

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 06-CR-020

GEORGIA THOMPSON,

Defendant.

DEFENDANT'S OBJECTIONS TO REPORT AND RECOMMENDATIONS

I.

INTRODUCTION

On May 25, 2006, United States Magistrate Judge Patricia J. Gorence issued a report and recommendation regarding the Motion for Bill of Particulars filed by Georgia Thompson (Docket No. 15). Magistrate Judge Gorence recommends the District Court deny the motion.

On May 30, 2006, United States Magistrate Judge Gorence issued a report and recommendation regarding the two separate motions to dismiss filed by Georgia Thompson (Docket Nos. 7 & 16). Magistrate Judge Gorence recommends the District Court deny each of the motions to dismiss.

A five day jury trial is scheduled to commence on June 5, 2006.

Because Magistrate Judge Gorence's decisions allow defense counsel at most three business days to file objections before the scheduled date for trial and, further, because Georgia Thompson seeks to vindicate her name by acquittal of the allegations contained in the indictment, these objections are, by necessity, sparse and will rely in great part on the briefs previously submitted in support of these motions (*see* Docket Nos. 8, 17, 19, 23, 24 & 25). Copies of the same are appended to the instant objections.

Pursuant 28 U.S.C. § 636(b)(1)(A) and Eastern District of Wisconsin General Local Rule 72.3, Georgia Thompson submits the following objections to Magistrate Judge Gorence's recommendations.

II.

OBJECTIONS

A.

MOTION FOR BILL OF PARTICULARS

At the outset of this case, the government sought to have the matter declared a "complex case." *See* Docket No. 10. Georgia Thompson noted that it was not. What makes this case complex is the manner in which the government has obliquely plead the indictment, making it difficult for defense counsel to understand what ought be simple concepts. Georgia Thompson agrees with

Magistrate Judge Gorence that the threshold for the government is low, especially when the government, through its “open file” discovery policy can claim that the answer to Georgia Thompson’s questions lies somewhere in the thousands of pages of discovery. Nevertheless, when fundamental questions exist, the District Court ought require the government to explain aspects of its indictment. The indictment ought not be complex – though it need not be so sparse as haiku – and, quite unlike the Da Vinci Code, its unraveling ought not be suspenseful; it should clearly apprise the accused and public of her offense. *See United States v. Vasquez-Ruiz*, 136 F.Supp.2d 941, 943 (court may consider clarity of the indictment as one of the factors for whether a bill of particulars should be ordered).

Despite having received over 3,850 pages of documents, Georgia Thompson is still left with questions which have not been answered. For this reason Georgia Thompson filed a Motion for Bill of Particulars (Docket No. 15). These questions are, in certain regards, fundamental to an understanding of the charges against her and necessary for a competent and complete defense to the charges.

For example, when the government asserts that Georgia Thompson was under an “obligation” to use an approved criteria of a scoring system when

evaluating a Request for Proposal, *see* Indictment, ¶¶ 10-12, no source for the “obligation” has been identified.

Similarly, the indictment (at ¶ 13) alleges that Georgia Thompson “misused her position by using political considerations.” What these “political considerations” are has never been identified. Indeed, to the extent that these “political considerations” are based on the testimony of other members of the evaluation committee, then the information provided by the government, though voluminous, does nothing to allow her counsel to understand what is meant by that term. As best as counsel can tell, the government’s evidence with respect to “political considerations” will involve testimony by members of the evaluation committee regarding observations made by some of them during a meeting on March 3, 2005, in which the evaluation committee discussed the RFP proposer’s scores for the “Partner” category. Specifically, some evaluation team members have made statements to investigators regarding Georgia Thompson’s demeanor, her (alleged) statements and the evaluators’ beliefs or impressions which (they believe) explain Georgia Thompson’s demeanor and statements. A number of the evaluators refer to the conclusions they draw in terms akin to “political considerations.” Such testimony is not the product of observation but, rather, uninformed (and inadmissible) surmise. And here, no witness could describe

any factual or objective observation for their assertion. So, what is meant by this phrase?

Another question which remains unanswered is found in the indictment's allegation that "[a]s a result of the actions of Thompson, an *additional* evaluation step was utilized ..." Indictment, ¶ 14 (emphasis supplied.) The Indictment suggests, but does not clarify whether the "additional evaluation step" was a "best and final" procedure or something else. The applicable statutes and the Request for Proposal provide for a "best and final" procedure; as such the "best and final" is *not* an "additional evaluation step" - it is a wholly integrated part of the RFP process. But from the plain language of the indictment this is not clear. Consequently, the government should be required to state what the "additional evaluation step" was. And if a different process is the source of the government's alleged "additional evaluation step," then from what legal authority does it derive?

