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
	)	
QUINTON T. ROSS, JR.	)	

UNITED STATES' OPPOSITION TO DEFENDANT ROSS'S MOTION TO DISMISS REGARDING HOBBS ACT CHARGES

The United States of America, through undersigned counsel, hereby opposes defendant Ross's motion, Dkt No. 469, to dismiss Counts 17 and 18, charging him with committing extortion "under color of official right." 18 U.S.C. § 1951. Because the Hobbs Act counts are sufficiently alleged to put defendant Ross on notice of the allegations against him and thereby permit him to prepare his defense, the Court should deny his motion to dismiss these counts.

ARGUMENT

Defendant Ross argues at length that the Indictment is insufficient because it fails to allege an offense under the Hobbs Act. Specifically, defendant Ross relies on the Supreme Court's decisions in McCormick v. United States, 500 U.S. 257 (1991), and Evans v. United States, 504 U.S. 255 (1992), for the proposition that the Indictment must allege an explicit quid pro quo evidencing an exchange of official action for personal benefit. The detailed factual allegations contained in the Indictment make clear the link between his solicitation of campaign contributions from defendants McGregor, Gilley, Coker, and Massey, as well as Jennifer Pouncy (Lobbyist A), and a specific official action: his vote on SB380. The Indictment provides ample detail to enable defendant Ross to prepare his defense to the crimes with which he is charged, including the Hobbs Act counts. This

readily satisfies the liberal pleading standard applicable to criminal indictments. Fed. R. Crim. P 7(c)(1).

I. Applicable Law

"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). Counts 17 and 18 of the Indictment provide far more detail than is required and defendant Ross cannot plausibly claim he lacks notice of the conduct forming the basis of the extortion charges or would be unable to claim double jeopardy in some future prosecution.

II. The Indictment Clearly and Properly Alleges Extortion Under Color of Official Right

The Hobbs Act, as it is charged here, punishes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). The statute defines "extortion" as "the obtaining of property from another, with his consent . . . under color of official right." Id. § 1951(b)(2).

It is beyond question that Counts 17 and 18 track the statutory elements. See Indict. ¶¶ 221-224. Moreover, rather than simply "parroting the language" of the statute, Resendiz-Ponce, 549 U.S. at 109, each count specifies both the time period of the offense, Indict. ¶ 222 ("in or about March 2010"), ¶ 224 ("in or about December 2009 through in or about March 2010"), as well as the conduct at issue and the individuals defendant Ross attempted to extort. Id. ¶ 222 ("ROSS, while serving as a member of the Alabama Senate, engaged in a course of conduct, whereby ROSS solicited and, directly and through others, pressured MCGREGOR and COKER, under the color of official right, to consent to provide an unspecified amount of campaign contributions for the benefit of ROSS, which money was not due to ROSS"), ¶ 224 ("ROSS, while serving as a member of the Alabama Senate, engaged in a course of conduct, whereby ROSS solicited and, directly and through others, pressured GILLEY, MASSEY, and Lobbyist A, under the color of official right, to consent to provide approximately $25,000 in campaign contributions for the benefit of ROSS, which money was not due to ROSS").

Although the charging language "fairly informs" defendant Ross of his alleged extortionate conduct, Hamling, 418 U.S. at 117, Counts 17 and 18 also expressly incorporate 178 allegations from elsewhere in the Indictment, Indict. ¶¶ 221 & 233, including twenty-six general allegations, id.

¶¶ 1-26, and 152 overt acts in furtherance of the charged conspiracy, id. ¶¶ 39-190. This sort of express incorporation is permitted by Rule 7's very language: "A count may incorporate by reference an allegation made in another count." Fed. R. Crim. P 7(c)(1).

Of the 178 incorporated allegations, fifteen pertain directly to defendant Ross. These allegations make clear that in the months and days leading up to a vote on SB380, defendant Ross actively solicited campaign contributions in connection with such legislation, and they identify the particular conversations in which the requests occurred. Specifically, in late December 2009 or early January 2010, defendant Ross demanded campaign contributions from defendant Gilley and Jarrod Massey, through Jennifer Pouncy, claiming that he was not "feeling the love" after sponsoring pro-gambling legislation during the 2009 legislative session. Indict. ¶¶ 20, 119. Later, as the legislative session progressed, defendant Ross introduced competing pro-gambling legislation on March 9, 2010, id. ¶ 124, before demanding additional campaign contributions in the amount of $25,000 from Massey, id. ¶ 125, who backed SB380.

