixty overt acts committed in furtherance of the conspiracy. *Id.* at 3709–3718.

The scheme to defraud alleged in Counts 3 through 7 and 9 through 12 of the indictment is described in paragraph B1 of the counts as a scheme to defraud the citizens of Louisiana of the intangible right to the honest and faithful service of their elected and appointed officials. However, paragraph B2 of the same counts charges that:

It was a part of the scheme and artifice to defraud that, among other things, the defendants would bribe public officials for the purpose of obtaining insurance contracts....

***4** *Id.* at 3723. Subparagraphs B2a through f set forth the specific bribery which each defendant was alleged to have committed. *Id.* at 3723–24. Clearly, the *indictment* for mail and wire fraud set forth a scheme to defraud that involved both non-property and property rights.

For the purpose of proceedings under the habeas corpus statute and writ of coram nobis, the indictment is sufficient unless it is so defective on its face as not to charge any offense under any reasonable construction. *Hayes v. United States,* 464 F.2d 1252 (5th Cir.1972); *Burchfield v. United States,* 544 F.2d 922, 924 (7th Cir.1976), *cert. denied,* 430 U.S. 956 (1977). Applying that standard in light of *McNally,* I find that the indictment charged a legally sufficient mail and wire fraud offense.

The indictment charged the defendants with engaging in a scheme to defraud the state and its citizens by bribing public officials. Under Louisiana law, the state has a property interest in bribes received by its public officials. *See infra* at 11. Thus, the indictment charged the defendants with a scheme to defraud others of property rights, and as such, charged an offense under the mail and wire fraud statutes.

In determining the adequacy of jury instruc-

tions, they must be examined in their entirety. *See Davis v. McAllister,* 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied,* 452 U.S. 907 (1981). Specific instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge," *Cupp v. Naughten,* 414 U.S. 141, 146–47 (1973), and the charge's correctness measured not by isolated passages but in light of the charge as a whole. *United States v. Rouse,* 452 F.2d 311, 314 (5th Cir.1971).

The jury was instructed that:

The term "racketeering activity" includes any act of bribery which is illegal under Louisiana law and certain acts constituting interstate travel in aid of unlawful activity, wire fraud, or mail fraud, which are illegal under the laws of the United States.

Count One of the indictment alleges that between February 1979 and February 1980, the defendants, Carlos Marcello, ... Charles E. Roemer, II ... unlawfully, willfully, and knowingly conspired to associate in fact as an enterprise engaged in, or the activities of which affected, interstate commerce for the purpose of obtaining insurance contracts through a pattern of racketeering activity in violation of the United States Code.

Jury Charges, Court Record, Document 138 at 3674, 3675. The predicate acts upon which the RICO conspiracy in this case is premised included bribery and interstate travel, wire fraud or mail fraud. The jury was instructed that the "scheme" or "artifice" to defraud involved schemes to deprive others of money or property. The charge provided that:

The words "scheme" and "artifice" used in the definitions of the federal offenses of wire fraud and mail fraud include any plan or course of action intended to deceive others, *and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived. The scheme alleged in this case was to defraud Louisiana citizens by illegally obtaining state insurance contracts through the bribery of public officials.*

***5** *Id.* at 3689. The instructions stated further that:

To act with "intent to defraud" as required by the wire fraud and mail fraud statutes means to act knowingly and with the specific intent to deceive, *ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.*

Id. at 3690. Concluding, the instructions provided that:

The indictment alleges that defendant Carlos Marcello bribed Charles E. Roemer, II, to use his official position and influence in obtaining insurance contracts; that he bribed James E. Fitzmorris, Jr., to use his official position and influence in obtaining insurance contracts; that in aid of an unlawful scheme to obtain insurance contracts, he initiated or caused others to initiate interstate telephone calls at the times charged ... that he caused others to travel in interstate commerce on or about September 9, 1979, in aid of unlawful activity charged in count eight of the indictment; and that he mailed or caused something to be mailed through the United States Postal Service on or about November 2, 1979, in furtherance of a scheme or artifice to defraud as charged in count twelve of the indictment.

