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
	)	
LARRY P. MEANS.	)	

UNITED STATES' OPPOSITION TO DEFENDANT MEANS'S MOTION TO DISMISS AND PARTIAL BRIEF IN SUPPORT THEREOF

The United States of America, through undersigned counsel, hereby opposes defendant Means's Motion to Dismiss and Partial Brief in Support Thereof, Dkt. No. 474. Defendant Means's motion presents numerous and disparate arguments. Because those arguments ignore controlling authority and rely on a mistaken understanding of the law, his motion should be denied.

ARGUMENT

As an initial matter, a significant portion of defendant Means's motion consists of boilerplate assertions that the Indictment or specified counts in the Indictment are unacceptably "vague, uncertain, and confusing." Mot. ¶¶ 1-3, 12-16. These nearly verbatim recitations are conclusory and wholly unsupported by argument or the application of law to facts. As such, to the extent that he intends these assertions to constitute grounds for dismissal of the Indictment as a whole or the specified counts, they should be rejected.

In ¶¶ 4 and 8 of his motion defendant Means restates grounds for the dismissal of Counts 1, 6, and 7 of the Indictment that he discusses in greater detail in his Motion to Dismiss Charges under 18 U.S.C. § 666, Dkt. No. 480. In order to avoid needless repetition, the United States incorporates here its Opposition to Defendant Means's Motion to Dismiss Charges under 18 U.S.C. § 666, which

will be filed concurrently with the present brief.[1]

Furthermore, defendant Means argues, Mot. ¶ 5, that the Indictment is inappropriately vague with respect to Count 1, which charges him with conspiring under 18 U.S.C. § 371 to violate federal program bribery, 18 U.S.C. § 666. Specifically, he appears to allege that Count 1 improperly charges multiple offenses by (1) asserting that defendant Means and others conspired to commit federal program bribery, see Indict. ¶ 28, and (2) listing the elements for federal program bribery in a manner that tracks the statutory language, see Indict. ¶¶ 28A, 28B.[2] Unsurprisingly, defendant Means fails to refer to caselaw in support of this argument–because there is none. It is entirely appropriate to both charge a conspiracy and to specify the substantive offenses that define the conspiratorial objects. Indeed, to do otherwise might lead to the vagueness that concerns defendant Means by failing to inform defendants of the misconduct that characterizes the conspiracy.

Defendant Means continues, Mot. ¶ 6, by arguing that the Indictment fails to allege a quid pro quo linking campaign contributions paid to him with a corrupt intent in Counts 1, 6, and 7, which charge him with violating § 666. There is no controlling law that mandates such a quid pro quo. Even if there were such a law, the Indictment sufficiently pleads a clear connection between

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[1] Among the points that he briefly raises, Defendant Means also states in this paragraph that ¶ 26 of the Indictment is speculative, and would only "be applicable" if Senate Bill 380, the pro-gambling legislation that he was being bribed to support, had been passed along with a constitutional amendment to permit gambling in Alabama. Paragraph 26 notes that fiscal estimates prepared by the Alabama State legislature established that Senate Bill 380 would have generated over $5,000 in annual proceeds. Although Defendant Means claims that he addresses this point in greater detail in his Motion to Dismiss Charges under 18 U.S.C. § 666, Dkt. No. 480, he does not. Because he inexplicably raises this point in a cursory fashion, without explanation, clarification, or legal or factual support, it must be rejected.

[2] Defendant Means complains that "[m]ultiple offenses are alleged in the same indictment." Presumably, he means to argue that Count 1 is defective because multiple offenses are alleged in the same count.

campaign contributions involving defendant Means and official acts that the bribes were intended to influence.

In arguing his position, defendant Means incorrectly relies on McCormack v. United States, 500 U.S. 257, 273 (1991), and Evans v. United States, 504 U.S. 255, 268 (1992), which mandate quid pro quos in the context of the Hobbs Act, 18 U.S.C. § 1951. No controlling caselaw holds that such a requirement exists in the context of federal program bribery. To the contrary, the Eleventh Circuit recently concluded that proving a violation of § 666 does not require a quid pro quo.[3] United States v. McNair, 605 F.3d 1152, 1188 (11th Cir. 2010) ("[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."). Assuming, however, that campaign-contribution-based prosecutions for federal program bribery and honest services fraud require a quid pro quo, the Indictment sufficiently pleads such a showing with respect to defendant Means.