Nor were defendant Ross's solicitations confined to defendant Gilley, Massey, and Pouncy. Indeed, defendant Ross also sought campaign contributions from one of defendant McGregor's principal lobbyists, defendant Coker, id. ¶¶ 126-127, and ultimately from defendant McGregor personally. To that end, the Indictment alleges with precision the direct connection between defendant Ross's demands for campaign contributions and the pending vote on the pro-gambling legislation. In a conversation the day before the vote on SB380, defendant Ross allegedly asked defendant McGregor,"You feel like you got the twenty-one [votes] in the Senate?" id. ¶ 128. Defendant McGregor responded that he was "cautiously optimistic." Later in the very same conversation, defendant Ross repeatedly solicited campaign contributions. Id.

And if the connection between defendant Ross's demand for contributions and the vote on SB380 were not sufficiently clear, in a conversation the next day—the day of the actual vote, March 30, 2010—defendant Ross again solicited contributions, stating "we're just getting down to the wire." Putting a fine point on this understanding, defendant Ross told defendant McGregor that "we know the window is closing on us fast and so I'm just trying to do everything I can to, uh, make sure I can raise [funds] . . . ." Id. ¶ 129. In response, defendant McGregor promised to help however he could. Id. These allegations, coupled with the charging language in Counts 17 and 18, which tracks the statute, satisfy Hamling and establish the Indictment's facial sufficiency.

III. The Indictment Adequately Incorporates the McCormick/Evans Quid Pro Quo Requirement

Defendant Ross downplays the Indictment's detailed factual recitation and statutory citation, arguing that the charging document must allege an explicit quid pro quo, establishing an exchange of official action for some personal benefit, and that it failed to do so. His argument misconstrues the relevant case law and, again, takes a cribbed viewed of the Indictment. While the Indictment does not include the Latin phrase, it clearly conveys the critical charge of an exchange of things of value for a specific official. That is all the law requires. 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.").

A. McCormick and Evans

Defendant Ross's argument proceeds from McCormick v. United States, 500 U.S. 257

(1991), which held, in a Hobbs Act prosecution for extortion "under color of official right," 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." Id. at 273 (emphasis added). McCormick involved a state legislator's acceptance of campaign contributions in exchange for support on legislation benefitting the contributors. Id. at 259-60. The jury was instructed that, to find that the legislator had induced the payments "under color of official right," see 18 U.S.C. § 1951(b)(2), it needed to find only that the contributors had made the payment with the expectation that the legislator would take future action that benefitted him, and that the legislator "accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office." 500 U.S. at 261 n.4 (emphasis added).

Reversing the conviction, the Supreme Court expressed concern that the absence of a quid pro quo requirement "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributors or expenditures, as they have been from the beginning of the Nation." Id. at 272. By requiring an explicit quid pro quo, the Court protected honest legislators from criminal liability "when they act[ed] for the benefit of constituents or support[ed] legislation further the interests of some of their constituents, shortly before or after campaign contributions [we]re solicited and received from those beneficiaries." Id.

The following Term, the Court held in Evans v. United States, 504 U.S. 255, 256-58 (1992), that an affirmative act of inducement by a public official, such as a demand or request for a payment, is not an element of extortion "under color of official right." Evans, too, was a campaign-

contribution case, in which the payments were purported contributions to the petitioner's campaign for election to a county board. Id. at 257. In affirming the decision of the Eleventh Circuit, the Evans Court, informed by McCormick, approved the following jury instruction:

> The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 257-58.

The Court explained further 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." Id. at 268. The district court's instruction, which did not require the jury to find an express promise or agreement between the official and payor, "satisfie[d] the quid pro quo requirement of McCormick." Id.

As the Sixth Circuit has explained, Evans clarified that the McCormick quid pro quo standard "is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing the payment was made in return for official acts is enough)." United States v. Blandford, 33 F.3d 685, 696 (6th Cir. 1994). The court continued:

> Evans provided a gloss on the McCormick Court's use of the word "explicit" to qualify its quid pro quo requirement. Explicit, as explained in Evans, speaks not to the form of the agreement between the payor and the payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms

> were articulated. Put simply, Evans instructed that by "explicit," McCormick did not mean express.

Id.

Other courts agree that, under Evans, an explicit quid pro quo does not require an express agreement or promise, but rather requires only that the payor and official clearly understand the terms of the bargain. See, e.g., United States v. Inzunza, 580 F.3d 894, 900 (9th Cir. 2009) ("An official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. In return for it, I promise to return your bill tomorrow.'" (emphasis in original)); 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); United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2001); United States v. Tucker, 133 F.3d 1208, 1215 (9th Cir. 1998); United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995); see also United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992) (holding in pre-Evans case that "[under] McCormick, the explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous"); cf. United States v. Massey, 89 F.3d 1433, 1439 (11th Cir. 1996) (holding that bribery conviction under general federal bribery statute, 18 U.S.C. § 201, may be supported by "inferences drawn from relevant and competent circumstantial evidence"). But see Ganim, 510 F.3d at 142 (noting in dicta that McCormick requires "proof of an express promise . . . when the payments are made in the form of campaign contributions."). Indeed, a rule requiring an "express" agreement or promise between the payor and official would allow officials to evade criminal liability through "knowing winks and nods," even where a meeting of the minds occurred to exchange money for official action. Evans, 504 U.S. at 274 (Kennedy, J., concurring).

