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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff/Appellee,

V.

KURT F. JOHNSON et, al.,

Defendants/Appellants.

_____/

Case No. 08-10147
08-10258

JOHNSON MOVES TO RECALL THE MANDATE

Kurt F. Johnson and Dale S. Heineman (hereinafter "Johnson," "Heineman"), Johnson filing as next friend for Heineman, hereby moves to recall the mandate and in support thereof:

Extraordinary Circumstances Exist

Extraordinary circumstances are defined as "An unusual set of facts that are not commonly associated with a particular thing or event." Black's Law Dictionary, Abridged 7th Ed. "The Courts of Appeals are recognized to have inherent power to recall their mandate..., However, the power can be exercised only in extraordinary circumstances." Calderon v. Thompson, 523 U.S. 538,

549-50(1998); 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedures § 3938, p. 712(2d Ed. 1996). Johnson recognizes that "Neither innocence nor just punishment can be vindicated until the final judgment is known." McCleskey v. Zant, 499 U.S. 467,491(1991). However, finality cannot rest on a miscarriage of justice, and that is precisely the case here.

Statement of the Case

Pertinent to this action: The case in chief involved a single count under section 1349, of Title 18, United States Code; 36 - counts under 1341 of Title 18, United States Code; and two - counts of contempt of court violative of section 401(3) of Title 18, United States Code. Initially there were 26 counts of bank fraud, but the government realizing there was no bases in which to convict --- as they should have with the remaning counts --- dismissed those counts.

A Jury trial spanning nearly a month left Johnson and Heineman guilty of all undismissed counts. Notice of appeal was filed, and attorney Maitreya A. Badami was appointed who concentrated primarily on the District Court permitting Johnson and Heineman to proceed without counsel at trial, and the trial judge's failure to recuse himself. Johnson continuously pestered appellant counsel to challenge the fraud statute's vagueness but to no avail.

Despite repeated attempts counsel refused to press the claim of vagueness and finally Johnson submitted a Pro Se brief. However, by the time Johnson was done fencing with counsel he

missed the opportunity to have his claim heard. Undoubtedly Johnson will pursue this matter under section 2255. This in itself does not come without obstacles. Johnson filed a Habeas under the earliest constitutional provisions, and the trial court construed the motion as a section 2255 without the consent of Johnson, and completely disregarding Supreme Court precedent. The same occured for Hieneman.

Reasons for Recalling the Mandate

Recently, the Supreme Court decided Skilling v. United States, 130 S.Ct. 2896(2010). Johnson does not suggest that Section 1346, affects his case. Instead, it is the principle path the Court takes in reaching their conclusion that interests Johnson and Heineman. For example, the Court determined that Congress intended Section 1346 to reach at least bribes and kickbacks, and immediately recognized that "[R]eading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the Due Process concerns underlying the vagueness doctrine." Id. at 2931, n.42.

Against this backdrop, Johnson points to section 1341, and any scheme or artifice to defraud involving money or property, and a question begs answer. If a scheme or artifice to defraud involving honest services has to be narrowed to bribes and kickbacks to save it from vagueness, then why doesn't a "wider range of offensive conduct" in Section 1341, which has no specific conduct listed, "raise the Due Process concerns underlying the Vagueness Doctrine". Ibid. Johnson and Heineman foster it does, absent a

narrower interpretation.

The mail fraud statute defines absolutely no scheme[s] or artifice to defraud involving money or property. In fact, outside section 1346 "Scheme" or "Artifice" remains undefined altogether. See United States v. Lemire, 720 F.2d 1327, 1335(D.D.C. 1983)("Congress did not define 'Scheme or Artifice to Defraud' when it first coined that phrase, nor has it since"). Accord, United States v. Reid, 533 F.2d 1255(D.C.Cir. 1976); United States v. Von Barta, 635 F.2d 999, 1005(2d Cir. 1980).

