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 FOR FAILURE TO INFORM THE GRAND JURY OF THE ELEMENTS OF 18 U.S.C. §§ 2, 666, 1341, 1343 & 1346

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, for failure to allege an explicit quid pro quo. Dkt. No. 488. Defendant Gilley's argument rests on a faulty reading of the law of pleading, and his motion should be denied.

ARGUMENT

"An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Woodruff, 296 F.3d 1041, 1046 (11th Cir. 2002). The government need not allege its theory of the case or list its supporting evidence. See United States v. Musacchio, 968 F.2d 782, 787 (9th Cir. 2001). "When analyzing challenges to the sufficiency of an indictment, courts give the indictment a common sense construction." United States v. Poirier, 321 F.3d 1024, 1029 (11th Cir. 2003). "Linguistic precision is not required." United States v. deVegter, 198 F.3d 1324, 1330 (11th Cir. 1999); United States v. Alber, 56 F.3d

1106, 1111 (9th Cir. 1995); see also 1 Charles A. Wright et al., Federal Practice and Procedure § 125, at 388 (1982) (noting that an indictment is not defective "simply because it might have been made more certain"). Indeed, "[w]hile detailed allegations might well have been required under common-law pleading rules, they surely are not contemplated by Rule 7(c)(1), which provides that an indictment 'shall be a plain, concise, and definite written statement of the essential facts constituting the offense charge.'" United States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007) (citation omitted).

Defendant Gilley concedes that the federal program bribery and honest services fraud charges track the statutory language of each relevant statute. Mot. at 3. Nor does he challenge the proper incorporation of at least[1] 178 overt acts alleged in Count 1, the conspiracy count, in each substantive count in which he is charged. This level of detail clearly goes beyond that which Rule 7 requires.

Nevertheless, he argues that the Indictment insufficiently pleads the explicit quid pro quo requirement for campaign-contribution-based extortion under color of official right announced in McCormick v. United States, 500 U.S. 257, 273 (1991). Id. (holding 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"); see also Evans v. United States, 504 U.S. 255, 268 (1992) (approving jury instruction in campaign-contribution Hobbs Act case and holding, pursuant to McCormick, 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").

[1] The federal program bribery counts incorporate 178 overt acts, and the honest services fraud counts incorporate 188, including the purposes and manner and means of the conspiracy.

Defendant Gilley's argument fails for several reasons. As an initial matter, he is not charged with a Hobbs Act violation for extortion under color of official right, see 18 U.S.C. § 1951(a), which applies only to public officials. He makes no reasoned attempt to explain how the explicit quid pro quo requirement of McCormick and Evans applies to either federal program bribery or honest services mail or wire fraud.[2] There is no controlling case law holding that such a requirement—for campaign-contribution or non-campaign-contribution cases—applies outside the Hobbs Act. 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 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, 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."). Nowhere did the McNair court suggest that the standard would be any different depending on the particular thing of value exchanged. And at least one court in the Eleventh Circuit has refused to

[2] Defendant Gilley cites language from United States v. Kincaid-Chauncey, 556 F.3d 923, 926 (9th Cir. 2009), and dicta from United States v. Ganim, 510 F.3d 134, 142 (2d Cir. 2007), Mot. at 2-3, neither of which apply McCormick's standard outside the Hobbs Act.

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").

For the sake of argument, however, assuming that the McCormick/Evans requirement of an explicit quid pro were applicable to campaign-contribution-based prosecutions for federal program bribery and honest services fraud,[3] such an exchange is sufficiently pled with respect to defendant Gilley. He is not entitled to have the document read in a way that makes most sense to him, and there is no mandate that the charging document include the Latin phrase quid pro quo.[4] 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

[3] The Eleventh Circuit in United States v. Siegelman did not reach the question of whether an explicit quid pro quo instruction was warranted in the § 666 context because the district court actually gave an instruction that was even more stringent than the one approved of in Evans. United States v. Siegelman, 561 F.3d 1215, 1225-27 (11th Cir. 2009) (per curiam), vacated and remanded on other grounds, Siegelman v. United States,130 S. Ct. 3542 (2010).

[4] Nevertheless, paragraph 35 of the Indictment, which is incorporated in the honest services charges, actually spells out the quid pro quo: "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." Indict. ¶ 35 (emphasis added).

"the magic words quid pro quo were not uttered [in a challenged charge]"). This is especially true where a required element is implicit in the statutory text. 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."); see also Resendiz-Ponce, 549 U.S. at 107 (holding that "indictment at bar implicitly alleged that the respondent engaged in the necessary overt act simply by alleging that he 'attempted to enter the United States.'" (emphasis added)).

To that end, the Indictment alleges in great detail the specifics of defendant Gilley's corrupt agreements with public officials. For example, these allegations make clear 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.
- 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). As a result, even if an explicit quid pro quo were required in a charging document with respect to federal program bribery and honest services fraud, that is exactly what the grand jury has charged as to defendant Gilley.

In light of the detailed allegations contained in the Indictment, defendant Gilley is "adequately informed of the charges against him and [is] accorded the opportunity to plan his defense accordingly." Martell, 906 F.2d at 558. The Indictment properly pleads the federal program bribery and honest services charges, and defendant Gilley is entitled to no more. The Court should deny his motion.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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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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