

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,)	Case No. 4:09-cr-004
)	
Plaintiff,)	
)	
v.)	DEFENDANT’S REPLY IN
)	SUPPORT OF MOTION TO DISMISS
VISION SYSTEMS GROUP, INC.,)	COUNTS 2 THROUGH 9 AND TO
)	STRIKE PORTIONS OF COUNTS 1
Defendant.)	AND 10 OF THE INDICTMENT

Defendant Vision Systems Group, Inc. (“Vision Systems”), by and through undersigned counsel, files this Reply in Support of its Motion to Dismiss Counts 2 through 9 and to Strike Portions of Counts 1 and 10 of the Indictment.

INTRODUCTION

On April 1, 2009, Vision Systems moved to dismiss or strike portions the indictment filed against it on January 22, 2009 (the “Indictment”) relating to mail fraud. As Vision Systems explained in its opening brief, the Indictment charged Vision Systems with making fraudulent statements to obtain H-1B visas and permanent resident green cards for its employees. Vision Systems further explained in its brief that because federal immigration licenses do not count as “property” within the meaning of 18 U.S.C. § 1341, as construed by *Cleveland v. United States*, 531 U.S. 12 (2000), the Indictment failed to state the offense of mail fraud or conspiracy to commit mail fraud.

The government resisted Vision Systems’ motion on April 13, 2009. The resistance abruptly abandoned what was obviously the Indictment’s theory, that Vision Systems committed

mail fraud or conspiracy to commit mail fraud by deceitfully obtaining government property in the form of immigration licenses. In light of Vision Systems' invocation of *Cleveland*, the government articulated in its resistance the novel theory that Vision Systems defrauded U.S. citizens out of jobs. The new theory, though arguably creative, does the government no good. The Indictment still fails to state a chargeable offense respecting mail fraud or conspiracy to commit mail fraud.

In addition to being legally defective, however, the government's new theory portends a trial about immigration policy, not criminality. The government's brief previews the evidence it will introduce at trial: "In January of 2009, the total number of workers employed in the information technology occupation under the H1B program substantially exceeded the 241,000 unemployed U.S. citizen workers within the same occupation." Government's Br. in Supp. of Resistance to Def.'s Mot. ("Gov. Br.") at 7.¹ This "evidence" is strikingly similar to objections to the H-1B program urged by its political opponents. See Patrick Thibodeau, *Grassley: H-1B Visas Used to Displace U.S. Workers* (online article at computerworld.com) (quoting U.S. Senator Chuck Grassley stating that "the H-1B program is so popular that it's now replacing the

¹ As noted by another defendant in the wave of immigration prosecutions in this Court, the government's briefing erroneously, and we hope unintentionally, refers to "U.S. citizen workers," a term that nowhere appears in Title 8 of the United States Code. See Reply Br. in Supp. of Mot. to Dismiss Counts Two and Three and to Strike Portions of Count One of the Indictment, *United States v. Sudarsanam* (S.D. Iowa 4:08-cr-168) (filed April 21, 2009) at 3 n.1 ("The statutory and regulatory scheme concerning immigration only talks in terms of 'U.S. workers' which, of course, includes eligible aliens.").

U.S. labor force.”).² The government thus argues that there is something illegitimate about the *entire H-1B visa program*, not just specific applications of it.

By relying on such “evidence” of the overall ramifications of the H-1B visa program, the government would be litigating the prudence of Congress’s decision to allow highly-skilled foreign workers to fill jobs in the technology sector, not whether Vision Systems broke the law. The fact that the government’s new mail fraud theory is supported with evidence that does not distinguish between violating the law and obeying it demonstrates that its new mail fraud theory is not a theory of *criminal* wrongdoing at all. This courtroom is an improper venue for a policy debate about immigration, and the government should not be allowed to conduct that debate in a vain attempt to save its mail fraud case.

ARGUMENT

The government’s resistance fails to rescue the Indictment’s mail fraud charges for two reasons. First, the government still has not identified a deprivation of *property* within the meaning of §1341. The thing the government says people lost -- the mere prospect of employment -- is not property in the hands of a job applicant. Second, even if employment prospects did count as property, the government fails to allege that Vision Systems schemed to *obtain* that property. Indeed, it is hard to see how Vision Systems could scheme to obtain its own jobs.