Defendant Charles E. Roemer, II, is charged with committing public bribery by accepting money in exchange for use of his official position and influence to obtain insurance contracts; causing someone to initiate an interstate telephone call in aid of an unlawful scheme or artifice on or about September 21, 1979, as charged in count ten of the indictment; and mailing or causing something to be mailed through the United States Postal Service on or about November 2, 1979, in furtherance of a scheme or artifice to defraud as charged in count

twelve of the indictment.

Id. at 3691–92, 3693.

The jury instructions contain no reference to or description of a scheme to defraud citizens of non-property rights. On the contrary, the jury was charged that a scheme to defraud required the obtaining of money or property. Unlike *McNally*, this jury could not have based its conviction for RICO conspiracy on predicate acts premised on a scheme to defraud others of non-property rights.

In contrast to the Brilab jury charge, the *McNally* instructions [FN3] charged the jury specifically with a scheme to defraud "the citizens of ... Kentucky ... of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud." More particularly, the *McNally* jury was instructed that to find the defendants had devised such a scheme to defraud, they had to find that Hunt controlled the awarding of insurance contracts and that he directed commissions from those insurance contracts to an entity in which he possessed an ownership interest. The scheme to defraud was predicated on the fiduciary duty owed by public servants to the state's citizens, which, as the Supreme Court noted, did not constitute a property interest. *See supra* n. 3. Significantly, the *McNally* charge did not define the words "scheme" and "artifice" to include only schemes to deprive others of money or property. In contrast, I charged the jury that the scheme alleged against Marcello and Roemer "was to defraud Louisiana citizens by illegally obtaining state insurance contracts through the bribery of public officials." *Jury Charges*, Court Record, Document 138 at 3689. Under Louisiana law such a scheme involves property rights.

Under Louisiana's law of agency, the state has a property interest in bribes received by its officials. LRS–C.C. art. 3005; *United States v. Faser*, 303 F.Supp. 380, 383–84 (E.D.La.1969); *see United States v. Fagan*, 821 F.2d 1002, 1011 n. 6 (5th Cir.1987), *cert. denied*, 56 U.S.L.W. 3459 (1988). While the jury was not instructed specifically on this property interest, the mail fraud statute "is to be broadly interpreted as far as property rights are concerned." *McNally*, 107 S.Ct. at 2879–80. A reasonable jury applying my instructions would have concluded that the state had a property interest in bribes to be received by the indicted state officials. *See Faser*, 308 F.Supp. at 383–384 (indictment charged defendant was agent of the state, that he engaged in scheme to defraud state by accepting monies and bribes, and stated the amount of the private financial gain; court applied Louisiana law that "an agent who makes a profit from the business conducted by him on account of his principal has a duty to the principal to account for [and restore to him] such profit" and rejected the argument that the indictment was deficient because it failed to state that the state lost money or property as a result of the defendant's actions). *See also McNally*, 107 S.Ct. at 2882 n. 9 (court assumed that the alleged acts *did not* violate state law); *McNally*, 107 S.Ct. at 2890 n. 10 (Stevens, J., dissenting); *Carpenter v. United States*, 108 S.Ct. 316 (1987).

***6** In instruction 11 of the *McNally* charge, the scheme alleged by the government in the indictment to deprive citizens of their right to honest government was specifically incorporated and emphasized in the jury instructions. See Appendix A at 27–16–27–18, 27–24—27–27. The alleged scheme to deprive Kentucky citizens of intangible rights was focused upon in the *McNally* instructions. Under these circumstances, the Supreme Court held "the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341." *McNally*, 107 S.Ct. at 2882.

