

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>No. 08 CR 888-6</b>
	)	
<b>ROBERT BLAGOJEVICH,</b>	)	<b>The Honorable</b>
	)	<b>James B. Zagel,</b>
<b>Defendant.</b>	)	<b>Judge Presiding.</b>

**DEFENDANT ROBERT BLAGOJEVICH’S  
MEMORANDUM OF LAW IN SUPPORT OF HIS  
MOTION TO SUPPRESS EVIDENCE OBTAINED  
THROUGH INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS**

**Introduction**

The Second Superseding Indictment in this case charges Robert Blagojevich with extortion, in violation of 18 U.S.C. § 1951(a); and conspiracy against the United States, in violation of 18 U.S.C. § 371.

**Legal Standards**

Under § 2518(1)(b), the application must include “a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued.” Section 2518(1)(b)(i)-(iv) require the inclusion of four elements in the probable cause statement: the offense being investigated, facilities or place from which the interception is to occur, type of communications to be intercepted, and the identity of the persons to be overheard. *United States v. Armocida*, 515 F.2d 29, 35 (3<sup>rd</sup> Cir. 1975).

Each of the four elements required by § 2518(1)(b) must be shown by proof sufficient to support a judicial finding of probable cause that those facts exist. *United States v. Lanza*, 341 F.Supp

405, 413-14 (M.D. Fla. 1972). If insufficient facts are offered to establish probable cause about any of the elements, the order may not be issued. *United States v. DeCesaro*, 349 F.Supp. 546, 549 (E.D. Wisc. 1972), *reversed*, 502 F.2d 604 (7<sup>th</sup> Cir. 1974).

The standards and procedure by which the judge determines probable cause to support the issuance of a surveillance order are the same as those used in conventional search warrant cases. *United States v. Plescia*, 773 F.Supp. 1068, 1074 (N.D. Ill. 1991), *affirmed*, 48 F.3d 1452 (7<sup>th</sup> Cir. 1995).

Section 2518(1), Title III's equivalent to the requirement for a conventional search warrant that probable cause exist to believe a crime has been committed, provides that an application for an electronic surveillance order shall include "details as to the particular offense that has been, is being, or is about to be committed." The details must be specific and include all elements of the offense. *United States v. DeCesaro*, 502 F.2d 604, 610-11 (7<sup>th</sup> Cir. 1974); and *United States v. Kleve*, 465 F.2d 187, 190 (8<sup>th</sup> Cir. 1972).

### **Background**

The application for order authorizing interception of wire communications for Rob Blagojevich's cell phone and three other phones states in pertinent part:

5. I have discussed the circumstances of the above offense with Special Agent Daniel Cain of the Federal Bureau of Investigation, who has directed and conducted this investigation, and have examined the Affidavit of Special Agent Daniel Cain which is attached to this Application and is incorporated herein by reference. Based upon that Affidavit, I state upon information and belief that:

a. There is probable cause to believe that Governor Rod Blagojevich, Rob Blagojevich, Alonzo Monk and others yet unknown, are engaged in violations of Title 18, United States Code, sections 1341, 1343, 1346, and 2 (mail fraud and wire fraud, including through the deprivation of honest services); Title 18, United States Code, Sections 1951 and 2 (extortion under color of official

right and the wrongful use of economic harm); and Title 18, United States Code, Section 371 (conspiracy to commit the above-described offenses).

