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 HONEST SERVICES CHARGES

The United States of America, through undersigned counsel, hereby opposes defendant Ross's motion to dismiss Counts 23 through 33, charging him with honest services mail and wire fraud, in violation of 18 U.S.C. § 2, 1341, 1343, and 1346. Defendant Ross spends the bulk of his energy arguing that campaign-contribution-based prosecutions are improper under the law of honest services following the Supreme Court's decision in Skilling v. United States, 130 S. Ct. 2896 (2010), and that non-campaign-contribution bribery must involve a specified official action. Mot. at 2-21. These arguments merely rehash those made by defendant McGregor in a similar motion he filed regarding § 1346. Dkt. No. 208. The United States has made clear in response to that motion that defendant McGregor's position is legally flawed and should be rejected. Dkt. No. 237. Those arguments apply with equal force to defendant Ross, and the Court should likewise reject his position.

Defendant Ross uses the remainder of his brief to argue that the honest services charges, Counts 22 through 33, are insufficient to allege an offense. Because the honest services 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 a required element of an honest services prosecution. Specifically, defendant Ross relies on the Supreme Court's decisions in McCormick v. United States, 500 U.S. 257 (1991), for the proposition that the Indictment must allege an explicit quid pro quo evidencing an exchange of official action for personal benefit. However, defendant Ross's myopic reading of the detailed factual allegations contained in the Indictment ignores the clear link between his solicitation of campaign contributions from defendants McGregor, Gilley, Coker, as well as Jarrod Massey and Jennifer Pouncy (Lobbyist A), and a specific official action: his vote on SB380. Defendant Ross benefits from such specificity—the degree of which is not required—and can prepare his defense to the crimes with which he is charged, including the honest services charges.

"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 23 to 33 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.

It is beyond question that Counts 3 and 23 through 33 track the appropriate statutory elements of honest services mail and wire fraud, respectively. Compare ¶¶ 234-236, with 18 U.S.C. §§ 1341, 1343, 1346. Moreover, rather than simply "parroting the language" of the statute, Resendiz-Ponce, 549 U.S. at 109, these charges specify both the time period of the offense, Indict. ¶ 234 ("in or about February 2009 through in or about August 2010"), and notify the defendants that their alleged scheme was devised to "deprive the State of Alabama, the Legislature, the Legislative Reference Service, and the citizens of Alabama of their right to the honest services of elected members and employees of the Legislature through bribery and concealment of material information," id. ¶ 234.

Although the charging language "fairly informs" defendant Ross of his alleged conduct, Hamling, 418 U.S. at 117, the honest services counts expressly incorporate 188 allegations from elsewhere in the Indictment, Indict. ¶ 233, including twenty-six general allegations, id. ¶¶ 1-26, the purposes and manner and means of the charged conspiracy, id. ¶¶ 29-38, 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 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 23 to 33, which tracks the statute, satisfy Hamling and establish the Indictment's facial sufficiency.

Nevertheless, defendant Ross 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").

Defendant Ross's argument fails for several reasons. As an initial matter, he challenges (here) the honest services charges and not the Hobbs Act counts (Counts 17 and 18) charging him with extortion under color of official right. 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, 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").

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 honest services fraud,[1] such an exchange is sufficiently pled with respect to defendant Ross. 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.[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'

[1] 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).

[2] Nevertheless, paragraph 35 of the Indictment, which is incorporated in the honest services charges, spells out the quid pro quo quite clearly: "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).

'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]"). 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)).

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), and defendants McGregor and Coker.

Defendant Ross complains that these allegations do not establish evidence of a quid pro quo under McCormick. 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)). Similarly—and fatal to defendant Ross's argument that the facts as alleged do not establish the required understanding—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 to with respect to the honest services charges.[3] His constitutional right "is to know the offense with which his is charged, not to know the details of how

[3] Although defendant Ross claims that the Indictment provides an insufficient "connection" between him and the mailings and wirings charged in the honest services counts, Mot. at 24, this argument, which, again, is an improper sufficiency challenge, displays a misunderstanding of the law of co-schemer liability. 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.").

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]

CONCLUSION

For the foregoing reasons, the Court should deny defendant Ross's motion to dismiss Counts 22 through 33.[5]

Respectfully submitted,

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[4] Defendant Ross's challenge to the aiding and abetting language is also misplaced. Mot. at 25-26. 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 Ross its theory of liability under § 2. United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir. 1980).

[5] As such, defendant Ross's request for what amounts to a bill of particulars, Mot.at 26-27, similarly fails. The Indictment (and discovery) provide him with more than he is entitled to for purposes of preparing a defense, and the Court has already held with respect to defendant McGregor that the honest services charges provide sufficient notice to prepare a defense. Dkt. No. 429 (rejecting defendant's reliance on United States v. Bobo, 344 F.3d 1076 (11th Cir. 2003)).

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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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