

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT  
No. 99 - 1865

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UNITED STATES OF AMERICA,	)	On appeal from the United
	)	States District Court for
Plaintiff-Appellee,	)	the Northern District of
	)	Illinois, Eastern Division
v.	)	
	)	No. 96 CR 157
	)	
HENRY MASQUELLIER,	)	Hon. Elaine Bucklo
	)	Presiding
Defendant-Appellant	)	

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*Chandler*, 98 F.3d 711, 2nd Cir. 1996, and *United States v. Moede*, 48 F.3d 238, 7th Cir. 1995) do not support the court's ruling. In both cases, the defendants were permitted to present evidence of intent to the jury. The appellate courts then upheld the convictions, but did not criticize the district courts for allowing the evidence to be so presented. Moreover, in both cases the defendants' entire dealings with the complaining parties, in both cases banks, were predicated on deceit from the very inception. They did not involve initially bona fide undertakings that later went sour. Those cases involved fraud from the inception, yet the defendants there were still allowed to present their evidence on intent to the jury. That is all that defendant Masquelier asks this court to allow him to do.

#### STANDARD OF REVIEW

The district court's determination of the correct mens rea standard is a question of law, which this court reviews de novo. *United States v. Santiago*, 12 F.3d 722, 726 (7<sup>th</sup> Cir. 1993). The district court's application of the correct standard in determining the admissibility of particular evidence is reviewed for abuse of discretion. *United States v. Haywood*, 70 F.3d 507, 510 (7<sup>th</sup> Cir. 1995).

#### ARGUMENT

Defendant Masquelier is charged with four varieties of fraud: conspiring to defraud the Department of Defense in violation of 18 U.S.C. §371, either by 1) intending to cause the government property or pecuniary loss or, 2) by interfering with a lawful government function (see, *United States v. Vollmer & Company*, 1 F.3d 1511, 1519, 7<sup>th</sup> Cir. 1993); 3) executing a scheme to defraud the United States in violation of 18 U.S.C. §§1031(a)(1); and 4) executing a scheme to

obtain money or property by means of false or fraudulent pretenses, in violation of 18 U.S.C. §§1031(a) (2).<sup>2</sup> In his motion in limine in the district court, defendant Masquelier sought to introduce evidence that improper actions taken by the Defense Logistics Agency, DLA, put him in the position where the only way he could continue to try to complete the contract to manufacture nozzles was to obtain a progress payment from DLA, and the only way he could obtain a progress payment was to make the representations that he did on the progress payment request form. Consequently, defendant Masquelier contended that he was entitled to introduce evidence of DLA's actions in order to argue to the jury that his intent and purpose in seeking the progress payment was to complete the contract.

Except for strict liability offenses, which are not implicated here, mens rea is an element of any criminal offense:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil....Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will"...We hold that mere omission from §641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

*Morrisette v. United States*, 342 U.S. 246, 250-251, 263 (1952).

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<sup>2</sup> The Defense Department could have brought administrative suspension and/or debarment proceedings against defendant Masquelier under the Federal Acquisition Regulations, 48 C.F.R. Subpart 9-400 et seq., or a civil fraud case could have been brought as well under the False Claims Act, 31 U.S.C. §231 et seq., the Program Fraud Civil Remedies Act, 31 U.S.C. §§3801-3812, or the Contract Disputes Act, 41 U.S.C. §601 et seq. Civil fraud requires proof of a false statement, but not intent to deprive of property. Criminal charges were brought instead, and the government must meet its full burden of proof, including the requisite mens rea, when it invokes the criminal process, which carries the most severe penalties.

