

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA,	}	
	}	
Plaintiff,	}	
	}	
vs.	}	Case No.: 2:10-CR-186-MHT-WC
	}	
ROBERT B. GEDDIE, JR.,	}	
	}	
Defendant.	}	

**MEMORANDUM OF ROBERT GEDDIE IN SUPPORT OF MOTION
TO DISMISS “OBSTRUCTION OF JUSTICE” CHARGES OR,
IN THE ALTERNATIVE, REQUIRING BILL OF PARTICULARS**

Defendant Robert Geddie (“Geddie”) submits this Memorandum in support of his Motion to Dismiss Count 39 of the Indictment or, in the alternative, for a bill of particulars with regard to that Count. Count 39 attempts to set out an obstruction-of-justice charge against Mr. Geddie. Mr. Geddie is entitled to dismissal (or, at a minimum, a bill of particulars) with regard to Count 39 for two reasons.

First, even if the allegations in Count 39 were logically sound and were assumed to be true, they do not make out a violation of any federal or state law.

Second, it is impossible for Mr. Geddie to determine what Count 39 is charging him with. The statutory language and the factual allegations do not logically relate to each other. Allegedly, Mr. Geddie caused someone at his firm to “alter” an internal, client-contribution ledger later produced to the grand jury, yet he is not charged under any statutory provisions dealing with alteration or destruction of documents. Conversely, he *is* charged under a “catch-all” obstruction statute, but the factual allegations only talk about documents. Catch-all provisions, by definition, seek to capture behavior not listed elsewhere (like, for example,

altering a document). The Indictment's combination of facts (that only talk about the alteration of documents; the Government's studied indifference to any statute that mentions document-alteration; and the vaporous quality of a catch-all provision) leaves Mr. Geddie with no guide as to what unenumerated wrongs the Government may try to prove against him at trial. Further, the Indictment fails to allege a sufficient "nexus" with an "official proceeding," as required by cases interpreting Section 1512(c)(2) in light of the Supreme Court's decisions in *United States v. Arthur Andersen*, 544 U.S. 696 (2005), and *United States v. Aguilar*, 515 U.S. 593, 599 (1995). See *United States v. Reich*, 479 F.3d 179, 186 (2d Cir. 2007) (Sotomayor, J.) ("We hold that § 1512(c)(2) incorporates a 'nexus requirement' as articulated in *Aguilar*.").

Simply put, Mr. Geddie cannot defend against a charge that rides a legal theory which in turn floats above the gap between facts as alleged and law as established. Count 39 of the indictment is unconstitutionally unfair. Mr. Geddie does not believe that these flaws in Count 39 can be remedied; for that reason, he is entitled to dismissal of that Count. In the alternative, and at a minimum, the Court should grant Mr. Geddie's motion for a bill of particulars and require the government to articulate a nexus between facts alleged in the indictment and the charges framed against him.

ARGUMENT

I. EVEN IF THE ALLEGATIONS IN COUNT 39 ARE ASSUMED TO BE TRUE, THEY DO NOT MAKE OUT A VIOLATION OF ANY LAW.

The Indictment tries to frame a criminal charge against Mr. Geddie with allegations about a "contribution ledger" that was "altered" and then "produced to law enforcement officials," yet the only statutory provision under which Mr. Geddie is charged in Count 39 does not refer to alteration or destruction of documents. Conversely, the subsection of § 1512 that *does* govern the situation where a person has "altered" a document is nowhere cited. The Government can

make charging decisions based on its tactical desires, but there is a logical gap between the factual allegations and the charge that renders the indictment in Count 39 facially --- and fatally - -- flawed.

A. The factual allegations that support Count 39 go to alteration of a document, yet that is not what is alleged in the indictment --- leaving open the question of what exactly Mr. Geddie is charged with.

In the Indictment, the first factual allegations we see about Mr. Geddie and “obstruction” arise on page 17, paragraphs 72 and 73:

Sometime after on or about February 16, 2010, GEDDIE instructed an employee to record the two checks he delivered to Legislator 3 as attributable to MCGREGOR in a contribution ledger maintained by GEDDIE’s lobbying business. Then, at a later date, GEDDIE told the same employee that the contributions to Legislator 3, in fact, should not be attributed to MCGREGOR. GEDDIE further instructed the employee to alter the contribution ledger to reflect that two other clients were the source of the contributions to Legislator 3, when in fact GEDDIE knew that the contributions were made on behalf of and at the direction of MCGREGOR and that the other two clients had no knowledge of and did not authorize such contributions.

Between in or about May 2010 and in or about August 2010, in response to grand jury subpoenas, GEDDIE caused to be produced to law enforcement officials the altered contribution records.