Defendant Means is not entitled to have the Indictment read in a manner that makes best sense to them, and no mandate requires the charging document to include the Latin phrase "quid pro quo." See United States v. Seminerio, 2010 WL 3341887, at *6 (S.D.N.Y. Aug. 20, 2010) ("[T]he Indictment need not utter the 'magic words' 'quid pro quo' or even 'bribe' or 'bribe receiving' or 'kickbacks'—so long as a jury could find that Seminerio understood what was expected as a result of the payments to exercise particular kinds of influence as opportunities arose."); see also United

[3] Likewise, at least one court in the Eleventh Circuit has refused to import the quid pro quo requirement into the honest services fraud doctrine. See United States v. Nelson, 2010 WL 4639236, at *2 (M.D. Fla. Nov. 8, 2010) ("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").

States v. Giles, 246 F.3d 966, 973 (7th Cir. 2001) (upholding bribery instruction in a Hobbs Act extortion despite that "the magic words quid pro quo were not uttered [in a challenged charge]"); United States v. Cincotta, 689 F.2d 238, 242 (1st Cir. 1982) ("But, to be sufficient, these elements need not always be set forth in haec verba. Indictments must be read to include facts which are necessarily implied by the specific allegations made."). This is especially true where the statutory test implies a required element. United States v. Aliperti, 867 F. Supp. 142, 145 (E.D.N.Y. 1994) ("[T]he requirement of a quid pro quo, rather than amounting to an additional element unspecified in the [Hobbs Act], is encompassed within the language of the statute itself."); United States v. Malone, 2006 WL 2583293, at *2 (D. Nev. Sept. 6, 2006) ("Although it is necessary to show quid pro quo where it is alleged that a campaign contribution is part of the illegal conduct, . . . a criminal indictment does not need to specifically allege quid pro quo."). But even without use of the specific words "quid pro quo," the Indictment alleges a clear link between corruption and defendant Means's solicitations for campaign contributions. Indeed, ¶ 35 of the document describes the quid pro quo with respect to the conspiracy spelled out in Count 1:

> It was a further part of the conspiracy that ROSS, MEANS, SMITH, and PREUITT would and did solicit and demand payments and campaign contributions from MCGREGOR and GILLEY and the lobbyists and other individuals working for them, including GEDDIE, COKER, MASSEY, WALKER and Lobbyist A, in return for their votes and support for pro-gambling legislation.

Each of the substantive federal program bribery charges faced by defendant Means incorporates at least 178 specific, detailed allegations regarding how and by whom that conspiracy was carried out. See Indict. ¶¶ 199 and 201. In particular, the allegations contained in ¶¶ 29 through 190 provide detailed descriptions of his misconduct, in addition to that of his co-conspirators,

thereby establishing the conspiracy to violate § 666 charged in Count 1.

Of the incorporated acts, nine pertain directly to defendant Means. See Indict. ¶¶ 74-82. These allegations make clear that in the months and days leading up to a vote on specific pro-gambling legislation, Senate Bill 380, defendant Means actively solicited campaign contributions in connection with such legislation. The allegations further identify the particular conversations in which the requests occurred. Specifically, the incorporated acts show the following:

- In late March 2010, in a call with defendant McGregor, defendant Means referred to pending pro-gambling legislation, noted that there was "nothing I want to do more than help you," and then suggestively added that he needed help in his upcoming reelection. Indict. ¶ 75.

- Also in late March 2010, through Lobbyist A and defendant Massey, defendant Means sought $100,000 in campaign contributions from defendant Gilley in exchange for his vote for the passage of pro-gambling legislation. See id. 76-82.

Accordingly, the Indictment alleges with precision the direct connection between defendant Means's demands for campaign contributions and the pending vote on the pro-gambling legislation. Taken as a whole, these acts and others in the Indictment comprise the factual basis of the federal program bribery charges as to defendant Means. The acts show with great clarity the specific intent of defendant Means in demanding campaign contributions in exchange for votes in support of pro-gambling legislation. Thus, even if those charges were required to include an explicit quid pro quo, the Indictment makes that showing.

Defendant Means's contention, Mot. ¶ 10, that Counts 19 and 20 of the Indictment fail to establish a quid pro quo between his demands for campaign support and an official act fails for the same reason. Counts 19 and 20 charge him with violating the Hobbs Act, which, as defendant Means correctly notes, require a quid pro quo. See Evans, 504 U.S. at 268; McCormack, 500 U.S.

at 273. Just as the federal program charges against defendant Means incorporate the overt acts from Count 1, Counts 19 and 20 likewise incorporate those same detailed allegations regarding the defendants and their misconduct. See Indict. ¶¶ 225, 227. Thus, Counts 19 and 20 include detailed facts regarding defendant Means's demands for campaign contributions in exchange for his vote to pass pro-gambling legislation, clearly establishing a link between the alleged bribery and official action.