The Supreme Court also quoted Roscoe Pound's statement that "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and wrong and choosing freely to do wrong," (*Morissette*, 342 U.S. at 251, n. 4), and took note of Oliver Wendell Holmes' observation that "Even a dog distinguishes between being stumbled over and being kicked." (*Morissette*, 342 U.S. at 252, n. 9).<sup>3</sup>

Fraud is a specific intent crime. As the Seventh Circuit has stated, "The Supreme Court has held that the conspiracy to defraud element of 18 U.S.C. §371 encompasses only conspiracies in which the defendants intended either to cause the government property or pecuniary loss or interfere with or obstruct a lawful government function." *United States v. F.J. Vollmer & Company*, 1 F.3d 1511, 1519 (7th Cir. 1993). Accord, *United States v. Feldman*, 711 F.2d 758, 765 (7th Cir. 19 83): "An essential element of a...fraud violation is specific intent to defraud."

The Seventh Circuit has repeatedly approved a basic definition for the meaning of intent to defraud. "The phrase 'intent to defraud' means that the acts charged were done knowingly with the intent to deceive a potential victim, in order to cause the loss of money or property to the potential victim, or to cause a financial gain to the defendant." *United States v. Catalfo*, 64 F.3d 1070, 1079

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<sup>3</sup> One judge of this circuit has advocated a behaviorist approach to criminal responsibility. See, Posner, *The Problems of Jurisprudence*, ch. 5, "Ontology, the Mind, and Behaviorism" (1990). The argument appears to be that intent can be approached in cost-benefit terms, and punishment should be imposed where it would serve as a deterrent to socially undesirable behavior. Here, defendant Masquelier is seeking to introduce evidence to demonstrate that the action he took was the one most likely to result in the contract being fulfilled, the socially desirable result. Hence, any deterrent-creating sanctions in this case should be applied to the government, not the defendant.

(7th Cir. 1995). Similarly, "We have defined intent to defraud as acting willfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Moede*, 48 F.3d 238, 241 (7th Cir. 1995). The Seventh Circuit likewise approved a jury instruction that read: "The phrase 'intent to defraud' means that the acts charged were done knowingly, with the intent to deprive the American Postal Workers Union or its members in order to cause loss to the American Postal Workers Union or its members or financial gain to the defendants." *United States v. Briscoe*, 65 F.3d 576, 585 (7th Cir. 1995).

Defendant Masquelier's position is also supported by the Seventh Circuit's pattern jury instruction on intent to fraud, which reads:

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the victim in order to cause [[a gain of money or property to the defendant][or][the [potential] loss of money or property to another][or][to deprive another of [description of honest services, including (insert definition taken from rule or statute)]].

Federal Criminal Jury Instructions of the Seventh Circuit, West Group, 1999.

Other circuits have similarly interpreted intent to defraud. The Second Circuit has stated, "Essential to a conviction under the 'scheme to defraud' clause of the mail fraud statute is a showing of fraudulent intent: i.e., intent to deceive *and* intent to cause actual harm." *United States v. Chandler*, 98 F.3d 711, 715 (2nd Cir. 1996). And the Sixth Circuit has written, "In order for the jury to convict Congo, the evidence at trial therefore must have permitted a reasonable jury to conclude that Congo intended to inflict a tangible injury upon NASA. We hold that it did not." *United States v. Frost*, 125 F.3d 346, 361 (6th Cir. 1997). In this case, defendant Masquelier is entitled to present evidence that he did not intend to either enrich himself or cause a loss or other harm to the

government.

The meaning of intent to defraud is the same under all of the fraud charges brought against the defendant. The requirement that fraud under §371 include the intention to cause a loss is recognized in *United States v. F.J. Vollmer & Company*, 1 F.3d 1511, 1519 (7th Cir. 1993), cited above. With respect to the two subsections of the Major Frauds Act, 18 U.S.C. §§1031(a)(1) and (2), that statute has been interpreted according to established fraud concepts. *United States v. Frequency Electronics*, 862 F.Supp. 834, 839 (E.D.N.Y. 1994). See also the Major Frauds Act legislative history. S. Rep. No. 503, 100<sup>th</sup> Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969 at 5975.