We see almost identical language in Count 39 itself:

242. From on or about February 16, 2010, through in or about August 2010, in the Middle District of Alabama and elsewhere, defendant

ROBERT B. GEDDIE, JR.,

aided and abetted by others known and unknown to the Grand Jury, corruptly obstructed, influenced, and impeded, and attempted to corruptly obstruct, influence, and impede an official proceeding, to wit: defendant GEDDIE instructed an employee to alter a contribution ledger to reflect that two contributions, totaling \$5,000, made by GEDDIE and another employee to Legislator 3 were not made on behalf of MCGREGOR as GEDDIE initially had indicated, but instead were made on behalf of two other clients, when in fact GEDDIE knew that the contributions were made on behalf of and at the direction of MCGREGOR and that the other

two clients had no knowledge of and did not authorize such contributions; and defendant GEDDIE caused to be produced to law enforcement officials, in response to multiple grand jury subpoenas, originals as well as copies of the altered contribution ledgers.

All in violation of title 18, United States Code, Sections 2 and 1512(c)(2).

Thus, with regard to Count 39, the reader knows only two things: (1) a document was allegedly altered before it went to the grand jury and (2) 18 U.S.C. §1512(c)(2) is the obstruction statute at issue.

B. The legal framework of Section 1512(c) does not fit over the factual foundation of the Indictment.

Section 1512 amended what had been a witness-tampering statute. “In essence, the amended § 1512(c) created a specific subsection dealing with tampering of tangible evidence, in what was otherwise a statute that previously dealt only with tampering of persons.” *United States v. Hutcherson*, No. Crim. 605 CR00039, 2006 WL 270019, at *2 (W.D. Va., Feb. 3, 2006). It became effective on July 30, 2002 as part of the Sarbanes-Oxley Act of 2002. *See* Pub.L.No. 107-204, 116 stat. 745 (2002).

Subsection (c) of 18 U.S.C. § 1512 has two parts, and they differ in critical ways.

Under 18 U.S.C. § 1512(c)(1), anyone who “**corruptly alters**, destroys, mutilates, or conceals a **record**, document, or other object, or attempts to do so, **with the intent to impair the object’s integrity or availability** for use in an official proceeding” commits the felony of obstruction of justice.

On the other hand, under 18 U.S.C. § 1512(c)(2), anyone who “**corruptly . . . otherwise obstructs**, influences, or impedes any official proceeding, or attempts to do so” likewise commits an obstruction of justice felony.

Thus, “section 1512(c)(1) lists specific conduct that is prohibited under this subsection; while §1512(c)(2) is intended to account for unenumerated conduct that violates the subsection.” *Hutcherson*, 2006 WL 270019, at *2. The statute distinguishes between particular conduct and unenumerated wrongs.

(1) **“Otherwise” Obstructed? How?**

Count 39 runs afoul of that distinction. Mr. Geddie is indicted for an obstruction of justice by violating § 1512(c)(2), (Indictment at 62), which means he must have, in the government’s view, obstructed justice (or tried to) “otherwise” than with a document. He is nowhere charged with violating § 1512(c)(1), which expressly deals with one who allegedly “corruptly alters . . . a . . . document” Mr. Geddie is not being charged with alteration of documents in an effort to obstruct justice. Had that been the government’s intent, it would have charged him under the section of the obstruction statute pertaining to alteration of documents. Instead, he is being charged with “otherwise” obstructing justice.

But how “otherwise”? The Indictment does not say. It is difficult to identify a legitimate purpose why the government would use the “catch-all” non-specific (c)(2) if the allegedly wrongful act spelled out in the Indictment --- the alteration of the ledger and its submission to law enforcement officials --- is specifically covered by (c)(1). On the other hand, if what is at issue is *not* a charge based upon the alteration of a document, the factual allegations going to Count 39 are all unrelated to the legal theory of charging, and Mr. Geddie has no idea what “unenumerated” wrong he is being charged with.

Although it is difficult to identify a legitimate purpose why the government would use the catch-all standard when a statute at least facially germane to the only facts pled in the Indictment is available, a reasonable conclusion is that the government is gaming its pleadings

because it realizes that it will not be able to prove at trial that Mr. Geddie acted with the kind of criminal intent the law requires. Although both Sections 1512(c)(1) and 1512(c)(2) require that the government allege and prove that the defendant acted “corruptly,” subsection (c)(1) places an additional burden on the government. To make out a document-alteration charge pursuant to Section 1512(c)(1), the Indictment must allege and the government must prove at trial the defendant’s “intent to impair the object’s integrity or availability for use in an official proceeding” The government cannot so allege because it cannot offer such proof at trial. It cannot offer such proof at trial because it has none. Not only was there no “impair[ment] [of] the [ledger’s] integrity or availability” for the grand jury’s use, the original entry, as well as the amended entry, are plain on the face of the document, and there is no allegation to the contrary in the Indictment.

With the ledger’s integrity maintained, and the document fully available for the grand jury, the government knows that it cannot prove an obstruction of justice charge against Mr. Geddie based on alteration of documents. Faced with that problem, it punted to the most vague provision it could find and hopes to argue at trial that documents that have been changed are intrinsically suspect and illegal. The Court should not countenance that kind of gamesmanship.

(2) The Indictment Does Not Allege That Mr. Geddie Altered A Document Himself, Yet Direct Action Is What Section 1512(c)(2) Normally Requires.

