

HUNTER BIDEN'S MOTIONS TO DISMISS: THE TECHNICAL COMPLAINTS

As noted, yesterday Hunter Biden filed eight motions to dismiss and a ninth motion to strike. Three of these – an immunity argument, a claim that David Weiss was not eligible to be Special Counsel, and a selective prosecution claim – are versions of MTDs filed in Delaware. A fourth argues that the disgruntled whistleblowers engaged in outrageous conduct.

The rest are technical complaints about the way David Weiss charged this. In combination, those motions to dismiss describe Weiss as having charged a scheme not to pay taxes that extended into the period of Hunter Biden's sobriety, rather than a failure to pay taxes during the period of his worst addiction. If some or all of these motions succeed, it will chip away at much of the indictment against Hunter.

To understand how this works, consider a detail from the filing arguing that the statutes of limitation for one of the charges, pertaining to 2016, have expired. It notes that the indictment charges 2016 as a failure to pay, rather than a failure to file.

Trying to avoid the SOL bar for Count 1, the prosecution alleges that Mr. Biden's failure to pay his 2016 taxes did not occur until June 2020, when his accountants late-filed his 2016 returns noting an outstanding amount,

But that creates a problem, because if Hunter's crime occurred in 2020, then all the evidence in the indictment regarding 2017 – and, Abbe Lowell argues, all the other tax years – is worthless.

Alternatively, the prosecution's

allegation that Mr. Biden's alleged failure to pay first became willful in 2020 means all counts (all of which require the prosecution to prove willfulness) must be dismissed for failure to state an offense pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). This is because the prosecution would be conceding that its allegations of Mr. Biden's knowledge and failure to meet his tax obligations in 2017 are insufficient to allege willfulness. (See Indict. ¶¶ 53–59 (alleging willfulness in 2020 when Mr. Biden late filed his returns based on the same or similar allegations of knowledge alleged in 2017).) And if the prosecution concedes that the facts in 2017 do not allege willfulness, it must agree the same allegations do not allege willfulness any other year.

In short, the prosecution cannot escape its dilemma. If it asserts, consistent with the allegations in the Indictment, that Mr. Biden willfully refused to pay his taxes when they were due on April 18, 2017, then Count 1 is barred by the SOL. If the prosecution instead claims that Mr. Biden did not willfully fail to pay until he filed his returns in 2020, then it relies solely on allegations it agrees are insufficient to allege willfulness in 2017, which requires dismissal of all counts for failure to state an offense pursuant to Rule 12(b)(3)(B)(v) since all counts rely on the same evidence. And if the prosecution refuses to clarify its position on willfulness one way or another, then the Indictment fails to meet the specificity requirements of Rules 7(c) and 12(b)(3)(B)(iii). Thus, while the prosecution may, in its opposition, pick its poison, either Count 1 or all counts must be dismissed.

Lowell describes a similar problem in the duplicity filing. Prosecutors are simultaneously claiming that Hunter failed to pay his taxes in the tax year in question and in the year he filed – 2018 and 2019, as well as 2020.

Count 2 charges Mr. Biden with willfully failing to pay income taxes due on April 17, 2018 and February 18, 2020 for the same tax year, while Count 4 charges Mr. Biden with willfully failing to pay income taxes due on April 15, 2019 and February 18, 2020 again for the same tax year.

And there's another problem with the 2019 taxes: COVID. Lowell argues that because Hunter has since paid the 2019 taxes that would have been due while the government was providing COVID restrictions, that count is itself problematic.

Among the collection procedures implemented, "[s]ome individual taxpayers who only owe for the 2019 tax year and who owe less than \$250,000 may qualify to set up an Installment Agreement without a notice of federal tax lien filed by the IRS."¹ (Ex. A) Other terms included that the IRS would offer "flexibility for some taxpayers who are temporarily unable to meet the payment terms of an accepted Offer in Compromise." For the 2019 tax year, Mr. Biden had a self-assessed tax due of only \$197,372, so he was in the range of taxpayers who were not being targeted for criminal enforcement.