In ¶ 10 of his motion, defendant Means argues that First Amendment protections prohibit the Indictment from charging his client for demanding campaign contributions as bribes. His arguments are baseless. Simply put, "the First Amendment does not protect political contributions made in return for an explicit promise by the official to perform an official act." United States v. Jackson, 72 F.3d 1370, 1376 (9th Cir. 1995); see also United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995) ("Assuming arguendo that certain marginal applications of section 1346 would impermissibly intrude on First Amendment rights, we hold that such potential problems with section 1346 are insubstantial when judged in relation to the statute's plainly legitimate sweep.")

Defendant Means further alleges, Mot. ¶ 7, that Count 1 of the Indictment improperly alleges multiple, rather than one, conspiracies. As defendant Means correctly suggests, a material variance between an indictment and the government's proof at trial may occur if the government proves multiple conspiracies under an indictment alleging only a single conspiracy. United States v. Seher, 562 F.3d 1344, 1364 (11th Cir. 2009). To determine whether a jury can find a single conspiracy, as opposed to multiple conspiracies, three factors must be considered: (1) whether the defendants shared a common goal; (2) the nature of the underlying scheme; and (3) the overlap of participants. United States v. Huff, 609 F.3d 1240, 1243 (11th Cir. 2010). "The existence of separate transactions

does not have to imply separate conspiracies if the co-conspirators acted in concert to further a common goal. . . . Each co-conspirator thus does not have to be involved in every part of the conspiracy." Id. (internal quotation marks omitted). Because the evidence that the government will introduce at trial easily fulfills these requirements, defendant Means's claim fails.

Turning to the first element, the Indictment states the defendants' common purpose clearly and succinctly: "the passage of pro-gambling legislation that was favorable to the business interests of MCGREGOR and GILLEY" through illicit means. Indict. ¶¶ 29, 31. To establish this common purpose, the government, at trial, will introduce audio and documentary exhibits as well as testimony including evidence described in over 150 overt acts. Id. ¶¶ 39-190. Even a cursory look at this evidence shows that each and every act establishes the common purpose of the ten remaining defendants. Because courts typically define the "common goal" broadly, this element poses no problem in the current prosecution. See United States v. Edouard, 485 F.3d 1324, 1347-48 (11th Cir. 2007) (finding that three different methods of importing cocaine into the United States fell within the common goal of bringing cocaine into the United States).

Similarly, the allegations set forth in the Indictment, especially the overt acts, establish unequivocally that there was an underlying scheme. Both gambling operators, defendants Gilley and McGregor, offered campaign contributions and other things of value in return for favorable votes on the pro-gambling legislation. Both worked through lobbyists and intermediaries—defendants Coker, Geddie, and Walker, as well as Jarrod Massey and Jennifer Pouncy (Lobbyist A)—to communicate the illicit offers. Both used these same lobbyists to hide the bribes by funneling money through political action committees and other organizations. Both depended upon defendant Crosby, who was paid $3,000 per month to draft legislation that would protect their business interests.

Moreover, the overt acts show, and the evidence will establish, that in connection with defendants Ross, Means, and Preuitt, as well as Legislator 1, they worked their targets simultaneously. See United States v. Moore, 525 F.3d 1033, 1043 (11th Cir.2008) (underlying scheme established by evidence that correctional officers charged with exchanging sex for contraband with inmates switched assignments to facilitate conduct, engaged in similar conduct with multiple inmates, threatened inmates who may have been in a position to report the conduct, and failed to turn other guards in for engaging in the same behavior).

The Indictment likewise satisfies the third and final of the Huff factors. Far from a collection of unconnected spokes, the Indictment in this case shows, and the evidence presented at trial will establish, a substantial overlap in participants, a strong interdependence among co-conspirators, and an immense amount of coordination and communication. For example, defendants Gilley and Walker, as well as Massey and Pouncy, all were involved in offering things of value to defendants Preuitt and Means at a time when defendants McGregor, Coker, and Geddie were doing the same. Defendants McGregor and Gilley, and various lobbyists for both the operators talked about the efforts in numerous conversations. The Indictment clearly shows that defendants Means and Preuitt were working together as "holdout" legislators. More importantly, defendant Coker was coordinating the offers being made by the two operators, traveling to each of the legislators hometowns to communicate the final package, or offer, in person. See Huff, 609 F.3d at 1244 (evidence that defendants were "fishing buddies," were treated by co-conspirator contractor to a hunting trip together, fraudulently used their government credit cards in the same way during the same period, and visited co-conspirators together sufficient to find overlapping participation and interdependence).

