

No. 19-1127

IN THE
Supreme Court of the United States

WHEELER K. NEFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Wheeler Neff previously filed a petition for a writ of certiorari with this Court seeking review of the judgment of the United States Court of Appeals for the Third Circuit which affirmed his conviction and sentence under counts charging violations of the Racketeer Influenced and Corrupt Organizations [RICO] and the Mail/Wire Fraud statutes.

A central issue raised by Neff in his petition was the unprecedented use by the United States of the mail/wire fraud statutes to prosecute him and co-defendant Charles Hallinan for allegedly misrepresenting to plaintiffs in a class action lawsuit against a payday lending company that Hallinan was not an owner of the company and thus not liable for any potential judgment. The misrepresentation was made during settlement negotiations before any judgment against any person or entity was reached and settlement occurred only after the plaintiffs were aware of Hallinan's true status *vis a vis* the named defendant. Neff has argued that such an alleged misrepresentation made during discussions about an unadjudicated civil claim did not involve the deprivation of money or property of the purported victim, did not establish an intent to defraud as that concept has been consistently interpreted by this Court, and did not anticipate any attempt by the defendants to obtain anything from the alleged victims.

This Honorable Court denied the grant of certiorari on April 20, 2020.

But on May 7, 2020, this Court unanimously reversed the judgment of the Third Circuit at the wire fraud convictions of two defendants on precisely the same basis as Neff has put forward. In *Kelly v. United States*, 590 U.S. ___, 2020 U.S. LEXIS 2640, No. 18-1059 (May 7, 2020), this Court, looking through the lens of a case involving sophisticated political chicanery, identified a critical, core truth about the mail/wire fraud statutes: they can only be applied where the central aim of the scheme is taking from the purported victim some money or property the victim then possesses.

This ruling is a compelling “intervening circumstance[s] of a substantial or controlling effect” to require rehearing of Neff’s petition under Rule 44(2) of this Court.

In *Kelly*, the Government charged that the defendants engaged in a scheme to defraud the Port Authority of New York and New Jersey by concocting a scheme to commandeer lanes of a major traffic artery at rush hour to punish a New Jersey mayor for failure to support Governor Christie, all under the false guise of a traffic study. The scheme indeed caused havoc and increased costs for the Authority. As the Court aptly observed, the “evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power.” Slip Opinion at p. 2. But federal statutes require more to permit a conviction to be sustained. Per “settled precedent” this Court held the defendants in *Kelly* could only be convicted under the wire fraud statute if “an object of their dishonesty was to obtain the Authority’s money or property.” *Id.* The incidental costs sustained from the

scheme was not the object of the scheme, and the convictions had to be reversed. *Id.*

Throughout this Opinion, this Court reemphasized these critical concepts. Quoting *McNally v. United States*, 483 U. S. 350, 356 (1987), the Court reminded that the “wire fraud statute thus prohibits only deceptive “schemes to deprive [the victim of] money or property.” *Id.*, at 356.” Slip Opinion at p. 6. The Court reasserted its vigilance in not permitting the mail/wire fraud statutes to criminalize “all acts of dishonesty” by limiting the scope of such statutes “to the protection of property rights.” Slip Opinion at p. 7, quoting *McNally* at 360. That a victim suffers some property loss as a result of a lie is not enough; the “deceit must also have had the ‘object’ of obtaining [the victim’s] money or property.” Slip Opinion at p. 8. The property of the victim “must play more than some bit part in the scheme: It must be the object of the fraud. . . Or, put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.” Slip Opinion at p. 10 [citations omitted].

Ultimately, this Court properly portended the result of a ruling less faithful to the traditional limits placed on mail/wire fraud prosecutions. Taking the government’s suggestion and allowing virtually every lie an official told in making a decision to be the basis of a federal prosecution would be a “sweeping expansion of federal jurisdiction” unwarranted by a proper grant of such authority from Congress. Slip Opinion at p. 12, citing *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

The *Kelly* ruling precludes Neff's conviction for mail/wire fraud. At the time he and Hallinan made the alleged misrepresentation, the plaintiffs in the Indiana lawsuit had no legal entitlement to money or property of any kind. The case was still pending. No judgment had been entered. The plaintiffs had nothing to be deprived of; nothing remotely constituting property was meant to pass from them to Neff or Hallinan. Whatever "scheme" Neff and Hallinan allegedly concocted could not have had the "property" of the victims as its "object" since the victims had nothing that could be objectified. As this Court put it most succinctly in *Kelly*, the mail/wire fraud statutes "bar only schemes for obtaining property" Slip Opinion at p. 12, and those statutes plainly do not apply in Neff's case.

Just as this Court has refused to permit federal prosecutors to use the mail/wire fraud statutes to set standards of conduct for state and local officials, Slip Opinion at p. 12, It must reject the even more ominous expansion of prosecutorial power upholding Neff's conviction will mean. Every lie, exaggerated claim or misrepresentation of any kind in settlement negotiations in cases throughout the country will now be prosecutable at the whim of the local United States Attorney. Indeed, negotiations of all kinds suddenly would become fruitful grounds for federal prosecution if the negotiators failed to adhere to a strict standard of truth-telling. If that is what the federal district courts should deal with on a daily basis, Congress should make that explicit choice by legislation. The current statutes, as *Kelly* holds, will not permit it.

Rehearing of Neff's petition is wholeheartedly supported by this most recent decision. At a minimum, as the result in *Kelly* entirely supports the petitioner's analysis of what constitutes "property" under the mail and wire fraud statutes, a GVR for reconsideration by the Third Circuit is warranted.

Secondarily, Charles M. Hallinan, Neff's co-defendant throughout these proceedings, filed a petition for a writ of certiorari on March 4, 2020. It remains pending at No. 19-1087.

An amicus brief was filed by the National Association of Criminal Defense Lawyers [NACDL] in support of the grant of Hallinan's petition on March 18, 2020. On March 25, 2020 this Honorable Court directed that the United States file a response. The United States requested an extension of time and the response is presently due to be filed on or before May 26, 2020.

The issues Hallinan raises are identical to the issues raised by Neff.¹ Specifically, Hallinan has argued that the mail/wire fraud counts were an improper application of those statutes in the precise ways that Neff has alleged. Hallinan has also alleged that the lower court failed to properly instruct the jury with respect to the *mens rea* of willfulness

¹ Neff additionally alleged in his petition that the jury instructions were faulty in multiple ways deriving from the lower courts' improper refusal to afford the doctrine of Tribal Sovereign Immunity any relevance in this case when such a doctrine remains a vital part of American jurisprudence.

regarding the RICO counts. The NACDL has supported both of those positions.

As the issues raised by Hallinan are the same as the issues raised by Neff, it would work a substantial injustice for this Court to consider the issues raised in Hallinan's appeal and to deny Neff the same opportunity. These individuals are legally in precisely the same set of circumstances and consistency in these considerations is a just and proper consideration.

CONCLUSION

Reconsideration of the petition for a writ of certiorari should be granted.

Respectfully submitted.

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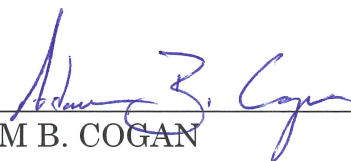
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May 2020

CERTIFICATION

I hereby certify that this Petition for Rehearing is restricted to the grounds specified in Rule 44 of the Rules of the Supreme Court and that this Petition is presented in good faith and not for the purposes of delay.

Respectfully submitted.



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May 2020