In a boilerplate section of its brief, the government recites law applicable to situations where an indictment allegedly fails to notify the defendant of the nature of the charge against

² The article is attached to this Reply as Exhibit A.

him or omits an essential element of the offense. *See* Gov. Br. at 3-4. The government misapprehends the nature of Vision Systems' motion. The defect in the Indictment is not one of form. Rather, with respect to mail fraud, the Indictment alleges conduct that is simply not a crime. It is plain that Fed. R. Crim. P. Rule 12(b)(3)(B) contemplates dismissal of a charging instrument if "the indictment or information fails to ... state an offense." That is the issue presented for the Court here. *See United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988) ("If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed."); *United States v. Ashford*, 403 F. Supp. 461 (N.D. Iowa 1975) *aff'd*, 530 F.2d 792 (8th Cir. 1976) (dismissing portion of indictment).

I. EMPLOYMENT OPPORTUNITIES ARE NOT PROPERTY WITHIN THE MEANING OF 18 U.S.C. §1341.

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court confirmed that 18 U.S.C. § 1341, the mail fraud statute, is "limited in scope to the protection of property rights." *Id.* at 360. As the government implicitly concedes in its resistance, *McNally* requires that an indictment "allege that the injured party has been deprived of something that fairly deserves the label of property under traditional usage." *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990). The Court subsequently clarified *McNally* in *Cleveland*, explaining that "§ 1341 requires the object of the fraud to be 'property' in the victim's hands." 531 U.S. at 26. *Cleveland* recognized that certain objects may be property in one person's hands yet not property in another's. Thus, while *Cleveland* held that video poker licenses were not property in the hands of the state government of Louisiana, the Court did not "question that video poker licensees may have property interests in their licenses." *Id.* at 25.

In its resistance, the government now asserts that the object of Vision Systems' "scheme" was "to deprive U.S. workers of employment opportunities, employment contracts, [and] wages and benefits." Government's Resistance to Def.'s Mot at 2. The victim is alleged to be "U.S. citizen workers both in general and in particular (U.S. workers that submitted actual resumes' [sic] and made application for specific employment.>"). *Id.* The government apparently believes that Vision Systems fraudulently advertised employment opportunities to Americans while intending to offer the positions only to foreign workers. Thus, were the government's allegations factually correct, Vision Systems would have deprived American workers of the right to fairly compete for Vision Systems jobs.

The government cites *Granberry* in support of the notion that employment opportunities constitute property. Gov. Br. at 6. Far from supporting the government's theory of property, however, *Granberry* sharply undercuts it. In *Granberry*, a job seeker fraudulently concealed his murder conviction in an application to be a school bus driver for the Normandy, Missouri School District. The government charged him with mail fraud, arguing that he fraudulently deceived the school district into hiring him. Although the Eighth Circuit threw out the government's claim that the defendant's school bus operator permit counted as property, correctly foreseeing *Cleveland*, the court held that the wages paid him by the school district were property within the meaning of § 1341. The court recognized that, in the hands of an *employer*, "[a]n employment contract is property." 908 F.2d at 280.

After *Cleveland*, the question is not whether an object is property in the abstract, but whether it is property *in the hands of the victim*. *Granberry*'s holding does not resolve whether an employment opportunity is property in the hands of a job applicant. *Granberry*'s framework

for determining whether an object is property, however, shows that it is not. In concluding that an employment contract is property in the hands of an employer, the court considered the following factors:

It is a chose in action. It represents a right in the employee to be paid agreed-upon wages for services performed, and a right in the employer to demand agreed-upon services for wages paid. And the right to control a thing, for example, money, is an integral part of the property right in the thing itself. When we say that we own something, one of the things that we mean is that we can determine what to do with it. We can either keep it or transfer it to someone else. And we can choose those persons to whom we will transfer it.

Id. Thus, the critical issues making an employment contract “property” in the employer’s hands in *Granberry* were that: (1) the employer had the right to control it, and (2) the employer had the right to transfer it. Other courts agree that exclusive control and transferability are principal factors in determining whether an object constitutes “property” within the meaning of § 1341. *See United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994) (“It is not a grant of a right of exclusion, which is an important aspect of traditional property.”); *United States v. Alsugair*, 256 F.Supp.2d 306, 313 (D.N.J. 2003) (“Two of the hallmarks of traditional property are exclusivity ... and transferability.”).

