IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. MCGREGOR	)	
THOMAS E. COKER	)	
ROBERT B. GEDDIE, JR.	)	
JAMES E. PREUITT	)	
LARRY P. MEANS	)	
QUINTON T. ROSS, JR.	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER, JR.	)	
JOSEPH R. CROSBY	)	

UNITED STATES' COMBINED RESPONSE TO DEFENSE OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS REGARDING FEDERAL PROGRAM BRIBERY, HOBBS ACT, AND HONEST SERVICES CHARGES (DKT. NOS. 862, 863, 864)

The United States of America, through undersigned counsel, hereby responds to defendant McGregor's, Coker's, Geddie's, Preuitt's, Means's, Ross's, Smith's, Walker's, and Crosby's objections to Judge Capel's reports and recommendations regarding charges brought pursuant to 18 U.S.C. §§ 666(a)(1)(B) & (a)(2) (federal program bribery), 18 U.S.C. § 1951(a) (Hobbs Act extortion under color of official right), and 18 U.S.C. §§ 1341, 1343 & 1346 (honest services mail and wire fraud). Dkt. Nos. 917, 918, 920, 924, 925, 928, 934, 935, 936, 940, 942, 943, 944, 945, 948, 949, 950, 951. The defendants raise a variety of objections to Judge Capel's reports and recommendations, all of which merely rehash the same arguments raised and litigated in great detail before the magistrate judge. To that end, the government relies on and incorporates by reference the arguments it made in its prior responses to the defendants' motions to dismiss these counts, as well as their motions for bills of particulars, which, in large part, mirror the arguments raised in their

motions to dismiss—i.e., that the government has failed sufficiently to allege an offense as to the counts at issue. The United States provides this response for the sole purpose of clarifying its position regarding the quid pro quo requirement of McCormick v. United States, 500 U.S. 257 (1991), and its applicability to the charges contained in the Indictment.

The defendants claim variously that, where payments as part of an illicit agreement take the form of campaign contributions, the government must allege and prove an express quid pro quo. See, e.g., Dkt. No. 917 (McGregor § 666 Objection) at 32-36.[1] In their view, the government must establish that the defendants engaged in a conversation, during which they spoke words to the effect of: "I will offer you a $10,000 campaign contribution in exchange for your vote in favor of a bill I support" and "I accept your offer and will vote in favor of the bill you support in exchange for the $10,000." Absent such an expressly formalized agreement, defendants claim that all charges premised on campaign contributions as bribe payments are insufficient. This argument is flawed for a number of reasons, as the government has argued previously.

As an initial matter, the defendants' arguments on this issue proceed from McCormick, which held, in a Hobbs Act prosecution for extortion "under color of official right," that receipt of campaign contributions is "vulnerable under the Act as having been taken 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." Id. at 273 (emphasis added). McCormick involved a state legislator's acceptance of campaign contributions in exchange for support on legislation benefitting the contributors. Id. at 259-60. The jury was instructed that, to find that the

[1] Several of the defendants merely adopt McGregor's arguments, see, e.g., Dkt. Nos. 924, 925, 935, 940, and the rest make the same general argument. See, e.g., Dkt. No.929.

legislator had induced the payments "under color of official right," see 18 U.S.C. § 1951(b)(2), it needed to find only that the contributors had made the payment with the expectation that the legislator would take future action that benefitted him, and that the legislator "accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office." 500 U.S. at 261 n.4 (emphasis added).

Reversing the conviction, the Supreme Court expressed concern that the absence of a quid pro quo requirement "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 contributors or expenditures, as they have been from the beginning of the Nation." Id. at 272. By requiring an explicit quid pro quo, the Court protected honest legislators from criminal liability "when they act[ed] for the benefit of constituents or support[ed] legislation further the interests of some of their constituents, shortly before or after campaign contributions [we]re solicited and received from those beneficiaries." Id. Through this requirement, the Court eliminated the possibility that a defendant would be convicted where the donor merely had an expectation or hope of favorable action.

