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
	)	
RONALD GILLEY.	)	

UNITED STATES' OPPOSITION TO DEFENDANT RONALD GILLEY'S MOTION TO DISMISS FEDERAL PROGRAMS BRIBERY COUNTS FOR FAILURE TO STATE A CLAIM

The United States of America hereby opposes defendant Ronald Gilley's Motion to Dismiss Counts Brought under 18 U.S.C. § 666 (Federal Programs Bribery) for Failure to State an Offense.

Defendant Gilley's motion fails because it erroneously presumes that charges under § 666 necessarily involve bribes offered or given in connection with some tangible interest that directly implicates federal dollars. To the contrary, binding authority and common-sense interpretation of the statutory text make clear that § 666 properly covers bribes relating to intangible interests, such as legislative support, that have no direct relationship with federal funds. It is therefore unsurprising that charges brought under § 666 need not specify a particular program that receives federal funding, nor do such charges require a nexus between federal dollars and alleged bribery. It is sufficient for the indictment to allege that an agent–such as a legislator–of a state that receives the appropriate amount of federal funding solicited or accepted, or was offered or given, money or other things of value in connection with state business–such as the passage of pro-gambling legislation. Defendant Gilley's motion should be denied.

ARGUMENT

I. 18 U.S.C. § 666 COVERS BRIBES RELATING TO INTANGIBLES THAT DO NOT DIRECTLY INVOLVE FEDERAL PROGRAMS.

Section 666(a)(2) criminalizes offering or paying bribes to an agent of a state or local government that receives in excess of $10,000 in federal funding, in connection with "any business, transaction, or series of transactions" of the government involving anything of value of $5,000 or more. The Supreme Court has explained that the statute broadly prohibits corruption of state agents, without regard to whether the particular business or transaction at issue involved federal funds: "Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars." Sabri v. United States, 541 U.S. 600, 605 (2004) (emphasis added). The federal government's interest in safeguarding the integrity of state and local agencies is no less compelling when the business or transactions at issue is of a "non-commercial" nature. The statute requires only that a state agent be corrupted in connection with the state's business, and does not require a direct impact on federal funds, much less an impact on commercial activity.

State legislators and legislative staff wield substantial power in the allocation of state and local funds, which in turn affects the allocation of the hundreds of millions of dollars of federal funds provided to the state; accordingly, § 666 broadly prohibits acts that corrupt these individuals, regardless of whether the immediate activity has an impact on federal funds or involves commercial activity. As the Supreme Court stated: "Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring

in there." Id. Put simply, § 666 broadly protects the integrity of state governments and prohibits efforts to corrupt them through bribery.

Here, Counts 1, 2, 4, 5, 8, 10, and 13 of the Indictment charge defendant Gilley with violating § 666(a)(2) through bribery offenses that corrupted the integrity of the core "business" of the Alabama state legislature—making laws. Defendant Gilley argues that these charges must be dismissed for failure to demonstrate a "relationship between the alleged conduct and any federal money." Br. at 3. But excluding such crimes from prosecution under § 666 would unduly narrow the government's "business" and contradict relevant caselaw. Accordingly, the Eleventh Circuit, in addition to other courts around the country, have affirmed convictions under § 666 relating to bribes paid to influence non-commercial activity without regard to whether the bribes influenced or were intended to influence federal funds.

A. The Text of § 666(a)(2) Makes Clear That the Statute Prohibits Bribes Made or Offered in Connection with Purely Legislative Activity by State Legislators.

The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). Applying that principle here, it is clear that Congress intended § 666(a)(2) to prohibit the misconduct for which defendant Gilley was charged in the aforementioned counts of the Indictment. Defendant Gilley aims to vitiate § 666(a)(2) by improperly excluding from the statute's reach bribes paid to state legislators that do not directly implicate federal money. That crimped interpretation ignores, however, the common-sense meaning of the statute's text, as well as binding authority that squarely undercuts defendant Gilley's argument.

1. Binding authority and the common-sense interpretation of the text of § 666(a)(2) shows that the statute covers bribes without a direct connection federal funds.