As noted, taking the government’s factual allegations as true, Vision Systems deprived American workers of the right to compete fairly for jobs. Per *Granberry*, the inquiry is two-fold: first, whether American citizens—in general or limited to those citizens that actually applied for employment—had any *exclusive* right to fair competition, and second, whether they could *transfer* that right to another. Both questions must be answered in the negative.

First, there is no exclusivity to a job seeker’s chance to apply for a job. Anyone could apply for a Vision Systems job. The government itself alleges that “Vision Systems Group and

other related companies repeatedly advertised information technology jobs within the United States.” Gov. Br. at 7. The government’s invocation of Vision Systems’ advertising underscores that employment opportunities lack exclusivity of any sort. In *Henry*, the Third Circuit rejected an analogous mail and wire fraud theory, holding that “competing banks’ interest in a fair bidding opportunity” was not property because the “condition that the bidding process would be fair” does not “grant [] a right of exclusion.” 29 F.3d at 115.

Second, common sense dictates that employment opportunities are not meaningfully transferable. Prospective employees typically cannot substitute for one another during the application process; they certainly do not buy and sell their prospects for a particular job.

Because the right to compete for a job lacks any of the hallmarks of property, the government’s theory that employment opportunities are property within the meaning of § 1341 goes nowhere. See *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (holding that for due process purposes “damage to prospective employment opportunities is too intangible to constitute a deprivation of a liberty or property interest.” (quotations omitted)). Having failed to articulate a cognizable deprivation of property, the mail fraud and conspiracy to commit mail fraud counts of the Indictment must be dismissed under *McNally* and its progeny.

II. VISION SYSTEMS DID NOT SCHEME TO OBTAIN THE PROPERTY OF THE AMERICAN PUBLIC.

The government’s new theory that Vision Systems defrauded the American public ignores a second requirement of the mail fraud statute: that the defendant have schemed to *obtain* the property of another. Section 1341 prohibits devising “any scheme or artifice to defraud, or for *obtaining* money or property by means of false or fraudulent pretenses, representations, or promises” 18 U.S.C. § 1341 (emphasis added). In *McNally* and *Cleveland*, the Supreme

Court clarified that these clauses do not define two offenses (i.e., a scheme or artifice “to defraud” *and* a scheme or artifice “for obtaining money or property by false pretense”), but one crime. As the Court explained in *Cleveland*:

In *McNally*, we recognized that [b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently. But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first by ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.

531 U.S. at 26 (quotations omitted).³ Because the two clauses define a single offense, they must be read together, such that scheming to “obtain” the property of another is a required element in any mail fraud prosecution.

Vision Systems acknowledges that the federal circuits are split as to whether the government must prove that a defendant schemed to obtain the property of another. *Compare Monterey Plaza Hotel Ltd. P’Ship v. Local 483 of the Hotel Employees Union*, 215 F.3d 923, 927 (9th Cir. 2000) (rejecting mail fraud because “[t]he Union’s conduct may have been vexatious or harassing, but it was not acquisitive”); *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) (“[W]e hold that only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud.”); *United States v. Baldinger*, 838 F.2d 176, 180 (6th Cir. 1988) (“We conclude that

³ The Eighth Circuit once interpreted the wire fraud statute, which is identical to the mail fraud statute for these purposes, to “forbid *both* schemes to defraud, whether or not any specific misrepresentations are involved, *and* schemes to obtain money or property by means of false or fraudulent pretenses, representations, or promises.” *United States v. Clausen*, 792 F.2d 102, 104-05 (8th Cir. 1986). In light of the portion of *Cleveland* quoted in the text, *Clausen* is no longer good law.

through its decisions in *McNally* and *Carpenter*, the Supreme Court has identified itself with the position that section 1341 . . . was intended by the Congress only to reach schemes that have as their goal the transfer of something of economic value to the defendant.” (quotations omitted) with *United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006) (agreeing with the Third Circuit “that a mail fraud violation may be sufficiently found where the defendant has merely deprived another of a right” (quotations omitted)); *United States v. Hedaithy*, 392 F.3d 580, 601-03 (3d Cir. 2003) (holding that no obtaining is required). The Eighth Circuit has often stated in dicta that a mail fraud conviction requires the government to prove that the defendant “intentionally devised or participated in a scheme to *obtain money or property*,” but has not yet squarely weighed in on this question. *United States v. Frost*, 321 F.3d 738, 740-41 (8th Cir. 2003) (quoting *United States v. Kelley*, 152 F.3d 881, 887 (8th Cir. 1998)) (emphasis supplied).

