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 E. GILLEY	)	

UNITED STATES' OPPOSITION TO DEFENDANT GILLEY'S MOTION TO DISMISS ON FREE SPEECH AND DUE PROCESS GROUNDS

The United States of America, through undersigned counsel, hereby opposes defendant Gilley's motion to dismiss counts charging him with committing federal program bribery, 18 U.S.C. § 666(a)(2), and honest services mail and wire fraud, 18 U.S.C. § 1341, 1343 & 1346, on free speech and due process grounds. Dkt. No. 487. Defendant Gilley cites no law to support his conclusion that a private citizen paying a bribe in the form of a campaign contribution should be exempt from criminal liability, and his motion should be denied.

ARGUMENT

The laws at issue here—federal program bribery under 18 U.S.C. § 666 and honest services mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1346—criminalize bribery and fraud, not speech. That defendant Gilley's particular crimes involved some[1] campaign contributions—i.e., the payment or promise of campaign contributions in exchange for official action—does not somehow transform them into protected speech. See United States v. Jackson, 72 F.3d 1370, 1376 (9th Cir. 1995) ("[T]he First Amendment does not protect political contributions made in return for an explicit

[1] Although the entirety of defendant Gilley's argument involves the applicability of these statutes in the campaign-contribution context, he is charged with promising more than mere contributions—including a $1 million public relations job to Legislator 2 (Count Four). Defendant Gilley asserts no protected status for this bribe offer.

promise by the official to perform an official act."); see also Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."). Indeed, the Eleventh Circuit has already rejected a First Amendment challenge to the honest services statute. 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."). As such, the "safe harbor" he so desperately seeks under case law involving laws that directly and substantially implicate protected speech, Mot. at 8-11 (citing FEC v. Wisc. Right to Life, Inc., 551 U.S. 449 (2007) (ban on issue advocacy during certain periods prior to federal elections)), is unavailable to him.

And for good reason. Evident from his motion is the flawed belief that, in fact, the law permits him to reach an agreement whereby he may exchange (or agree to exchange) things of value—including campaign contributions—for specific official action. Mot. at 6 ("[A] constituent such as Gilley has the right to condition his campaign contribution on the representative's official action."). What he describes is a crime, regardless of the form of the payment. See, e.g., 18 U.S.C. § 201(b) (prohibiting bribery involving "anything of value"); id. § 666(a)(2) & (a)(1)(B) (same); 41 U.S.C. § 52 (anti-kickback statute) (same); see also United States v. Townsend, No. 09-12797, 2011 WL 102765, at *4 (11th Cir. 2011) (upholding § 666 conviction based on intangible thing of value); United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (upholding sex-for-official-action

bribery conviction and noting the "broad interpretation" of the term "thing of value" for purposes of the federal bribery statute, 18 U.S.C. § 201, which includes both tangible and intangible considerations without regard to "monetary worth"); United States v. Marmolejo, 89 F.3d 1185, 1191 (5th Cir. 1996) (same construction under federal program bribery statute, 18 U.S.C. § 666); cf. United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (reviewing intangibles held to be things of value, including amusement, sexual intercourse or the promise of sexual intercourse, the promise to reinstate an employee, and an agreement not to run in a primary election).

No court has ever held that a campaign contribution cannot form the basis of a bribe payment. Indeed, courts have not shied from approving of such prosecutions. United States v. Whitfield, 590 F.3d 325, 352-53 (5th Cir. 2009) (upholding honest services conviction where defendant claimed payments were campaign contributions); United States v. Siegelman, 561 F.3d 1215, 1224-28 (11th Cir. 2009) (upholding federal program bribery conviction under 18 U.S.C. § 666 involving receipt of campaign contributions as bribe), vacated and remanded on other grounds, Siegelman v. United States,130 S. Ct. 3542 (2010); United States v. Brewster, 506 F.2d 62, 77-78 (D.C. Cir. 1974) (holding that former version of federal bribery statute, 18 U.S.C. § 201, applied to illicit campaign contributions).

Thus, while such contributions may, in a vacuum, implicate core First Amendment speech, their use in furtherance of graft provides no shield from criminal liability. That principle has been settled since at least 1991, when the Supreme Court ruled in McCormick v. United States, 500 U.S. 257, 273 (1991), that campaign-contribution-based extortion under color of official right violated the Hobbs Act. As defendant Gilley concedes, the Court imposed an explicit quid pro quo requirement, but in no way prohibited such prosecutions. The next Term, the Court once again

reaffirmed the principle that extortion involving campaign contributions was punishable under the Hobbs Act. Evans v. United States, 504 U.S. 265, 268 (1992).