(i) Specifically, there is probable cause to believe that Governor Rod Blagojevich, Rob Blagojevich, Alonzo Monk and others **are soliciting** lobbyists and/or clients **for contributions to** FOB in exchange for state action or decisions by Governor Rod Blagojevich in violation of federal law. FOB is a private entity organized and existing under the laws of the State of Illinois as a state-wide political campaign committee established on behalf of Governor Rod Blagojevich to support his campaign efforts. Rob Blagojevich is the brother of Governor Rod Blagojevich and is the Chairman of FOB. ... FOB headquarters are located at 4147 North Ravenswood Avenue, Suite 300, Chicago, Illinois. ... a source has recently advised that Governor Rod Blagojevich, Rob Blagojevich, Alonzo Monk, and others have met at these offices recently and discussed **soliciting contributions to FOB** in connection with state action or decisions by Governor Rod Blagojevich. ... during a meeting in the FOB offices on October 6, 2008, the source was informed by Governor Rod Blagojevich that he was directing that State of Illinois funds be used to fund a \$1.8 billion project and that he could have funded the project for more, but that he wanted to see whether a donation was made to FOB. ... Shortly after the October 6, 2008, meeting, Rob Blagojevich called source from Target Phone 1 to follow up on **setting up a fundraising event** with the source's client who wanted Governor Rod Blagojevich's help. ... on approximately October 9, 2008, Rob Blagojevich called source using Target Phone 4 to follow up on Governor Rod Blagojevich's request that source raise \$50,000 from one of source's clients. Between October 9, 2008, and October 22, 2008, source received or made calls to Target Phone 4 and Target Phone 3 in relation to Governor Rod Blagojevich's request that the source **raise money** from source's clients who had received or wanted state action as well as to set up additional **fundraising meetings**. As further described below, on October 22, 2008, Governor Rod Blagojevich, the source and others met in the FOB offices to discuss **fundraising and attempting to quickly obtain campaign contributions**. During the October 22, 2008 meeting, Governor Rod Blagojevich again made clear that he had provided money to one of the source's clients and that Governor Rod Blagojevich wanted either the source or **Rob Blagojevich to ask the client for campaign contributions** but that Governor Rod Blagojevich did not want to do so personally so as to avoid allegations of mixing state action with campaign fundraising. In addition, during the October 22, 2008 meeting, Governor Rod

Blagojevich used Target Phone 2 to **discuss fundraising** in connection with State action. As noted above, **the coordination for the meetings described above, as well as additional calls related to attempting to obtain campaign contributions** in connection with state action, occurred on the Target Phones. (Application, pages 4-7) (Emphasis added.)

The affidavit of Special Agent Daniel Cain states in pertinent part:

18. According to the CS and a recorded voicemail, ... Rob Blagojevich called the CS and asked him to come to a meeting at the FOB Ravenswood Office on October 8, 2008. On October 8, 2008, CS attended a meeting in the FOB Conference Room. In addition to the CS, Governor Rod Blagojevich, Rob Blagojevich and Alonzo Monk were present at the meeting. According to the CS, **the purpose of the meeting was to discuss fundraising efforts through the end of the year.** The CS indicated that he was told that **FOB's fundraising goal** is to raise \$2.5 million before the end of the year. **The CS described Governor Rod Blagojevich and Rob Blagojevich as having a "laser focus"** on achieving this goal by December 31, 2008, because of a new ethics law that goes into effect January 1, 2009, which prohibits any entity or individual with an existing state contract of more than \$50,000 from contributing to entities like FOB. ... According to the CS, because of the ethics legislation, Governor Rod Blagojevich, Rob Blagojevich, Monk and others are **soliciting large contributions to be made to FOB before the end of the year** by certain entities and individuals who have state contracts. The solicitations are being made, at least in part, through lobbyists like CS, Monk and others.

19. According to the CS and documentary evidence, at the October 8, 2008 meeting in the FOB Conference Room at the FOB Ravenswood Office, **Rob Blagojevich passed out a spreadsheet listing certain individuals and entities with a particular goal to be raised in contributions from each individual or entity.** ... According to the CS, the participants at the meeting discussed the individuals and entities listed as well as the target amounts to be raised. In addition, during the discussion, **Governor Rod Blagojevich made phone calls to particular lobbyists and others in an effort to, according to the CS, "warm up" the fundraising process.**

20. At the meeting in the FOB Conference Room, the CS was sitting next to Governor Rod Blagojevich. According to the CS, at one point in the meeting, the discussion turned to Children's