These cases make clear that the government must charge and prove an exchange of property/money for a specific official act. That is precisely what the Indictment does here.

B. The McCormick Quid Pro Quo Requirement Is Inherent in the Statutory Language of the Hobbs Act and Need Not Be Pled Using Particular Words

Further, in Evans the Supreme Court provided a detailed examination of the history and meaning of the terms "extortion" and "under color of official right." 504 U.S. at 259-260. In doing so, the Court explained that

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Id. at 259. The Court proceeded to examine the common-law definition of extortion—"an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties"—and held that the definition encompasses the concept of a quid pro quo: "[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." Id. at 268; id. 268 n.20 (reiterating that the quid pro quo requirement "is derived from the statutory language 'under color of official right,' which has a well-recognized common-law heritage").

In light of the Evans Court's analysis, other courts have held that "the requirement of a quid pro quo, rather than amounting to an additional element unspecified in the statute, is encompassed within the language of the statute itself." United States v. Aliperti, 867 F. Supp. 142, 145 (E.D.N.Y.

1994); 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."). Because the term "under color of official right," as used in the Hobbs Act, is a term of art and not generic in nature, its definition, encompassing the quid pro quo requirement, "need not be alleged in the indictment in order to establish its sufficiency." Hamling, 418 U.S. at 118-19;[1] cf. United States v. Russell, 639 F. Supp. 2d 220, 236 (D. Conn. 2007) ("[T]he term 'nexus,' like the terms 'obscenity' in the statute criminalizing the mailing of obscene material, 'overt act' in the illegal reentry statute, and 'quid pro quo' in the federal extortion statute, is not a generic or descriptive term that must be alleged with the factual specificity required by Russell [v. United States, 369 U.S. 749, 764 (1962)].") (citing Resendiz-Ponce, 549 U.S. at 107 ("attempt" in illegal reentry statute), Hamling, 418 U.S. at 117 ("obscenity" in 18 U.S.C. § 1461), Aliperti, 867 F. Supp. at 145 ("quid pro quo" in 18 U.S.C. § 1952(b)(2))); see also United States v. Agostino, 132 F.3d 1183, 1190 (7th Cir. 1997) (holding that despite 18 U.S.C. § 666's requirement of a quid pro quo under circuit authority, such authority "was not positing an additional element to the statutory definition of the crime, but instead was explaining the sine qua non of a violation of § 666"); id. ("Section 666(a)(2), by its statutory language, requires that the defendant act "corruptly . . . with intent to influence or reward." This

[1] Although Justice Kennedy referred to the quid pro quo requirement as an "element" of the offense of extortion, he explained that "this essential element of the offense is derived from the statutory requirement that the official receive payment under color of official right." Evans, 504 U.S. at 275 (Kennedy, J., concurring) (emphasis added). "Moreover, the concurring opinion focused upon what the Government must prove at trial, and in no way intimates whether a quid pro quo must be identified in the indictment." Aliperti, 867 F. Supp. at 145 n.4.

intent, and not any specific quid pro quo, is what must be alleged in the indictment.").[2]

The Supreme Court's decision in United States v. Resendiz-Ponce, 549 U.S. 102 (2007), provides a useful analog. In Resendiz-Ponce, Justice Stevens reversed the Ninth Circuit's dismissal of a Mexican national's conviction for illegal reentry based on the court of appeals' view that the indictment improperly omitted an overt act from the charging language. Id. at 102. First, the Court confirmed that proof of an overt act "qualifying as a substantial step toward completion of his goal" was required for conviction under the illegal reentry statute. Noting that "'[a]n indictment must set forth each element of the crime that it charges,'" id. at 107 (quoting Almendariz-Torres v. United States, 523 U.S. 224, 228 (1998)), Justice Stevens nevertheless determined that the "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.'" Id. (emphasis added). In reaching this conclusion, the Court's analysis was informed by the use of the word "attempt" in common parlance and "in the law for centuries." Id. As a result, Resendiz-Ponce illustrates the principle—wholly applicable here—that the definition of a statutory element need not be spelled out in an indictment. Id. (citing Hamling, 418 U.S. at 119). Defendant Ross's suggestion that the Indictment must use particular words to allege an explicit quid pro quo under McCormick and Evans misses the point. The charging document alleges that defendant Ross committed extortion "under color of right," Indict. ¶¶ 122 & 124, the definition of which implicitly contains the quid pro quo requirement, which in turn