Moreover, a records search indicates that, at the time, the IRS chose not to file a notice of federal tax lien² regarding Mr. Biden's 2019 taxes, even though Mr. Biden did not formally seek such relief under the IRS's COVID-19 program.

This is less persuasive: the described leniency is for those who are otherwise current. Hunter wasn't in 2020. Still, it makes the decision to charge 2019 all the more problematic.

Which seems to be the point of the surplussage filing, which is not a motion to dismiss, but instead a request for Weiss to lose the salacious commentary about Hunter's lifestyle.

Moreover, the Indictment includes numerous allegations about Mr. Biden's finances at irrelevant times, such as 2020 when he late filed his tax returns. (DE 1 at 55.) As Mr. Biden explains in the contemporaneously filed Motion to Dismiss Count I, the fact Mr. Biden's accountants late filed his past returns in 2020 does not render the 2020 filing date any sort of legal payment or filing deadline. See Motion to Dismiss Count I at 10. Therefore, even if allegations about Mr. Biden's finances had any relevance, allegations about his finances long after he is accused of committing the charged offenses are irrelevant and present a high risk of prejudice and jury confusion

Lowell also complains that prosecutors made a big deal about where Hunter *got* money from.

Finally, the Indictment includes a whole section of allegations related to incoming payments to Mr. Biden from different sources that it alleges indicate Mr. Biden's ability to pay his taxes at various times. (DE 1 at 29 – 30.) As noted, Mr. Biden's ability to pay is irrelevant to his intent to pay taxes or file returns and the Court should therefore strike these allegations as well.

By excluding such allegations (except for 2018, where payments to sex workers are key to claims

of improper business deductions), Lowell would exclude a lot of what would draw the dick pic sniffers, if this goes to trial.

Finally, there's a bigger technical complaint: for all years but 2019, Hunter (claims he) wasn't a California resident.

With respect to failure to pay claims (Counts 1, 2, and 4), the CTM explains "a person required to pay a tax must pay the tax at the place fixed for filing the return" and "[v]enue would therefore normally be in the district in which the return was filed." CTM Section 10.06[5] (2024). That is because if the return is not filed on time, the prosecution "normally would [charge] failure to file rather than a failure to pay." Id. Counts 1, 2, and 4 allege Mr. Biden failed to file his returns on time, yet the prosecution nevertheless proceeded with failure to pay charges. More specifically, Count 1 alleges Mr. Biden willfully failed to pay his 2016 taxes by April 18, 2017, Count 2 alleges Mr. Biden willfully failed to pay his 2017 taxes by April 17, 2018, and Count 4 alleges Mr. Biden willfully failed to pay his 2018 taxes on April 15, 2019.

The CTM explains that, for failure to file claims, the district "in which the taxpayer was required to file a return for the year at issue" is where "the crime was committed." CTM Section 10.05[7] (2024). For individuals, tax returns must be filed in the district in which the taxpayer lives. Id. Count 3 of the Indictment alleges Mr. Biden failed to file his 2017 returns by the extended deadline of October 15, 2018.

As noted, Mr. Biden moved to California in the summer of 2019, which the prosecution knows. Because the Indictment alleges Counts 1-4 occurred before then when Mr. Biden was living

outside of California and was required to file and pay his taxes outside of California, venue is not proper in California for those charges, and they must be dismissed from the Indictment pursuant to Federal Rule of Criminal Procedure 18.

This is certainly true of 2016 and 2017.

If these technical filings succeed – and some of them seem quite clear – it will chip away at much of the indictment (though may result in charges in DC).

Technical filings

Untimely

Duplicity

Specific selective prosecution (2019)

Machala declaration

IRS announcement

IRS Covid announcement

IRS Covid announcement 2

Venue

Surplussage

Machala declaration

Indictment