Memorial Hospital, which is one of CS' clients. According to the CS, at this point in the meeting, Governor Rod Blagojevich leaned over to the CS and said words to the effect of, "Dusty Baker called me. I'm going to do \$8 million for them. I want to get Magoon for 50." The CS understood Governor Rod Blagojevich to be referring to the CS approaching Pat Magoon, the CEO of Children's Memorial Hospital, for a \$50,000 contribution to FOB. ...The CS understood Rod Blagojevich's reference to \$8 million to be referring to Governor Rod Blagojevich's recent commitment to get Children's Memorial \$8 million in state funds for some type of pediatric care reimbursement. According to the CS, Children's Memorial's charter reflects its policy of medically treating all children, regardless of insurance coverage, and the Medicaid reimbursement on pediatric care is low. Because of this, CS had been lobbying on behalf of Children's Memorial to increase the Medicaid reimbursement. According to the CS, as a result of his efforts and the efforts of others associated with Children's Memorial, including Dusty Baker, Governor Rod Blagojevich has recently committed \$8 million from the state of Illinois toward this particular issue. **It is my belief** that the conversation as related by CS indicates that Governor **Rod Blagojevich expects a *quid pro quo* of \$50,000 from Children's Memorial in exchange for his commitment of money to Children's Memorial.**

(Cain Affidavit, pages 14-17) (Emphasis added.)

### Discussion

#### THE APPLICATION FAILS TO ESTABLISH PROBABLE CAUSE.

The application and affidavit in support make clear that the underlying basis of Rob Blagojevich's conduct involves campaign fund raising. In the instant case, the application fails to establish probable cause because the application fails to set forth an explicit promise to perform an official or not perform an official act or the existence of a *quid pro quo* for any of the solicitations made by Robert Blagojevich or his knowledge of an explicit promise or *quid pro quo*. This Court can rely on *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991), and its progeny, to guide in it determining that the Government's reliance on the matter involving Children's Memorial Hospital does not establish probable cause.

In *McCormick*, the Supreme Court considered the requirements for an extortion conviction under color of official right in the special context of campaign contributions. In *McCormick*, a state legislator received several cash payments during his reelection campaign from a lobbyist supporting a particular piece of legislation allowing foreign medical school graduates to practice under temporary permits while studying for state licensing exams. The legislator subsequently sponsored and spoke in favor of the legislation, which resulted in some doctors practicing for years under the program as they repeatedly failed their medical exams. The legislator subsequently sponsored a bill extending the program's expiration date and later agreed to legislation that would grant the doctors a permanent license by virtue of their years of experience. After advising the doctors' lobbyist during his reelection campaign that he had heard nothing from the doctors, the legislator received several cash payments from them, which the legislator neither listed as campaign contributions nor reported as income on his federal income tax return. A jury convicted the legislator of five counts of violating the Hobbs Act by extorting payments "under color of official right," in violation 18 U.S.C. § 1951(b)(2). The Court of Appeals affirmed McCormick's conviction.

In reversing the legislator's conviction, the Supreme Court held that the trial court had not instructed the jury that the receipt of campaign contributions constitutes extortion under color of official right "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." *McCormick*, 111 S.Ct. at 1816. In reaching its decision, the Supreme Court observed:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the

federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. ...

This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

*McCormick*, 500 U.S. at 272-273, 111 S.Ct. at 1816.

This is precisely the situation in this case with respect to Children’s Memorial Hospital. Governor Blagojevich’s action of providing funding for Children’s Memorial Hospital was made without an explicit *quid pro quo* and Rod Blagojevich’s hope for a future campaign contribution came after the fact.

In *United States v. Allen*, 10 F.3d 405, 411 (7<sup>th</sup> Cir. 1993), the Seventh Circuit echoed *McCormick* and stated:

*McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. People vote for candidates and contribute to the candidates’ campaigns because of those candidates’ views, performance, and promises. It would be naive to suppose that contributors do not expect some benefit – support for favorable legislation, for example – for their contributions. To hold that a politician committed extortion merely

by acting for some constituents' benefit shortly before or after receiving campaign contributions from those constituents "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation."