[2] In United States v. Blitch, 2008 WL 5115028 (M.D. Ga. Dec. 4, 2008), the court dismissed a Hobbs Act count, where the indictment insufficiently alleged a quid pro quo. Id. at *2-4. However, the court's decision was animated by the indictment's allegation that the offer of a quid (re-instatement of associate magistrate judge) took place after the alleged quo (favorable action by magistrate judge against defendant's debtor). Id. at *3. Blitch is therefore distinguishable in so far as defendant Ross's solicitations of campaign contributions in the context of the pro-gambling legislation occurred prior to his vote.

involves the exchange of property for official acts. The Indictment identifies both the property and the official act to be exchanged. No further clarification is required.

C. The Indictment Sufficiently Alleges a Quid Pro Quo

As such, even if the law required that a charging document allege an explicit quid pro quo in an extortion "under color of official right" prosecution involving campaign contributions, the Indictment here sufficiently alleges the requisite agreement under McCormick and Evans. As noted, during the pendency of SB380 before the Alabama Senate, defendant Ross actively solicited campaign contributions, while making explicit reference to pro-gambling legislation. Shortly before pressing Massey for additional campaign contributions in March 2010, defendant Ross introduced competing pro-gambling legislation—after telling Jennifer Pouncy that he was not "feeling the love." Further, when defendant Ross spoke to defendant McGregor the day before and day of a vote on SB380, defendant Ross (1) asked whether defendant McGregor thought there were sufficient votes to pass the bill, (2) solicited campaign contributions during the same conversation, and (3) told defendant McGregor "the window is closing on us fast." These allegations make clear what was to be exchanged between defendant Ross and defendant Gilley (along with Massey and Pouncy) in Count 17, and defendants McGregor and Coker in Count 18. Defendant Ross simply is not entitled to have the document read in a way that makes most sense to him. See Giles, 246 F.3d at 973 (upholding bribery instruction in a Hobbs Act extortion despite that "the magic words quid pro quo were not uttered [in a challenged charge]"); Seminerio, 2010 WL 3341887, at *6.

Defendant Ross complains that these allegations do not establish a quid pro quo under McCormick and Evans. Indeed, he spends the bulk of his brief challenging the government's evidence. His argument is misplaced. If he wishes to challenge the sufficiency of the government's

evidence at trial, he may do so through arguments to the jury, cross-examination of government witnesses, and a Rule 29 motion. That sufficiency argument is wholly separate from the simple inquiry of whether the Indictment puts him on adequate notice to defend his conduct. Cf. Russell, 639 F. Supp. 2d at 235 ("Not only does Russell misread the factual allegations in the indictment, his argument as to what must be pleaded in an indictment . . . is wrong in that it conflates permissible claims based on sufficiency of the government's allegations with impermissible claims based on the sufficiency of the government's evidence." (emphasis added)).[3] Similarly—and fatal to defendant Ross's argument that the facts as alleged do not establish his intent—the government is under no obligation to allege in an indictment its theory of intent. Agostino, 132 F.3d at 1190-91.

Under Rule 7(c)(1) and applicable case law construing the requirements of an indictment, a common sense review of the charging document here reveals that the grand jury has provided defendant Ross with more than he is entitled. His constitutional right "is to know the offense with which his is charged, not to know the details of how it will be proved." United States v. Kendall, 665 F.2d 126, 135 (7th Cir. 1981). At this stage of the proceedings, nothing more is required, and the Court need not engage in an analysis of the facts underlying the extortion charges. Costello v. United States, 350 U.S. 359, 363 (1956); United States v. Thomas, 348 F.3d 78, 82 (5th Cir. 2003).[4]

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[3] Defendant Ross's suggestion that the instant prosecution, involving promises of campaign contributions, somehow implicates due process concerns is similarly a dressed-up sufficiency-of-the-evidence challenge. Mot. at 17-18. He cannot plausibly assert that contribution-based prosecutions under the Hobbs Act are constitutionally suspect, as McCormick and Evans establish their viability.

[4] Defendant Ross's challenge to the aiding and abetting language is also misplaced. Aiding and abetting is a theory of liability (and not a substantive offense in and of itself), and there is no requirement that a criminal indictment even allege it. United States v. Martin, 747 F.2d 1404, 1407 (11th Cir.1984) (stating that "[a]iding and abetting need not be specifically alleged in the indictment; assuming the evidence supports it, the accused can be convicted of aiding and abetting so long as the jury is instructed on it"). Further, the government is under no obligation to detail for defendant

CONCLUSION

For the foregoing reasons, the Court should deny defendant Ross's motion to dismiss Counts 17 and 18.

Respectfully submitted,

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Ross its legal theory of liability under § 2 in an indictment. United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir. 1980).

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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