(The "additional evaluation step" is not the only part of the RFP process which the government appears to have created of whole-cloth. The government has argued that Georgia Thompson "prevented the committee from unanimously recommending that the partner contract be awarded to a bidder other than Adelman Travel." GOVERNMENT'S CONSOLIDATED RESPONSE TO PRETRIAL

MOTIONS at 9. No such “unanimity” requirement is pled in the Indictment. Nor does such a requirement exist under Wisconsin statute, administrative code or the procurement manual used by the Wisconsin Department of Administration. *See* WIS. ADMIN. CODE, ADM § 10.08. Though the government seems to assert a requirement that the evaluation committee’s decision be unanimous, when later addressing this point, the government subsequently argues, that “this argument misses the mark.” GOVERNMENT’S CONSOLIDATED RESPONSE TO PRETRIAL

MOTIONS at 11. Either there is such a requirement or there isn’t; if the Indictment is to provide sufficient notice, then the government cannot have it both ways.)

Finally, the indictment alleges that Georgia Thompson aided and abetted another in violating 18 U.S.C. §§ 1341, 1346 and 666. Based on the plain language of the indictment and the voluminous discovery Georgia Thompson cannot ascertain who, if anyone she aided and/or abetted and/or those who did the same with regard to her. This information is critical in formulating a defense to the charge. So too, the government should be required to identify any unindicted co-conspirators. Georgia Thompson recognizes that though the names of unindicted coconspirators are a proper subject of a bill of particulars, there is a split of authority as to whether the government must provide the names of unindicted co-conspirators. *See, e.g., United States v. Hubbard*, 474 F. Supp. 64, 81

(D.D.C. 1979). Compare *United States v. Taylor*, 707 F. Supp. 696, 699 (S.D. N.Y.1989); *United States v. Williams*, 113 F.R.D. 177, 178 (M.D. Fla. 1986)(must produce names of co-conspirators) with *United States v. Dicesare*, 765 F.2d 890, 897 (9th Cir. 1985) amended 777 F.2d 543 (9th Cir.1985); *United States v. Lobue*, 751 F. Supp. 748, 756 (N.D. Ill. 1990); *United States v. Larracuenta*, 740 F. Supp. 160, 163 (E.D. N.Y. 1990)(no need to produce names of co-conspirators). See *United States v. Ladd*, 218 F.3d 701 (7th Cir. 2000)(names of unindicted coconspirators whose hearsay statements were considered as evidence during trial were subject to disclosure to media).

In sum, a Bill of Particulars should be ordered for the requested information because, absent such information, Georgia Thompson's rights under the Fifth and Sixth Amendments to the United States Constitution are impaired. See *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991).

B.

MOTION TO DISMISS INDICTMENT

Georgia Thompson moved to dismiss the indictment because it fails to state an offense cognizable under the laws of the United States (Docket No. 7). The motion was made pursuant to Rule 12 (b)(3)(C), FED. R. CRIM. PRO.; and the Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

Georgia Thompson relies on the briefs she previously submitted in support of this motion and makes two points with respect to Magistrate Gorence's recommendation.

First, the Magistrate misplaces reliance on three cases for the proposition that providing political advantage to another as a result of the misuse of one's position, and thus gaining personal job security (a benefit), can satisfy the requirement of personal gain under 18 U.S.C. §§ 1341 and 1346. *See* Recommendation at 6. The cases are factually not apt.

Though *United States v. Sorich*, 2006 U.S. Dist. LEXIS 18227, 22-23 (N.D. Ill. 2006), *United States v. Munson*, 2004 WL 1672880 (N.D. Ill. 2004), and *United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000), deal with theft of honest services by public officials, those cases are not on point. In all three cases – and unlike the instant case – the defendants accomplished their offenses by committing underlying, independent criminal offenses or dishonest acts tending to harm the public in the end. Thompson did neither; whatever the composite of her reasons, her services were honest.

In contrast to *Sorich*, *Munson* and *Bauer*, the instant Indictment alleges that Georgia Thompson violated federal law solely through the exercise of her

discretion, where the exercise of that discretion was permitted.¹ There was no underlying unlawful act; she accomplished the objective of the procurement statutes.