As previously mentioned, § 666(a)(2) prohibits offering or making bribes "in connection with any business, transaction, or series of transactions." § 666(a)(2) (emphasis added). The ordinary meaning of "business" and "transaction"—particularly of "business"—covers, as a primary definition, non-commercial activities. "Business" denotes "[t]hat which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest." Black's Law Dictionary 179 (5th ed. 1979); see also United States v. Bonito, 57 F.3d 167, 172 (2d Cir. 1995) ("'Business,' broadly defined, includes 'work,' 'professional dealings,' 'one's proper concern,' and 'serious work or endeavor that pertains to one's job.'"); Webster's Third New International Dictionary 302 (1961) (describing business as "an activity engaged in as normal, logical, or inevitable and usually extending over a considerable period time"; synonymous with "role" or "function").

Particularly with government agencies, the term "business" commonly describes the government's official powers and duties, without restriction to the government's commercial business. See, e.g., Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1096 (2009) (upholding state law barring government paycheck deductions for political action committees because "of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity") (emphasis added); Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (in government-speech First Amendment case, stating that "[i]t is the very business of government to favor and disfavor points of view") (emphasis added) (quoting Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998)); Oregon v. Ice, 129 S. Ct. 711, 718 (2009) (in Sixth Amendment

Confrontation case, noting that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government") (emphasis added) (internal quotation marks and citation omitted); Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (in government employment case, expressing concern over "the government's capacity to conduct public business") (emphasis added); Cheney v. U.S. District Court for D.C., 541 U.S. 913, 921 (2004) (Scalia, J., mem. op.) (in opinion addressing recusal, noting that "social courtesies, provided at Government expense by officials whose only business before the Court is business in their official capacity, have not hitherto been thought prohibited") (emphases added).[1]

Reinforcing the view that "business" and "transaction" should be interpreted broadly and without restriction to conduct that involves federal dollars is the word "any" that precedes the phrase "business, transaction, or series of transactions." 18 U.S.C. § 666(a)(2). Such unqualified language signals the statute's broad reach over all business or transactions, and cautions against attempts to limit the statute's application to misconduct tied to federal funding. Salinas v. United States, 522 U.S. 52, 57 (1997) (holding that "[t]he word 'any,' which prefaces the business or transaction clause" undercuts an attempt to narrow the reach of the statute) (citations omitted); see also United

[1] It is telling that Congress, when it sought to prevent kickbacks (a form of bribery in which the transaction generates the funds for the bribe) in federal-government contracting, used much more narrow terms in describing the government activities covered by the Anti-Kickback Act. 41 U.S.C. §§ 51-58. Specifically, prohibited "kickback[s]" are defined as those payments made for the purpose of obtaining or rewarding favorable treatment in connection with a "prime contract" or a "subcontract relating to a prime contract." 41 U.S.C. § 52(2). "Prime contract" and "subcontract" themselves are specifically defined as a "contract or contractual action" "for the purpose of obtaining supplies, materials, equipment, or services of any kind." § 52(4), (7). In sharp contrast, § 666 uses the broader term "business." This contrast highlights the fact that Congress knows how to use narrower terms when discussing commercial or contractual activities of the government, particularly in the context of a bribery statute.

States v. Koh, 199 F.3d 632, 637 (2d Cir. 1999) (the term "any" as used in relation to a bank fraud statute means without limitation); Johnston v. Iowa Dep't of Human Servs., 932 F.2d 1247, 1249 (8th Cir. 1991) (as used in a federal statute, the word "'any' literally means 'any'").

For example, Salinas v. United States involved a bribery scheme operated by sheriffs who worked in a county prison for which the United States Marshals Service had an agreement to house federal prisoners. 522 U.S. at 54. A prisoner bribed a deputy sheriff in exchange for allowing the prisoner to have conjugal visits with his wife and girlfriend. Id. at 55. Nothing in the Salinas bribery scheme, however, related to federal funds nor commercial activities in any form of the county or the prison. Rather, the bribes were paid solely to obtain additional privileges not available to other prisoners. The Fifth Circuit nevertheless affirmed the convictions, holding that conjugal visits for prisoners were a "thing of value" related to the business of properly housing prison inmates. United States v. Marmolejo, 89 F.3d 1185, 1191-92 (5th Cir. 1996) (citing United States v. Mongelli, 794 F. Supp. 529, 531 (S.D.N.Y. 1992)).