Finally, with respect to the interference with a government function prong of §371, the Supreme Court has told us that the test is whether the defendant had the intent "to defeat a lawful function of the government and injure others thereby..." *Hammerschmidt v. United States*, 265 U.S. 182,187, 44 S.Ct. 511 (1924). Earlier, in *Haas v. Henkel*, 216 U.S. 462 (1910), while interpreting a precursor statute the Court stated, "(t)he statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of the government. Assuming..that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports...would be to defraud the United States..." *Haas*, 216 U.S. at 479-480. Purposeful conduct is the equivalent of specific intent. *United States v. Bailey*, 444 U.S. 394, 404-405 (1980).

This leads to the question of what constitutes a government function in this case. The government claims that processing a progress payment by itself is an autonomous government

function. Defendant replies that the government function at issue here is the administration of the contract into which plaintiff and the government entered. This is supported by the appellate caselaw. For example, in *Haas*, it was the "statistical side of the Department of Agriculture" that constituted a government function. *Haas*, 216 U.S. at 479.

The Supreme Court has warned against defining conspiracies to defraud too narrowly. The defendants charged with a conspiracy to fraudulently obtain the services of the National Labor Relations Board by filing false non-Communist affidavits asked to have the case dismissed on the grounds that it alleged no more than the filing of false affidavits, a narrower crime. The Supreme Court disagreed, stating, "It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge." *Dennis v. United States*, 384 U.S. 855, 860, 86 S.Ct. 1840 (1966). In this case, the gravamen of the charge is that defendant Masquelier defrauded the government in implementing a contract during the period January through April, 1991. The filing for the progress payment was but one of many steps taken by defendant Masquelier carrying out the DLA contract.

Similarly, *Tanner v. United States*, 483 U.S. 107, 128 (1987), states, "the fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." That language, of "the function of any department," implicates overarching responsibilities, rather than individual administrative actions.

The government's myopic view that the court should not look beyond the processing of the progress payment constitutes a *reductio ad absurdum* of the fraud law. The interest of the public is in having government contractors deal honestly with the government in fulfilling their contractual obligations. When a charge such as the present one is brought, the central issue is whether defendant

Masquelier impaired, obstructed or defeated the lawful administration of the contract. Defendant seeks no more than to be permitted to introduce evidence relevant to his state of mind on that question.

Judge Bucklo ruled that "the intent to deceive and the intent to harm are inextricably intertwined in this case" Mem. Op., p. 5, and that "[t]he question of intent to harm should thus focus on whether Mr. Masquelier's intended to obtain \$150,169. Mr. Masquelier's evidence is not relevant to negating that intent." Other courts have recognized that this is too narrow a view of intent. The 11<sup>th</sup> Circuit has written, "behavior reflecting an intent to deceive does not in itself satisfy the legal requirements for proving intent to defraud. As the Supreme court has noted generally, '[i]ntent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or misled. Defraud is to deprive of some right, interest or property.'" *United States v. Gajczak*, 847 F.2d 685, 689 (11<sup>th</sup> Cir. 1988).

Moreover, the two cases principally relied upon by Judge Bucklo do not support her conclusion. In *United States v. Chandler*, 98 F.3d 711 (2<sup>nd</sup> Cir. 1996), the defendant was convicted of bank fraud for representing herself to Household Bank in 1991 as her sister, who had died in 1968, to obtain a line of credit on which she wrote checks totaling \$4,898. She argued that she had not defrauded the bank since she began making payments and intended to pay everything back, including finance charges. The case came before the appellate court on a plain error review, because the issue had not been raised below. The court found that the district court had committed error in not instructing the jury that the defendant intended to both deceive and harm the victim, but that it was harmless error because the defendant had deceived the bank from her very first contact with it and, as a result, "in the context of this case the intent to harm is inextricably bound to the intent to

deceive....Thus, the jury's finding of intent to deceive is the functional equivalent of the essential finding of intent to harm."