The following Term, the Court held in Evans v. United States, 504 U.S. 255, 256-58 (1992), that an affirmative act of inducement by a public official, such as a demand or request for a payment, is not an element of extortion "under color of official right." Evans, too, was a campaign-contribution case, in which the payments were purported contributions to the petitioner's campaign for election to a county board. Id. at 257. In affirming the decision of the Eleventh Circuit, the Evans Court, informed by McCormick, approved the following jury instruction:

> The defendant contends that the $8,000 he received from agent Cormany was

> a campaign contribution.[2] The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
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> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 257-58 (emphasis added).

The Court explained further that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268. The district court's instruction, which did not require the jury to find an express promise or agreement between the official and payor, "satisfie[d] the quid pro quo requirement of McCormick."[3] Id.

Indeed, there was no evidence in Evans that the payments were accepted in exchange for an express promise to perform some official action. Id. at 257 ("Thus, although petitioner did not initiate the transaction, his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver."). Likewise, as Justice Kennedy noted in his concurrence, a rule requiring an "express" agreement or promise between the payor and official would allow officials to evade criminal liability through "knowing winks and nods," even where a meeting of the minds occurred to exchange money for official action. Id. at 274 (Kennedy, J.,

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[2] In light of this instruction, defendant Ross's claim that Evans was somehow not a campaign-contribution case, Dkt. No. 951 (Ross Hobbs Act Objection) at 7 n.5, is unsubstantiated.

[3] Because the Evans instruction "satisfied" the McCormick standard, defendant Ross's claim that Evans established a "lesser" standard than McCormick, Dkt. No. 951 at 6-10, also fails.

concurring).

Not surprisingly, the defendants point to no campaign contribution case in which a court required an express statement of the agreement. None exists. Indeed, almost every court that has addressed the issue has concluded that proof of a formalized, express agreement is not required under McCormick. See, e.g., United States v. Whitfield, 590 F.3d 325, 352-53 (5th Cir. 2009) (holding in case involving agreement for unspecified official action that "even if we assume that a [McCormick] quid pro quo instruction was necessary because at least some of the financial transactions in question were campaign-related, we conclude that the jury charge in this case sufficiently fulfilled that requirement"); United States v. Inzunza, 580 F.3d 894, 900 (9th Cir. 2009) ("An official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. In return for it, I promise to return your bill tomorrow.'" (emphasis in original)); United States v. Siegelman, 561 F.3d 1215, 1225-27 (11th Cir. 2009) (per curiam) (holding in campaign-contribution case that "[s]ince the agreement is for some specific action or inaction, the agreement must be explicit, but there is no requirement that it be express."), vacated and remanded on other grounds, Siegelman v. United States,130 S. Ct. 3542 (2010); United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2001); United States v. Tucker, 133 F.3d 1208, 1215 (9th Cir. 1998); United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995); United States v. Blandford, 33 F.3d 685, 696 (6th Cir. 1994) ("Evans provided a gloss on the McCormick Court's use of the word "explicit" to qualify its quid pro quo requirement. Explicit, as explained in Evans, speaks not to the form of the agreement between the payor and the payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated. Put simply,

Evans instructed that by 'explicit,' McCormick did not mean express.");[4] see also United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992) (holding in pre-Evans case that "[under] McCormick, the explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous"); cf. United States v. Massey, 89 F.3d 1433, 1439 (11th Cir. 1996) (holding that bribery conviction under general federal bribery statute, 18 U.S.C. § 201, may be supported by "inferences drawn from relevant and competent circumstantial evidence"). But see Ganim, 510 F.3d at 142 (noting in dicta that McCormick requires "proof of an express promise . . . when the payments are made in the form of campaign contributions.").

The Courts of Appeals' almost uniform rejection of an express-agreement requirement makes sense in practice. What the defendants seek is effectively a grant of immunity for exchanging a political contribution for official action. Under a standard that requires either a verbally-stated or written agreement, all but the most careless officials and donors would be able to escape criminal liability by consummating a corrupt exchange through "knowing winks and nods." The Court should adopt Judge Capel's rejection of this position.