The Supreme Court likewise affirmed the convictions. Salinas, 522 U.S. at 54. In doing so, the basis of the Court's holding was the plain language of the statute and, in particular, the word "any" in the phrase "any business, transaction, or series of transactions." Id. at 57. Responding to the defendant's attempt to limit the statute to bribery affecting federal funds, the Court held that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." Id.

Although Salinas did not directly address the definition of "business" and "transaction,"[2] the

[2] Whether conjugal visits were a thing of value in connection with the business of the prison was not raised as an issue before the Supreme Court. Salinas, 522 U.S. at 61 ("[W]e do not address § 666(a)(1)(B)'s applicability to intangible benefits such as contact visits, because that question is

Supreme Court rejected any constitutional question about whether § 666 applied to the facts of the case, stating that the "preferential treatment accorded to [the defendant] was a threat to the integrity and proper operation of the federal program." Id. at 61. The decision's focus on the integrity of the recipient of the federal funding, and its reliance and emphasis on the word "any" in the business or transaction clause, cautions against narrowing the construction of the business or transaction clause of § 666.

Consistent with the Supreme Court's approach in Salinas, on January 13, 2011, the Eleventh Circuit decided United States v. Townsend, No. 09-12797, 2011 WL 102765 (11th Cir. 2011) (publication pending). Townsend squarely contradicts defendant Gilley's argument.

Townsend concerned an indicted drug dealer who was released under supervision pending trial. Id. at *1. In an attempt to purchase freedom of movement, which of course is totally unrelated to federal funding, the drug dealer had bribed the state corrections officer responsible for his supervision. Id. at *1-4. On appeal, the Eleventh Circuit affirmed the officer's conviction under § 666(a)(1)(B) for accepting the bribes. Id. at *9. Beginning with the plain language of § 666, the Court noted that the statute merely required that the "business, transaction, or series of transactions" to which the bribes were directed involved "any thing of value" worth in excess of $5,000. Id. at * 4. Indeed, with respect to § 666, the Eleventh Circuit firmly held that "'any thing' means quite literally 'any thing whatever; something, no matter what.'" Id. (citation omitted). Townsend dispels any lingering doubts regarding whether bribes prohibited by § 666 must directly involve some tangible commercial benefit that is tied to federal money. Not only did the bribery at issue involve an intangible–freedom of movement–that had no connection whatsoever to a commercial, let alone

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not fairly included within the questions on which we granted certiorari.").

federal, interest, but the target of the bribe was a state, not federal, employee.

Other courts around the country have likewise agreed that the phrase "business, transaction, or series of transactions" should apply broadly. See, e.g., United States v. Bonito, 57 F.3d 167, 172 (2d Cir. 1995) (holding that the word "business" as used in § 666 includes "'work,' 'professional dealings,' 'one's proper concern,' and 'serious work or endeavor that pertains to one's job'"); United States v. Apple, 927 F. Supp. 1119, 1126-27 (N.D. Ind. 1996) (denying motion to dismiss indictment charging defendant with bribing an officer of the state environmental agency and concluding that the agency's primary business is preventing pollution, which is encompassed by § 666 even though such a "business" does not involve government contracting); United States v. Marlinga, No. 04-80372, 2006 WL 2086027, at *5 (E.D. Mich. July 25, 2006) (rejecting defendant's arguments that the prosecution of criminal cases was not a "business or transaction" under § 666 and holding that a prosecutor's job to properly, and without corrupt intent, proceed in criminal cases "is plainly" within the definition of "business" as used in § 666).

2. Proof of an agency relationship between the target of bribes and an entity that receives federal funds is sufficient to support charges under§ 666.

Defendant Gilley claims that if there were no requirement of a nexus between misconduct and federal funds under § 666, the statute would be virtually unlimited scope because any state employee could be charged in relation to bribery. This pointedly ignores the statute's agency requirement.

Section 666 criminalizes bribery that "influence(s) or reward(s) an agent of an organization or of a State" where that organization or State "receives, in any one year period, benefits in excess of $10,000 under a Federal program . . . ." The statute defines "agent" to mean "a person authorized

to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." § 666(d)(1). State legislators and legislative staff fall within the plain terms of this simple definition.