The Supreme Court has specifically noted, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." See Bordenkirker v. Hayes, 434 U.S. 357, 363(1978); North Carolina v. Pearce, 395 U.S. 711, 738(1969). This is precisely what the mail fraud statute does in this case. There is simply no statute in the federal code with undefined terms that provides the government with more unguided reach. The mail and wire fraud statutes leave to the government to determine what is offensive based on nothing more than their own predilections.

These statutes, as currently written, allow the prosecution a standardless sweep of discretion, so to, constructively amen the indictment nearly undetected. To literally invent any scheme or artifice, and call it fraud with no oversight. Johnson or Heineman was never on notice of any offensive conduct because it wasn't offensive behavior until the government waived their all telling legal wand over it. Nowhere, in any statute in this section is

the conduct that Johnson and Heineman supposedly committed listed.

The danger of the vagueness in these statutes is like no other, with the stroke of the government's imagination a defendant is taken from his family for 20-years and put in prison. "A penal code is void for vagueness if it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited' or fails to establish guidelines to prevent 'arbitrary and discriminatory enforcement' of law." City of Chicago v. Morales, 527 U.S. 41, 64-65(1998)(quoting Kolender v. Lawson, 461 U.S. 352(1983)). Of these, "The more important aspect of the vagueness doctrine 'Is...The requirement that the legislature establish minimal guidelines to govern law enforcement." Kolender, 461 U.S. at 358(quoting Smith v. Goguen, 415 U.S. 566, 574(1974)).

As a matter of first impression, the government's authority to cast such a large net without any guidance fails to avoid attributing to "The legislature...An unjust or an absurd conclusion." See United States v. Ganderson, 511 U.S. 39, 56(1994). It is Johnson and Heineman's position that the vagueness in these statutes incorporate the absurdity doctrine because they facilitate opportunistic and arbitrary prosecutions, that produce absurd results. The government's use of the fraud statutes ignores 'A sensible construction." Id.; See Also United States v. Kirby, 74 U.S.(7 wall) 482, 486(1868)(All laws should receive a sensible construction. General Terms [Such as scheme or artifice to defraud] Should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."). This Principle applies with equal force to a statute written with clear

language. K-Mart Corp. v. Cartier, 486 U.S. 281, 325 n.z(1988)(Scalia, J., Concurring in part and dissenting in part).

In other words, "[W]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' we need to apply the language in such a fashion..." Astatute is absurd "where it is quite impossible that congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." Public Citizen v. United States Dept. ofJustice, 491 U.S. 440, 470-71(1989)(internal citations ommitted)(Kennedy, J., Concurring). Regardless of how the court has articulated the principle, it is a long-standing one, and ultimately concerns the results of a statute that can objectively be seen as absurd and unjust. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-10(1989). The fraud statutes involved in this case are hopelessly unclear and fatally defective because they are too broad, unlimited and produce an unjust or an absurd result.

The government consistently shows it is unable to act with self-discipline by limiting their use of these statutes to actual offensive behavior. The vagueness in these statutes allow an unhealthy process of amending them by executive interpretation and intruding upon the lawmaking powers of congress. Such "Accretion of Dangerous Power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of restrictions that fence the most disinterested assertion of authority." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594(1952)(Concurring opinion). It is the government themselves that create the extraordinary circumstances that warrant recalling

the mandate, taking advantage of a vague set of statutes that produce absurd and unjust results. The mandate must be recalled and full briefing ordered.

Filed October 22, 2010
Under 28 U.S.C. §1746

Respectfully,

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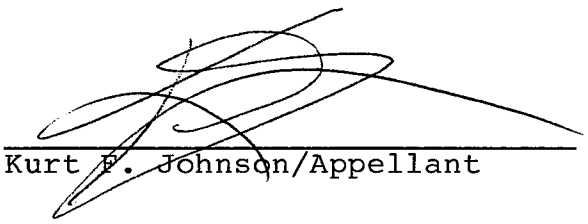
Dale S. Heineman/Appellant



Kurt F. Johnson/Appellant