Finally, defendant Means's argument should be rejected because it is based on total conjecture and, as a result, is premature. No jury has been empaneled in this case and no evidence has been introduced. Yet, it is axiomatic that it is the jury's function to determine the question of fact as to whether the evidence establishes a single conspiracy. United States v. Adams, 1 F.3d 1566, 1584 (11th Cir.1993). In the unlikely event that the government, at the conclusion of all the evidence, has not clearly established that all defendants participated in a single overarching conspiracy, defendant Means may then seek an instruction for multiple conspiracies. See Edouard, 485 F.3d at 1348 ("[I]n determining whether to give an instruction for multiple conspiracies, the district court considers whether there is sufficient evidence for a reasonable jury to conclude that some of the co-conspirators were involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." (internal quotation marks omitted)). A dismissal at this juncture would deprive the jury of its constitutionally bestowed function.

Defendant Means also argues, Mot. ¶ 9, that the Indictment's incorporation of overt acts from Count 1 into ¶¶ 199 (Count 6) and 201 (Count 7) renders the latter counts improperly vague and confusing. Incorporation is permitted by the Federal Rules of Criminal Procedure, which dictate the pleading requirements of indictments: "A count may incorporate by reference an allegation made in another count." Fed. R. Crim. P 7(c)(1). Here, as described above, the overt acts that were incorporated into Counts 6 and 7 from Count 1 illustrate with great specificity the misconduct that characterizes defendant Means's violations of § 666. Indeed, the overt acts clearly and explicitly allege that in the period leading up to a vote on Senate Bill 380, defendant Means actively sought campaign contributions in exchange for his vote in favor of passing the legislation. See Indict. ¶¶ 74-82. Because the incorporation of the overt acts into Counts 6 and 7 actually serve to clarify–not

confuse or muddle–the federal program bribery charges that defendant Means faces, his argument should be rejected.

Counts 23 through 33 of the Indictment charge defendants Means, among other defendants, with violating 18 U.S.C. §§ 1341, 1343, and 1346 (honest services fraud). Defendant Means seeks the dismissal of those counts because the Indictment allegedly pleads insufficient details regarding the fraudulent scheme that is charged. Defendant McGregor made nearly identical claims in his Motion for a Bill of Particulars, Dkt. No 359, which the Court denied, Dkt. No. 429. In its denial the Court ruled that "the indictment does set forth with detail the allegations against McGregor for each count." Dkt. No. 429, at 2. The Court's denial of defendant McGregor's motion applies with equal force to defendant Means because Counts 22 through 33 describes a single scheme involving both defendants.

Defendant Means further argues that the honest services charges are fatally vague because they improperly incorporate overt acts in furtherance of a conspiracy detailed elsewhere in the Indictment. The Court rejected this contention, too, in its denial of defendant McGregor's Motion for a Bill of Particulars. Dkt. No. 429, at 2-3. Thus, there is no basis for the dismissal of Counts 23 and 33.

In ¶ 18 of his motion, defendant Means alleges that the mail and wire fraud allegations that constitute the honest services fraud charged in Counts 23 through 33 of the Indictment are impermissibly vague and uncertain. Specifically, he claims that the Indictment is defective because it fails to show that all the defendants participated in the predicate use of mail and wire communications that underlie the honest services fraud, and, furthermore, that none of the mailings involved him. Defendant Means's argument fails because it misconstrues the law. As the Eleventh

Circuit has emphasized, "so long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for the use of the mails." See, e.g., United States v. Munoz, 403 F.3d 1357, 1369 (11th Cir. 2006) ("[S]o long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for the use of the mails."). The same logic establishes that an indictment does not need to allege that each defendant charged in a wire fraud scheme caused a use of wire communications as part of the misconduct.

Finally, in ¶ 22, defendant Means raises in cursory fashion the argument that the honest services fraud charges that he faces should be dismissed because they are unconstitutionally vague under Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010). As he notes in his motion, defendant Means filed a separate Brief in Support of Motion to Dismiss (Regarding "Honest Services Charges"), Dkt. No. 479, regarding this issue. That brief is nearly identical to defendant McGregor's Second Motion to Dismiss, Dkt. No. 209, which the United States responded to in its Opposition, Dkt. No. 237, to defendant McGregor's Second Motion to Dismiss. Because of the close similarity, the government's Opposition should be deemed a response both to McGregor's Second Motion to Dismiss and Means's Brief in Support of Motion to Dismiss (Regarding "Honest Services Charges").

CONCLUSION

For the foregoing reasons, the Court should deny defendant Means's Motion to Dismiss and Partial Brief in Support Thereof.

Respectfully submitted,

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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 14th day of February, 2011.

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