In United States v. Langston, 590 F.3d 1226 (11th Cir. 2009), the Eleventh Circuit identified two factors that help identify state agents under § 666: Such agents (1) act on behalf of the state and (2) are paid from state funds. Langston, 590 F.3d at 1234. Applying those two criteria here, there can be no question that a member of the Alabama State legislature is an agent of the State of Alabama. First, state legislators are "authorized to act on behalf of . . . a government,"§ 666(d)(1), in its most important affairs: passing laws in that state's name. Through the power to legislate, Alabama State legislators are agents of the Alabama State government for purposes of § 666(a)(2). So too are the employees of the Alabama State legislature mentioned in the Indictment, such as defendant Crosby, who help legislators draft bills. As "employees" and "servants" who serve the State of Alabama through its legislature, they also fall directly under the definition of government agents found in § 666(d)(1). What is more, Alabama State Legislators receive their salaries from state funds. Amendment 57 of the Alabama State Constitution of 1901 provides that "[t]he pay of the members of the legislature shall be ten dollars per day." Thus, in the context of § 666, state legislators are undoubtedly agents, regardless of whether they are paid or demand bribes in connection with federal programs.

Caselaw directly supports this conclusion. Under facts analogous to those in the Indictment, courts have affirmed convictions under § 666 in cases that involved the bribery of local and state agents in connection with activity unrelated to federal programs. See, e.g., United States v. Oros, 578 F.3d 703, 705 (7th Cir. 2009) (affirming conviction of a City of Chicago building inspector

charged with accepting bribes in exchange for expediting architectural plans through the City's approval process); Fernandes, 272 F.3d at 938 (affirming conviction of a local prosecutor who accepted bribes in exchange for accessing driver's license files and expunging convictions); United States v. Zimmerman, 509 F.3d 920, 926-27 (8th Cir. 2007) (affirming conviction of a city councilman for accepting items of value in exchange for influencing the councilman's vote on a zoning application); United States v. Guishard, 163 Fed. Appx. 114, 116 (3d Cir. 2006) (unpublished opinion) (affirming conviction of a conservation enforcement officer for accepting a bribe in return for misidentifying the suspect of an investigation), United States v. Lipscomb, 299 F.3d 303, 333 n.155 (5th Cir. 2002) (describing a city councilman whose duties included voting on local measures as an officer of that city).

For example, in Townsend, the agent in question was a state corrections officer who accepted bribes in exchange for overlooking violations of a defendant's supervised release. Townsend, No. 09-12797, 2011 WL at *1. The misconduct had no direct relation whatsoever to federal funds, and focused entirely on an intangible benefit, the defendant's freedom of movement. Id. Thus, the Eleventh Circuit established that § 666 does not require that a bribe involve federal funds. It is enough if the agent–whether it be a state corrections officer or a state legislator–who receives or demands the bribe is an agent of an organization or state that receives at least $10,000 in federal benefits.

Despite this widespread understanding, defendant Gilley urges the Court to view § 666 as requiring a direct connection between bribes and federal funds. He relies on caselaw that not only fails to support but actually contradicts his arguments, inapposite caselaw, and references that have no legal force.

For example, in an attempt to avoid the impact of Salinas on his arguments, defendant Gilley points to Lipscomb. Br. at 4-5. In doing so, he ignores the fact that the decision actually emphasizes that § 666 covers bribes that do not have "a direct effect on federal funds." Lipscomb, 299 F.3d at 314.

His reliance on Sabri v. United States, 541 U.S. 600 (2004) is likewise misplaced. Br. at 5-6. If anything, Sabri directly undercuts defendant Gilley's argument. Sabri concerned a real-estate developer who offered bribes to a city councilman who was a member of a local board, which had received in excess of $23,000,000 in federal funds, responsible for the development of city housing. Sabri, 541 U.S. at 602-03. The bribes were paid in exchange for the councilman's support with respect to the defendant's local real-estate interests, and had no connection whatsoever with federal funds. Id. Nevertheless, the Supreme Court upheld the constitutionality of § 666, recognizing that the statute did not require a connection between the charged criminal activity and federal funds. Id. at 606-07. Thus, Sabri emphasizes that the bribery alleged in Counts 1, 2, 4, 5, 8, 10, and 13 of the Indictment does not need to implicate federal funds.