This Court should follow the Sixth, Seventh, and Ninth Circuits and the Eighth Circuit’s dicta in holding that a mere deprivation of the victim’s property, without a corresponding “obtaining” of that property by the defendant, does not suffice under § 1341. As the Eighth Circuit has noted, “it is . . . axiomatic that [courts] read the language of a statute so as to give effect to each word enacted by Congress.” *United States v. Baca-Valenzuela*, 118 F.3d 1223, 1228-29 (8th Cir. 1997). Because Supreme Court precedent makes clear that § 1341’s introductory clauses define a single offense, holding that the government need not show “obtaining” impermissibly reads the word out of the statute.

Requiring the government to prove “obtaining” by Vision Systems also comports with common sense and avoids a disturbingly expansive reading of the statute. As Judge Easterbrook made the case for the Seventh Circuit in *Walters*:

According to the United States, neither an actual nor a potential transfer of property from the victim to the defendant is essential. It is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense. We asked the prosecutor at oral argument whether on this rationale practical jokes violate § 1341. A mails B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation. But there is no party; the address is a vacant lot; B is the butt of a joke. The invitation came by post; the cost of gasoline means that B is out of pocket. The prosecutor said that this indeed violates § 1341, but that his office pledges to use prosecutorial discretion wisely. Many people will find this position unnerving (what if the prosecutor's policy changes, or A is politically unpopular and the prosecutor is looking for a way to nail him?). Others, who obey the law out of a sense of civic obligation rather than the fear of sanctions, will alter their conduct no matter what policy the prosecutor follows. Either way, the idea that practical jokes are federal felonies would make a joke of the Supreme Court's assurance that § 1341 does not cover the waterfront of deceit.

997 F.2d at 1224. Finally, to the extent that any doubt remains, the Supreme Court has “instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cleveland*, 531 U.S. at 25 (quotations omitted). *See also United States v. Santos*, ___ U.S. ___, 128 S. Ct. 2020, 2025 (2008) (where each of two interpretations of a statute are equally plausible, then “[u]nder a long line of our decisions, the tie must go to the defendant”) (citing authority).


Section 1341 is properly understood to require that the defendant have schemed to obtain the victim's property. Here the government alleges that the victim is U.S. citizens and the property is employment opportunities with Vision Systems. The government thus must be alleging that Vision Systems has schemed to obtain *its own jobs*. This is transparently incoherent. The Supreme Court recently interpreted the word “obtain” as it appears in the Hobbs Act, concluding that it means “to gain possession of.” *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 n. 8 (2003). Simply put, one cannot *gain* possession of property that one *already* possess. The government's argument conflates obtaining with retaining. Since Vision

Systems cannot plausibly be accused of scheming to obtain employment opportunities *with Vision Systems*, the government's mail fraud charges cannot stand.⁴

CONCLUSION

For the reasons stated above and in Vision Systems' opening brief, Vision Systems respectfully requests that the Court grant its Motion to Dismiss Counts 2 through 9 and to Strike Portion of Counts 1 and 10 of the Indictment.

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⁴ The government's theory of mail fraud suffers from a third defect. The Indictment alleges that Vision Systems engaged in various acts to deceive the federal government, but asserts that the American public is the victim. Properly interpreted, § 1341 requires that the victim be the person deceived, not someone else. *See United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) ("[T]he [*McNally*] Court made it clear that the intent must be to obtain money or property from the one who is deceived."). Vision Systems recognizes, however, that *United States v. Blumeyer*, 114 F.3d 758, 767-68 (8th Cir. 1997), is binding on this Court and forecloses this argument. Vision Systems believes that *Blumeyer* was wrongly decided and will, should the need arise, ask the Eighth Circuit or the Supreme Court to reconsider it.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on April 23, 2009 by

U.S. Mail

FAX

Hand Delivered

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