IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNARD C. SEIDLING,

Defendant.

REPORT AND RECOMMENDATION

11-cr-126-bbc

REPORT

The grand jury has returned a 50-count mail fraud indictment against defendant Bernard C. Seidling, charging him with making false representations in Wisconsin small claims court actions for the purpose of obtaining small claims judgments against individuals and corporations based on the false and fraudulent representations he had made in his lawsuits. (dkt. 2). Seidling has moved to dismiss the indictment on the ground that the conduct charged against him, even if assumed true, does not constitute mail fraud because there is no actual or implied allegation of materiality. (dkt. 19). For the reasons stated below, I am recommending that the court deny Seidling's motion to dismiss.

The indictment, dkt 2, speaks for itself and is incorporated herein by reference. Paragraph 2 of Count 1 is the "elements" paragraph, charging:

> 2. From in or about 2003, and continuing through December 31, 2009, in the Western District of Wisconsin and elsewhere, the defendant, Bernard C. Seidling, devised and intended to devise a scheme to obtain money and property by means of false and fraudulent pretenses and representations, specifically, as set forth in paragraphs 3-10 below, Seidling made false representations in Wisconsin small claims court actions, and used the Wisconsin court system to obtain small claims judgments against individuals and corporations based on the false and fraudulent representations made in the lawsuits he filed.
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> Nov. 9, 2011 indictment, dkt. 2 at 2-3.

Paragraphs 3 through 8 set forth the alleged parts of the scheme, charging that Seidling filed small claim suits in Wisconsin small claims courts, usually claiming the $5000 maximum; he would intentionally hide the filing of these lawsuits from the defendants by lying to the court about his attempts to serve

the defendants, among other things; these lies allowed Seidling to obtain default judgments to which he was not entitled; then Seidling would attempt to cash in on his fraudulently-obtained judgments with wage garnishments and judgement executions. *Id*. at 2-4. The indictment closes with a chart of 50 alleged mailings in furtherance of the charged scheme, associated with 15 different victims

In his motion to dismiss, Seidling claims that the indictment fails specifically to allege the materiality of his alleged false statements, and that the facts alleged are insufficient to show materiality of the alleged false statements or to warrant the inference that the false statements were material. Thus, contends Seidling, the indictment does not comply with F.R. Cr. P. 7(c)(1) because it does not state the essential facts of the offenses charge, and it does not comply with F.R. Cr. P. 12(b)(3)(B) because it fails to state an offense within this court's jurisdiction. Motion To Dismiss, dkt. 19 at 1-2.

Seidling acknowledges in his brief (dkt. 20) that the indictment tracks the words of the mail fraud statute, 18 U.S.C. § 3141 and that this is generally acceptable, *see United States v. White*, 610 F.3d 956, 958-59 (7th Cir. 2010). Seidling further acknowledges that in determining whether an indictment contains the elements of the offense intended to be charged, the court may look beyond the mere recitation of the general terms of the essential elements of the offense; but if the court concludes that the specific facts alleged fall beyond the scope of the relevant criminal statute as a matter of statutory interpretation, then the court must find that the indictment fails to state an offense. *United States v. Bergrin*, 650 F.3d 257, 264-65 (3rd Cir. 2011). Seidling then acknowledges that the term "fraud" embodies the concept of materiality; fraud is a material misrepresentation or omission, one relevant to the decision that the perpetrator of the fraud wants his intended victim to make. *United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996).

Honing in on his main point, Seidling argues that a statement is *immaterial* if it is incapable of influencing the intended *victim*. *United States v. Neder*, 527 U.S. 1, 24 and n.3 (1999); materiality requires at least some convergence between the fraud and the anticipated loss to the victim/gain to the defrauder. *United States v. Ali*, 620 F.3d 1062, 1070 (9th Cir. 2010); *cf. United States v. Walters*, 997 F.2d 1219 (7th Cir. 1998). Noting that the indictment against him does not specifically allege materiality, Seidling contends that the facts alleged do not allow an inference of materiality because there is a complete disconnect between his allegedly fraudulent statements, which were made to state courts, and his alleged victims, who were the defendants in his allegedly fraudulent lawsuits. Defendant's Brief, dkt. 20, at 7-8. Seidling made no representations of *any* sort to his alleged victims.[1] Therefore, argues Seidling "the alleged misrepresentations are facially immaterial because they were not intended to influence th victims and had not tendency or capability to do so–their 'intrinsic capabilities' to influence are completely lacking." *Id.* at 7. Perforce, Seidling continues, since federal courts cannot expand criminal statutes to cover conduct that strikes the courts as wrong but not within the actual ambit of the statute, this court must dismiss the mail fraud charges against him.

