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
	)	
JOSEPH R. CROSBY	)	

UNITED STATES' OPPOSITION TO DEFENDANT CROSBY'S MOTION TO DISMISS THE FEDERAL PROGRAM BRIBERY AND HONEST SERVICES CHARGES

The United States of America, through undersigned counsel, hereby opposes defendant Crosby's motion, Dkt. No. 469, to dismiss Counts 16 and 23 through 33, charging him with federal program bribery, 18 U.S.C. § 666(a)(2), and honest services mail and wire fraud, 18 U.S.C. §§ 1341, 1343 & 1346, respectively. Defendant Crosby borrows his arguments largely from motions filed elsewhere by defendant McGregor. Indeed, he focuses his entire honest services argument on the premise that, in a prosecution for bribery under § 1346, the government must prove an agreement to perform a specific official action. Mot. at 1-9. The government separately has responded to defendant McGregor's motion, Dkt. No. 208, addressing the same issue, arguing that Skilling v. United States, 130 S. Ct. 2896 (2010), did nothing to alter the viability of stream-of-benefits or retainer-theory bribery in the honest services context. Dkt. No. 237 at 11-13. Those arguments apply with equal force to defendant Crosby—indeed, the specific payments[1] at issue in defendant

[1] Defendant Crosby's reference, Mot. at 4, 7-8, to McCormick v. United States, 500 U.S. 257 (1991), and Evans v. United States, 504 U.S. 255 (1992), are especially misplaced in that those cases involved the appropriate quantum of proof required to prove extortion under color of official right, 18 U.S.C. § 1951(a)—not federal program bribery and honest services fraud—where the form of the payment was a campaign contribution—not monthly payments made by check directly to a non-legislator.

McGregor's motion (and the subject of the applicable portion of the government's response) were those made in the amount of $3,000 to defendant Crosby by defendant McGregor on a monthly basis.

Similarly, defendant Crosby's arguments concerning whether § 666 criminalizes bribes demanded, received, offered, or given in exchange for intangibles, such as legislative support for the passage of a bill, is taken nearly verbatim from defendant McGregor's First Motion to Dismiss, Dkt. No. 206. The United States responded to those arguments in its Opposition, Dkt. No. 238, to defendant McGregor's First Motion to Dismiss, demonstrating that caselaw, as well as statutory text and legislative history clearly show that § 666 does, in fact, prohibit bribery of the very sort at issue here. Furthermore, in its Notice of Supplemental Authority, Dkt. No. 413, the United States explained that United States v. Townsend, No. 09-12797, 2011 WL 102765, at *1 (11th Cir. 2011) (publication pending), squarely undercuts defendant McGregor and Crosby's crimped interpretation of the statute's broad ambit.

Likewise, defendant Crosby's arguments regarding the requirement to show a quid pro quo link between bribes and official action in the context of § 666 are materially identical to arguments also raised in defendant McGregor's Third Motion to Dismiss, Dkt. No. 450. In its Combined Opposition to Defendant McGregor and Coker's Third Motions to Dismiss, Dkt. No. pending at 7-8, which the United States will file concurrently with the present motion, the United States explained that no controlling law mandates such a requirement. Nevertheless, the Indictment sufficiently pleads such a showing with respect to defendant Crosby.

Defendant Crosby is not entitled to have the Indictment read in a manner that makes best sense to him, and no mandate requires the charging document to include the Latin phrase "quid pro

quo."[2] This is especially true where the statutory test implies a required element.[3] But even without use of the specific words "quid pro quo," the Indictment alleges a clear link between defendant Crosby's campaign support and the desire to influence official acts. Indeed, ¶ 34 of the document, which is incorporated into defendant Crosby's honest services charges, describes the quid pro quo:

> It was a further part of the conspiracy for members and staff of the Alabama Legislature, including MEANS, PREUITT, ROSS, SMITH, AND CROSBY, to enrich themselves by corruptly accepting payments, campaign contributions, and offers of payments and campaign contributions with the intent of being influenced and rewarded for supporting the business interests of MCGREGOR and GILLEY, in connection with pro-gambling legislation.

If that language were not enough, the charges plead with great specificity the details of defendant Crosby's corrupt dealings. In 25 separate paragraphs, the Indictment illustrates the manner in which defendant Crosby accepted $42,000, in monthly payments of $3,000, from defendant McGregor in exchange for making revisions to pro-gambling legislation. See Indict. ¶¶ 33, 156-81.

Taken as a whole, these acts comprise the factual basis of the federal program bribery as to defendant Crosby. They show with great clarity the specific intent of defendant Crosby to accept

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[2] 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 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.").

[3] 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.").

payments in exchange for revisions to pro-gambling legislation. Thus, even if the federal program bribery charges were required to include an explicit quid pro quo, the Indictment makes that showing.

CONCLUSION

For the foregoing reasons, the Court should deny defendant Crosby's Motion to Dismiss Federal Program Bribery and Honest Services Fraud Charges.

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/ Barak Cohen
Barak Cohen
Trial Attorney
Public Integrity Section
U.S. Department of Justice
1400 New York Ave., NW, Suite 12100
Washington, DC 20005
(202) 616-1969

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.

/s/ Barak Cohen
Barak Cohen
Trial Attorney
Public Integrity Section
U.S. Department of Justice
1400 New York Ave., NW, Suite 12100
Washington, DC 20005
(202) 616-1969