Thus, even assuming that the McCormick and Evans quid pro quo requirement applies to federal program and honest services fraud prosecutions,[2] defendant Gilley's constitutional challenge is at an end. As the Evans Court recognized, under common law "[e]xtortion by [a] public official was the rough equivalent of what we now describe as 'taking a bribe.'" Id. at 260. Bribery is exactly what the Indictment charges Gilley with in Counts 2, 4, 5, 8, 10, and 23 to 33, and he provides no basis for claiming that permissible contribution-based prosecutions in the Hobbs Act context somehow become impermissible when charged under § 666 or §§ 1341, 1343, and 1346.

Defendant Gilley's due process challenge under the void-for-vagueness doctrine similarly is misplaced. Again he cites no legal basis establishing the protected nature of paying bribes through campaign contributions. Nor does he provide any support for the bald claim that only the public official participant in a bribe transaction is liable under federal criminal law because the constituent participant somehow lacks appropriate notice of what conduct is prohibited. The Supreme Court has very recently upheld § 1346 against a vagueness challenge, without a single word of caution regarding its implications in the contribution context. Skilling v. United States, 130 S. Ct. 2896

[2] Recently the Eleventh Circuit has concluded that a 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."). And 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").

(2010). Similarly, the Eleventh Circuit previously has upheld § 666 against a vagueness challenge. United States v. Edgar, 304 F.3d 1320, 1327-28 (11th Cir. 2002). Moreover, the mail and wire fraud statutes (which form the predicate of the honest services charges) and the federal program bribery statute each require proof of criminal intent. 18 U.S.C. § 1341 (intent to defraud), § 1343 (same), § 666(a)(2) (requiring corrupt intent). Inclusion of a mens rea element blunts due process concerns. See, e.g., Skilling, 130 S. Ct. at 2933 ("As to fair notice, whatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud, and the statute's mens rea requirement further blunts any notice concern." (internal quotation marks and citations omitted)); Waymer, 55 F.3d at 568-69; cf. United States v. Sattar, 314 F. Supp. 2d 279, 303 (S.D.N.Y. 2004) ("The statute lays out with sufficient definiteness what is prohibited, and the specific intent that is required . . . .").

Nevertheless, Gilley claims that the statutes are unconstitutional as applied in this case.[3] He makes no effort to describe how his conduct falls outside the legitimate sweep of either statute. The Indictment makes clear, however, that his conduct is exactly what the statutes at issue were meant to address. For example, these allegations establish the following:

- In March 2009, defendant Gilley, along with defendant Smith and Jarrod Massey, offered to provide campaign support to Legislator 1 in exchange for Legislator 1's support of specific pro-gambling legislation. See, e.g., Indict. ¶¶ 41, 43.

[3] Defendant Gilley makes no attempt to challenge either statute on its face. "The possibility of a substantial number of realistic applications in contravention of the First Amendment . . . suffices to overturn a statute on its face." Massachusetts v. Oakes, 491 U.S. 576, 595-96 (1989). Despite his unsupported digression into discussion of the strict scrutiny standard, Mot. at 10-11, he simply cannot establish that the federal program bribery or honest services statutes raise the specter of substantially inappropriate applications such that his conduct is either protected or that the statutes must withstand such a test.

- In February 2010, defendant Gilley, along with defendant McGregor, as well as Massey, offered Legislator 2 $1 million per year in connection with a public relations job in exchange for Legislator 2's vote in favor of pro-gambling legislation. See, e.g., id. ¶¶ 47, 50-51, 54, 59, 60, 62, 64.
- In March 2010, defendant Gilley, along with Massey and Pouncy, offered $100,000 in campaign contributions to defendant Means in exchange for his vote on SB380. See, e.g., id. ¶¶ 77-79.
- In March 2010, defendant Gilley, along with Massey, Pouncy, and defendants Coker and McGregor, offered various things of value to defendant Preuitt in exchange for his vote on SB380. See, e.g., id. ¶¶ 85-87, 90-94, 100-105, 106-108, 115.
- From late December 2009 through March 2010, defendant Gilley, through Massey and Pouncy, agreed to provide defendant Ross with campaign contributions in connection with his vote on pro-gambling legislation. See, e.g., id. ¶¶ 119, 125, 127.
- From December 2009 through March 2010, defendant Gilley, along with Massey, Walker, and Pouncy, provided hundreds of thousands of dollars in campaign contributions to defendant Smith in exchange for her vote on SB380 and efforts to seek additional support and votes from other legislators. See, e.g., id. ¶¶ 135, 137,140, 144-152.

These acts, and others, form the factual basis as to the substantive federal program bribery and honest services charges involving defendant Gilley. See, e.g., Indict. ¶¶ 192, 196, 198, 204, 208 & 214 (federal program bribery under 18 U.S.C. § 666(a)(2)), ¶¶ 234-236 (honest services mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1346). In light of the detailed factual allegations,

linking various things of value, including campaign contributions, with desired official action, defendant Gilley cannot plausibly complain that his conduct is somehow protected by the legitimate speech and notice concerns embodied in the First and Fifth Amendments, respectively. The Court should deny his motion to dismiss.

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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