Defendant Masquelier had no such deceptive relationship with DLA from the inception of their dealings. Moreover, in Chandler the defendant was given the opportunity to present her evidence on intent to the jury, and the appellate court determined no more than that, under a plain error analysis, defendant Chandler's argument was not sufficient to overcome the jury's finding that she had the requisite intent to defraud. Defendant Masquelier is asking this court to allow him to also have a jury decide that question in his case.

Judge Bucklo also relied upon *United States v. Moede*, 48 F.3d 238 (7<sup>th</sup> Cir. 1995), for the proposition that intent to cause a potential loss is sufficient to support a conviction for fraud. Mem. Op. at 6. *Moede* is also a case that went to the jury and in which the defendant was permitted to present his evidence. The appellate court found no more than that the inferences that the jury chose to draw had enough support in the evidence that the court would not overturn the conviction.

Furthermore, *Moede* is factually very different from the case at bar. The defendant in *Moede* was a bank officer who in the early 1980s set up dummy accounts, without authorization and using false information. He diverted money from actual accounts into the dummy accounts and invested the money in the stock market. The money came from bank sources that the bank could not legally invest in stocks. The scheme was successful for several years, but in the crash of 1987 it was exposed and resulted in a substantial loss to the bank. The defendant was convicted in a jury trial. The facts of *Moede* are very different from the facts of this case. The defendant in *Moede* engaged in an undertaking that was deceptive from the outset and throughout its whole existence. The fact that he was trying to make money for the bank, rather than himself, did not change the fact that he

was obviously seeking to advance his career at the bank by engaging in a scheme that was entirely fraudulent. Further, notwithstanding the facts of that case, the defendant in *Moede* was allowed to present his defense to the jury, and the appellate court found no more than that the inferences that the jury chose to draw had enough support in the evidence that the court would not overturn the conviction.

Thus, both cases relied upon by Judge Bucklo involve jury trials in which the defendant was permitted to present his evidence of mens rea, and neither case involved a defendant who embarked upon his dealings with the entity allegedly defrauded in good faith. In both cases the defendants' whole course of dealing were deceptive from beginning to end. This led the courts in those cases to allow the respective juries to infer, after hearing the defendants' as well as the government's evidence, that it was the defendants' intention and purpose during their entire course of conduct to expose the banks to a loss. Defendant Masquelier seeks the opportunity to present his evidence to a jury and to be able to argue that his intention and purpose was to prevent a loss by completing the contract through the only means available to him. The government, of course, would be free to ask the jury to draw a contrary inference.

A defendant's right to present evidence supportive of his position on intent has been repeatedly recognized. "(T)his court has traditionally had a liberal policy as to the admission of evidence tending to prove intent in mail fraud cases." *United States v. Etheridel*, 948 F.2d 1215, 1217 (11<sup>th</sup> Cir. 1991). And, "the defendant 'should be permitted to offer any evidence which bears directly and not too remotely on his intention [to defraud], and the court should not exclude any evidence offered by accused which tends to refute the fraudulent intent charged." *United States v.*

*Thomas*, 32 F.3d 418, 412 (9<sup>th</sup> Cir. 1994) (citations omitted).

This also implicates the rule that "the defendant in criminal case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous." *United States v. Douglas*, 818 F.2d 1317, 1320 (7<sup>th</sup> Cir. 1987). Of course, a theory of defense must be grounded in a correct statement of the law. See, e.g., *United States v. Buchanan*, 115 F.3d 445, 449 (7<sup>th</sup> Cir. 1997). In this case defendant Masquelier submits that his theory of defense is consonant with the Seventh Circuit pattern instruction on intent to defraud. Additionally, if the evidence is relevant to any of the four variants of fraud with which defendant Masquelier is charged, then he should be able to present it to the jury.

#### CONCLUSION

WHEREFORE, defendant Masquelier asks this Court to reverse the ruling of the district judge on the motion in limine and to remand the case for trial.

Respectfully submitted,

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