Where a public employee uses his office for *ultra vires* pecuniary gain, that is dishonest and, independently, unlawful. *See, e.g., United States v. Bolden*, 1997 WL 473240 (N.D. Ill. 1997)(city commissioner grants after-hours access to city facilities in exchange for payment as a security consultant). Where a public employee uses his office in order to undermine the purpose of another statute, that too is dishonest and, independently, unlawful. *See, e.g., United States v. Bauer*, 2000 WL 1720245 (N.D. Ill. 2000). But where, as here, a public employee uses her position to fulfill the purpose of the statute without either gain to anyone (including herself) or harm to the public, then no criminal offense has been committed. *See United States v. Sawyer*, 85 F.3d 31 (1st Cir. 2001)(“ Although a public official might engage in reprehensible misconduct related to an official

¹ Sorich was indicted for allegedly engaging in widespread corrupt hiring and promotion practices that involved the rigging of jobs by conducting sham employment interviews, falsifying interview scores, and violating federal court orders, state laws and city codes. In *Bauer*, the defendant was a public official who inappropriately terminated investigations of other government employees to spare his political patron from embarrassment did personally gain from the cover-up when the patron was, as a result of defendant's actions, “in a better position to tender favors to the defendant.” *Munson* involved a scheme by which the defendant sought to increase his business and to become client’s general counsel at some future date constituted a significant personal benefit to him.

position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result”).

Thus, in *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997), the court noted that

the government must not merely indicate wrongdoing by a public official, but must also demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant’s official duties. In other words, ‘although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result.’

106 F.3d at 1077 (internal citations omitted); see also *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003). The holding of *Czubinski* is particularly apt in this case as the State – as a result of the “best and final” process – obtained the lowest, best price for services for a qualified responsible proposer proving that the process worked.

Second, *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997) and *United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003) are particularly apt cases when determining whether the instant indictment has been plead so as to demonstrate an intent to defraud on Georgia Thompson’s part. Both cases demonstrate that

with respect to allegations of depriving the government of an employee's honest services require more than an allegation that the employee engaged in wrongdoing – if this were not the case, imagine the potential number of cases alleging violations of 18 U.S.C. § 1346 which could be filed in federal court. “The wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties.” *Czubinski, supra*. Assuming the allegations to be true for the sake of argument, even if Georgia Thompson injected additional considerations into her assessment of the proposers and she did not achieve a personal gain as a result, she did wrong, but she did not commit a criminal offense. This distinction was noted by the court in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), which explained that misuse of a government position for private gain “is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime.” The *Bloom* court held that an employee deprives the government of her honest services only if she misuses her position for personal gain. *Id.* at 656-57.

In the assessment of Magistrate Judge Gorence, the exception swallows the rule. This is not the state of the law as it regards 18 U.S.C. § 1346.

Additional argument regarding Georgia Thompson's objections to Magistrate Gorence's recommendation relies upon the two briefs previously

submitted by Georgia Thompson.

C.

**MOTION TO DISMISS INDICTMENT:
UNCONSTITUTIONAL AS APPLIED**

Georgia Thompson moved to dismiss the indictment because, as applied, it failed to provide her constitutionally sufficient notice (Docket No. 19 at 26). For details of Georgia Thompson's objections to Magistrate Judge Gorence's recommendation, she relies upon the two briefs she previously submitted.

D.

**MOTION TO DISMISS:
COUNT 2 VIOLATES ARTICLE III, § 3 OF
THE UNITED STATES CONSTITUTION**

Georgia Thompson and Magistrate Judge Gorence agree on one point: the crime of high treason, 18 U.S.C. § 2381, is different than honest services fraud, 18 U.S.C. § 1346. *See* recommendation at 15. But that difference is why the magistrate judge is wrong. No one disputes that Article III, § 3 preserves the crime of high treason, or *lese majeste*. Instead, other forms of treason are what it bars, including principally petit treason. And the entire thrust of Thompson's argument is that § 1346 resuscitates the ancient crime of petit treason that proved so politically malleable and prone to undisciplined expansion that the Framers rejected it. The magistrate judge nowhere disagrees that § 1346 sounds in petit

treason. Nor could she; the roots and similarity are unmistakable. So the very difference between this statute, a form of petit treason, and high treason is the reason this statute is unconstitutional.

In short, high treason survives in this country, preserved by the very same provision of the Constitution, Article III, § 3, that bars petit treason in all its forms, including this latest one. For the details of her underlying exegesis of petit treason and why § 1346 takes that form, Georgia Thompson attaches and relies upon the two briefs she submitted to the magistrate judge (Docket Nos. 17/19?? &25?).

III.

CONCLUSION

For the foregoing reasons, Georgia Thompson prays the Court to

(A) order the government to provide written notice of the particulars described in defendant's Motion for Bill of Particulars;

(B) dismiss the indictment for failure to state an offense cognizable under the laws of the United States;

(C) dismiss the indictment as unconstitutional because Georgia Thompson did not have fair notice that her conduct could be read to constitute a violation of an offense cognizable under the laws of the United States; and

(D) dismiss Count Two of the indictment, because 18 U.S.C. § 1346 offends Article III, § 3 of the United States Constitution. Without § 1346, the count alleges no crime.

Dated this 1st day of June, 2006.

Respectfully submitted,

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