Further, the defendants also fail to cite any binding authority extending the McCormick standard beyond application in the context of the Hobbs Act prosecution to prosecutions under the honest services and federal program bribery statutes. Again, there is no such case law in the Eleventh Circuit. Indeed, Evans makes clear that the Hobbs Act's quid pro quo requirement derives from the common-law history and understanding of that particular statute. 504 U.S. at 268 ("[O]ur construction of the statute is informed by the common-law tradition from which the term of art was

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[4] Contrary to defendant McGregor's position, see Dkt. 918 (McGregor Honest Services Objection) at 14-17, "explicit" and "express" are not simply interchangeable. See Blandford, 33 F.3d at 696 n.13 (comparing definitions from Black's Law Dictionary).

drawn and understood. We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."). Moreover, at least one court in the Eleventh Circuit has refused to import a quid pro quo requirement into the honest services doctrine. United States v. Nelson, 2010 WL 4639236, at *2 (M.D. Fla. Nov. 8, 2010) (examining the Supreme Court's decision in Skilling v. United States, 130 S. Ct. 2896 (2010), and finding that "the Court is not prepared to find that an honest services mail fraud charge alleging a bribery scheme requires identifying a quid pro quo as an element of the offense").

Moreover, recently the Eleventh Circuit has concluded that a specific quid pro quo is not required to prove a violation of § 666. United States v. McNair, 605 F.3d 1152, 1188 (11th Cir. 2010) ("The requirement of a "corrupt" intent in § 666 does narrow the conduct that violates § 666 but does not impose a specific quid pro quo requirement."); id. ("[W]e now expressly hold there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a quid pro quo."). In other words, in this Circuit § 666 permits prosecution based on an exchange that does not tie a specific benefit to a specific official act.

Nevertheless, even if the McCormick explicit quid pro quo requirement did extend to prosecutions under § 666 and § 1346 involving campaign contributions, the Indictment in this case sufficiently alleges the requisite connection between the offer and payment of contributions and a specific official action—a vote in favor of pro-gambling legislation. In response to the defendants' motions to dismiss and motions for bills of particulars, the government distilled the allegations as to each defendant to illustrate the sufficiency of the Indictments' allegations. We will not restate

them here. As before, the defendants' complaints that these allegations do not establish evidence of a quid pro quo under McCormick are misplaced. If they wish to challenge the sufficiency of the government's evidence at trial, they may do so through arguments to the jury, cross-examination of government witnesses, and a Rule 29 motion.

Ultimately, the Court will decide what legal standard the government must meet in order to sustain its burden under § 666, § 1951, and § 1346, and instruct the jury accordingly. Out of an abundance of caution and in an effort to simplify and streamline the jury instructions, the government anticipates seeking an instruction consistent with the one approved in Evans that addresses payments and other things of value in the form of campaign contributions,[5] notwithstanding the lack of authority, as noted, requiring such an instruction. The Supreme Court has ratified the following instruction, and its provision here can only serve to ensure the fairness of the jury's verdict:

> The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act, the federal program bribery statute, or the honest services statute, even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for a specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act, the federal program bribery statute, or the honest services statute, regardless of whether the payment is made in the form of a campaign contribution.

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[5] The United States, however, continues to assert, based on the reasoning outlined in its pleadings before Judge Capel, that the government is not required to prove an agreement involving the exchange of a specific benefit for a specific official action or type of action, when, as is the case with defendant Crosby, for example, payments are not in the form of campaign contributions. See, e.g., Dkt. No. 237 at 11-13.

For the foregoing reasons, and those articulated with respect to each statute in the government's oppositions to the defendants' motions to dismiss, the Court should adopt the recommendations of Judge Capel, Dkt. Nos. 862, 863, and 864, and deny the defendants' motions.

Respectfully submitted,

LANNY A. BREUER
Assistant Attorney General, Criminal Division
Attorney for the United States
Acting Under Authority of 28 U.S.C. § 515

JACK SMITH, Chief
Public Integrity Section

By: /s/ Eric G. Olshan
Eric G. Olshan
Trial Attorney
Public Integrity Section
U.S. Department of Justice
1400 New York Ave., NW, Suite 12100
Washington, DC 20005
(202) 514-1412

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on counsel of record through the Court's electronic filing system this 25th day of April, 2011.

/s/ Eric G. Olshan

Eric G. Olshan
Trial Attorney
Public Integrity Section
U.S. Department of Justice
1400 New York Ave., NW, Suite 12100
Washington, DC 20005
(202) 514-1412