In further support of his arguments, defendant Gilley also cursorily refers to decisions regarding Spending Clause limitations. Br. at 3.[3] Those decisions are inapposite. Sabri unequivocally rejects any constitutional need for a direct relationship between criminal activity and federal funds under § 666. Sabri, 541 U.S. at 608.

Defendant Gilley's dependance on dicta from Supreme Court dissents is similarly unavailing–that dicta has no force. Br. at 3, 9 (quoting Fischer v. United States, 529 U.S. 667, 689

[3] Citing South Dakota v. Dole, 483 U.S. 203, 207 (1987); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, n.3 (1981).

n.3 (2000); Evans v. United States, 504 U.S. 255, 291-92 (1992)). Nor does his strained attempt to exploit a quotation from a United States Department of Justice manual regarding § 666. Br. at 7. Whatever the import of the language that he quotes from the manual, it is not law.

In sum, defendant Gilley's motion cannot withstand the sheer bulk of caselaw presented above that flatly rejects the need for a connection between misconduct and federal funds under § 666.

II. THE INDICTMENT CONTAINS AMPLE INFORMATION REGARDING DEFENDANT GILLEY'S VIOLATIONS OF 18 U.S.C. § 666.

Eighty-eight paragraphs of the Indictment contain information regarding defendant Gilley's violations of § 666.[4] He nevertheless asks the Court to dismiss those charges because they do not specify the particular federal program for which the State of Alabama received funds from the United States in excess of $10,000, a detail that is tangential to his misconduct. Indeed, the information in the Indictment is more than sufficient.

"[I]t is axiomatic that an indictment is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgement under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." United States v. Woodruff, 296 F.3d 1041, 1046 (11th Cir. 2002) (internal quotation marks and citation omitted). Here, the Indictment closely tracks the essential elements of § 666(a)(2). See Indictment, ¶¶ 1-3, 27-28, 191-92, 195-96, 203-04, and 207-08. Specifically with respect to the statute's federal benefit requirement, the Indictment states that (1) the Alabama State Legislature was a political subdivision within the State of Alabama; the

[4] See Indictment, ¶¶ 28-45, 47, 48, 50-52, 54, 55, 59, 60, 62, 64-66, 76-79, 82, 85-87, 91-94, 96. 98, 100, 102, 104-11, 115, 119, 127, 133-137, 140, 142, 144-49, 151-53, 155, 160, 177, 183-86, 188, 190, 192, 196, 198, 204, 208, and 214.

State of Alabama received more than $10,000 per year in funds from the United States in fiscal years 2009 and 2010; and (3) members of the Alabama State Legislature were agents of the State of Alabama. Id., ¶¶ 1-3. What is more, the Indictment presents numerous particular details regarding conversations, transactions, and interactions with co-conspirators. See, e.g., 50-51, 62, 93, and 96. Such details not only notify defendant Gilley of the charges that he faces, but arm him with specific facts with which he can fashion his defense. Nothing more is required.

The elements of the offenses and the factual details presented in the Indictment express with great clarity the nature and circumstances of defendant Gilley's alleged violations of § 666. Thus, his argument that he requires knowledge of the specific federal program for which the State of Alabama received funding is unavailing. That information neither affects his substantive defense nor his ability to guard against double jeopardy. Indeed, the ample caselaw presented above clearly establishes that § 666 does not require a connection between charged bribery and a particular federal program.

Quoting language from Fischer v. United States, 529 U.S. 667 (2000), defendant Gilley tries to argue otherwise, but the facts in that case are distinguishable from the facts at issue here. Fischer concerned bribery with respect to a very specific federal program–Medicare. See Fischer, 529 U.S. at 670-71. Thus, the decision naturally focused on whether Medicare received federal dollars in a sense that was meaningful under § 666. In this case, however, the bribery allegations do not directly implicate federal dollars. And as the Eleventh Circuit demonstrated in Townsend, violating § 666 does not necessarily require bribes paid or demanded in order to influence federal funds. For purposes of the Indictment, it is sufficient that Alabama State legislators are agents of the State of Alabama, and that the State of Alabama received in excess of $10,000 from the United States during

the relevant time period.

CONCLUSION

For the foregoing reasons, the Court should deny defendant Gilley's Motion to Dismiss Federal Programs Bribery Counts for Failure to State an Offense

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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