*Allen*, 10 F.3d at 410-411, quoting *McCormick*, 111 S.Ct. at 1816.

\* \* \* \* \*

As the law has evolved, extortion "under color of official right" and bribery are really different sides of the same coin. . . . **Because of the realities of the American political system, and the fact that the Hobbs act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office – the *quid pro quo* – be explicit.**

*Allen*, 10 F.3d at 411. (Emphasis added.)

The Seventh Circuit's teaching in *Allen* is clear: Because of the realities of the American political system, and the fact that the Hobbs Act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office – the *quid pro quo* – be explicit.

*Allen* does not stand alone. In *United States v. Giles*, 246 F.3d 966 (7<sup>th</sup> Cir. 2001), Percy Giles was a Chicago alderman convicted of racketeering, mail fraud, extortion, and understating the income on his federal tax returns. On appeal, Giles argued that Judge Bucklo mistakenly interpreted *Evans v. United States*, 504 U.S. 255, 112 S.Ct. 1881 (1992), when she concluded that the *quid pro quo* requirement applies only to cases where the suspect funds are campaign contributions. *Giles*, 246 F.3d at 971. Giles contended that *Evans* extends the requirement for a *quid pro quo* to cases which do not involve campaign contributions. *Id.* The Seventh Circuit held:

We are not convinced that *Evans* clearly settles the question. And we



recognize a policy concern which might justify distinguishing campaign contributions from other payments. After all, campaign contributions often are made with the hope that the recipient, if elected, will further interests with which the contributor agrees; there is nothing illegal about such contributions. **To distinguish legal from illegal campaign contributions, it makes sense to require the government to prove that a particular contribution was made in exchange for an explicit promise or undertaking by the official.** Other payments to officials are not clothed with the same degree of respectability as ordinary campaign contributions. For that reason, perhaps it should be easier to prove that those payments are in violation of the law.

*Giles*, 246 F.3d at 972. (Emphasis added.)

*Accord*, *United States v. Martin*, 195 F.3d 961, 965-66 (7<sup>th</sup> Cir. 1999) (“the courts have made clear that criminal inducement of a legislator to take a particular action cannot be inferred from the legislator’s acceptance of campaign contributions from interests urging the action ... or his acceptance of lobbyists’ hospitality.”).

In *United States v. Kincaid-Chauncey*, 566 F.3d 923, 937 (9<sup>th</sup> Cir. 2009), the Ninth Circuit followed *McCormick* and *United States v. Ganim*, 510 F.3d 134, 142 (2<sup>nd</sup> Cir. 2007) for the proposition that proof of an express promise is necessary when the payments are made in the form of campaign contributions.

In the case at bar, the application fails to set forth an express promise or *quid pro quo*. It must be remembered that at the time the Government made its application, its theory of prosecution was grounded on a fraud violation premised upon intangible rights to honest services. The Government has abandoned the intangible rights theory of prosecution in the Second Superseding Indictment.

As the above cases recognize, legislators by necessity both accept campaign contributions and work for the benefit of their constituents. Thus, the fact that a legislator took official action to benefit a constituent that contributed to that legislator’s campaign fund cannot be evidence of a federal crime. Clearly, Robert Blagojevich’s asking for campaign contributions, without more, cannot constitute a

federal crime. Evidence of Robert Blagojevich soliciting campaign contributions on behalf of his brother, without proof of an explicit *quid pro quo*, is not remotely criminal, but, rather, exemplifies the American political process. Accordingly, this Court should grant Robert Blagojevich's motion to suppress evidence obtained through the interception of wire or oral communications because the application failed to establish probable cause that an explicit *quid pro quo* existed.

**CONCLUSION**

Based upon the facts, authority and argument set forth above, this Court should grant Robert Blagojevich's motion to suppress evidence obtained through the interception of wire or oral communications because the application failed to establish probable cause that an explicit *quid pro quo* existed.

Respectfully submitted,

/s/ Michael D. Ettinger  
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