The government's terse response is that Seidling's motion to dismiss is off-target. Starting with the observation that an allegation of fraud embodies materiality, the government argues that Seidling's contention of a disconnect between the false statements to the courts and the alleged victims is not an attack on the indictment, but instead, an attack on the evidence. This is the equivalent of a request for summary judgment, a procedure that does not exist in a criminal case. *United states v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006); *United States v. Ladish Malting*, 135 F.3d 484, 490-91 (7rth Cir. 1998).

[1] Indeed, the success of his alleged scheme depended on keeping them completely ignorant of his false statements to the courts in his lawsuits against them so that they could not expose his lies.

The government suggests that Seidling's pretrial dismissal motion is premature because the indictment alleges fraudulent intent, false statements, victims, and mailings, which is enough to make it to trial. According to the government, Seidling should argue the lack of materiality to the court at the close of the evidence.[2] In reply, Seidling simply notes that the government never addressed his legal argument, which he continues to advocate as dispositive here. *See* dkt. 27.

But Seidling's gloss of the materiality standard is illogically narrow and does not appear to have been accepted by either the Supreme Court or the Court of Appeals for the Seventh Circuit. Notwithstanding the Court's reference in *Neder* to a requirement that a defendant's deception be capable of influencing the intended victim (a reference cited by Seidling), I do not read the Court's opinion as holding that this is the *only* way that a false statement can be material in a mail fraud prosecution. The Court's holding simply is that materiality is an element of federal mail fraud, just like it is an element of common law fraud. The Court then cites the Restatement (Second) of Torts,§ 538(2)(a) to define materiality: a misrepresentation is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." 527 U.S. at 23, n.5. There is no requirement that the archetypal reasonable person be the victim of the alleged fraud.

To the same effect, the Seventh Circuit defines materiality more broadly that Seidling would like: "A representation is material if it has a tendency to influence the decision of the audience to which it is addressed." *United States v. Rosby*, 454 F.3d 670, 674 (7th Cir. 2006)(mail and wire fraud prosecution); "A false statement is material if it has a natural tendency to influence or is capable of

[2] The parties have agreed to a bench trial at which both sides will submit a set of stipulated facts. *See* dkt. 26. The court surmised from this agreement that the dismissal motion had been rendered moot, *see* April 9, 2012 text-only order, dkt. 24, but Seidling subsequently alerted the court that he still wanted a pretrial ruling on his dismissal motion, *see* dkt. 25.

influencing the decisionmaking body to which it is addressed." *United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004)(mail fraud prosecution). Similarly, the redrafted (but not yet accepted) pattern criminal instructions for the Seventh Circuit define a false or fraudulent representation as material "if it is capable of influencing the decision of the [person[s] [or [*list victim*]] to whom it was addressed." The pattern instruction's choice of the disjunctive "or" indicates that victims are just one class of persons a fact-finder may consider when determining the materiality of a false statement.

Common sense suggests why this would be so: accepting Seidling's crimped definition of materiality would allow con men to evade criminal responsibility for their fraud schemes simply employing the court system as their cat's paw. Accepting as true the grand jury's allegations in the indictment, Seidling intentionally lied to state courts in order to cause them to enter money judgments against innocent and unknowing third parties who then were on the hook to pay Seidling money that they did not owe him. Seidling's alleged lies actually influenced the audience to which those lies were addressed: the decision-making courts. This sufficiently implies the required element of materiality.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Bernard Seidling's motion to dismiss the indictment.

Entered this 9th day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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July 10, 2012

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Re: United States v. Bernard Seidling
Case No. 11-cr-126-bbc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 20, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 20, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**