My charge did not recite or incorporate in any way the indictment's claim that Louisiana citizens had been defrauded of intangible rights. While the indictment set forth a scheme to defraud the citizens of Louisiana of both property and non-property interests, the jury was instructed that the

law to be applied was that given by the judge. *See United States v. Heffington,* 682 F.2d 1075, 1084 (5th Cir.1982), *cert. denied sub nom. Giella v. United States,* 459 U.S. 1108 (1983); *United States v. Ruppel,* 666 F.2d 261, 273–74 (5th Cir.), *cert. denied,* 458 U.S. 1107 (1982). Indeed, the jury was instructed that:

[I]t would be your duty—indeed your obligation, to apply the law as I instruct you in reaching your decision as to what the facts are.

The law requires that you follow my instructions as a whole. You must not disregard or give special attention to any one instruction, or question the wisdom or correctness of any rule that I state to you.

And you cannot substitute or follow your own notion or opinion as to what the law is or ought to be. *It is your duty to apply the law exactly as I give it to you,* regardless of the consequences.

***7** *Jury Instructions,* Court Record, Document 138 at 3659–60 (emphasis added).

Moreover, before the trial began the jury was admonished that:

[FN4] [T]he indictment is only a charge. It's not [sic] the means or the vehicle by which the government comes to court. It's not evidence of guilt, and you may not draw any inference of guilt from the mere fact that the government has charged the defendant.

Preliminary Instructions, Court Record, Document 607 at 53–54.

Further, on voir dire examination the jurors were told:

[I]t will be your sworn duty under the law to decide this case solely on the evidence adduced during this trial and the law applicable to it as given to you by the court.

Id. at 100. *See Fed.R.Crim.P.* 7(c)(1); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* sec. 10.01 (3d ed. 1977); *United States v. Hephner,* 410 F.2d 930, 934–35 (7th Cir.1969).

Again, at the close of trial I instructed them that:

The formal charges against the defendants are contained in the indictment. The indictment is not evidence of guilt. Indeed, each defendant is presumed by the law to be innocent, and the burden of proving his guilt beyond a reasonable doubt is on the government.

Jury Instructions, Court Record, Document 138 at 3661. *See United States v. Bynum,* 566 F.2d 914, 923–24 (5th Cir.), *cert. denied, Becker v. United States,* 439 U.S. 840 (1978).

The jury charge on mail and wire fraud restricted the scope of a scheme to defraud to property rights. Specifically, the jury was instructed in the elements of each of the offenses with which the defendants were charged and cautioned "that the defendants are charged with, and may be convicted of, only the offenses set out in the indictment as it now stands. The defendants are not charged with, nor are they on trial for, any other offenses or possible offenses." *Id.* at 3668–71. Only through willful disregard of my instructions could the jury have based its verdict solely on the deprivation of intangible rights charged in the indictment.

I find the instructions entirely proper in light of the Supreme Court's holding in *McNally.* The reference in my charge to the indictment that set forth a scheme to defraud citizens of non-property rights was insignificant in light of the thrust of the instructions read as a whole and resulted in no actual or substantial prejudice to the defendants. *Pope v. Illinois,* 107 S.Ct. 1918 (1987); *Rose v. Clark,* 106 S.Ct. 3101, 3107–09 (1986); *United States v. Frady,* 456 U.S. 152, 170 (1982).

Because I find that the mail and wire fraud

counts were properly charged, it is unnecessary to address Roemer's contention that if the mail and wire fraud counts were invalidated, his conviction is deficient because he was alleged to have committed only one predicate act, bribery.

Accordingly,

***8** IT IS ORDERED that the defendant, Carlos Marcello's, motion to vacate his sentence is DENIED.

IT IS FURTHER ORDERED that the defendant, Charles Roemer's, petition for a writ of coram nobis is DENIED.

FN1. Marcello was sentenced in a separate case to 10 years imprisonment to be served consecutively with the sentence in this case. *United States v. Marcello,* 731 F.2d 1354 (9th Cir.1984).

FN2. Counts nine and eleven against Roemer were withdrawn from the indictment. *Jury Instructions*, Court Record, Document 138 at 3670.

FN3. *See* Appendix A.

FN4. While the word “not” appears in the text of the transcript it is obviously a typographical error.

E.D.La.,1988.
U.S. v. Marcello
Not Reported in F.Supp., 1988 WL 15564 (E.D.La.)

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