Further compounding the confusion is the fact that subsection (c)(2) is *intransitive*. Unlike, for example, Section 1512(b), subsection (c) applies to obstructive activity that the defendant performs himself or herself, rather than encouraging others to do so. In other words, § 1512(b) reaches those who corruptly persuade (or try to persuade) others to alter or

destroy documents; § 1512(c) reaches those who corruptly do so (or try to do so) themselves. We see this in almost all of the published opinions dealing with subsection (c)(2). In each, the defendant himself “forged” or “created” or “signed.” See *United States v. Carson*, 560 F.3d 566 (6th Cir. 2009) (false statements by the defendant directly to the grand jury); *United States v. Reich*, 479 F.3d 179 (2d Cir. 2007) (forged judicial order); *United States v. Guardiola Ramirez*, 2006 WL 573971 (D.P.R. Mar. 8, 2006) (drafted phony services contract to hide kickbacks); *Hutcherson*, 2006 WL 270019, at *2 (prepared fake document).

In the Indictment, however, the government does not allege that Mr. Geddie himself altered any documents. Rather, “GEDDIE instructed an employee to alter a contribution ledger” (Indictment ¶ 242 at 62) (emphasis added). Again, there is no fit between the factual allegations supporting Count 39 and the plain language of § 1512(c)(2).

II. THE INDICTMENT FAILS TO ESTABLISH A SUFFICIENT “NEXUS” WITH AN “OFFICIAL PROCEEDING.”

A. The Indictment fails to allege and the Government cannot prove conduct that has the natural and probable effect of interfering with the due administration of justice.

Two related notions --- that a defendant must have “notice” of what exactly he is charged with doing that obstructed justice, and that it be “foreseeable” to him that his actions would naturally and probably have the proscribed effect --- have roots in American law going back to at least to the nineteenth century. Those two principles doom Count 39, or at least require a meaningful bill of particulars.

In *Pettibone v. United States*, 148 U.S. 197, 206 (1893), the Supreme Court, in construing a predecessor statute to 18 U.S.C. § 1503, held that “a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court.” Just over

a century later, the Court pointed out that *Pettibone*'s reasoning was that "a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995). The Court in *Aguilar* described this "as a 'nexus' requirement – that the act must have a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice [I]f the defendant lacks knowledge that his actions are likely to affect a judicial proceeding, he lacks the requisite intent to obstruct." *Aguilar*, 515 U.S. at 599 (citations omitted). Although the Court in *Aguilar* was construing Section 1503, at least three courts have applied the nexus requirement to a Section 1512(c)(2) charge. See *United States v. Reich*, 479 F.3d 179, 186 (2d Cir. 2007) (Sotomayor, J.) ("[W]e hold that §1512(c)(2) incorporates a 'nexus requirement' as articulated in *Aguilar*."); *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009); *United States v. Phillips*, 538 F.3d 1261, 1264 (10th Cir. 2009).

Although the government has typed on page 62 of the Indictment the phrase that Mr. Geddie "corruptly obstructed . . . an official proceeding," word-processing is not enough. The government must marry the words of the statute with a time, a theory of causation or a chain of logic that connects something Mr. Geddie did to an official proceeding and, further, that properly alleges that his endeavor had the "natural and probable effect" of interfering with the administration of justice.

Mr. Geddie does not dispute that his firm, Fine, Geddie & Associates ("FGA"), produced in response to grand jury subpoenas documents that had been corrected --- by hand, and openly --- from their original condition. That fact is obvious throughout on the face of the documents submitted: the original entry is clearly visible. Documents in the ordinary course of

human affairs have changes, edits, corrections and supplements made to them all the time. The government cannot be saying that the mere act of submitting an “altered” document in response to a grand jury subpoena violates Section 1512(c)(2). But if not, then what is it saying?

Tellingly, the Indictment fails to allege that a “false” or “fraudulent” document was actually submitted to the grand jury. Rather, the government attempts to shoot the gap between its factual allegations and its charging theory by claiming that there was an alteration caused by Mr. Geddie that made the ledger show that the two contributions at issue were made “on behalf of” other FGA clients, “when in fact Geddie knew that the contributions were made on behalf of McGregor”

(1) **“On Behalf of Another” Is Meaningless.**

The phrase “on behalf of another” is meaningless as a matter of law and cannot support a criminal charge. This is not a case alleging violations of the federal or state election laws (under which, for example, a “contribution in the name of another” can be illegal). *See* 2 U.S.C. § 441f; Ala. Code § 17-5-15. As allowed under Alabama political-contributions laws, and confirmed by the government’s disclosures, the contributions at issue in Count 39 are exactly in the name of who they are --- one or more political action committees (“PACs”). Nor is there a claim that Alabama state laws regarding political contributions or PACs were violated. Unable to allege anything actually wrong with the two contributions or with the fact of their recording at FGA, the government assembles a new phrase (“contribution on behalf of another”) that is nowhere in the federal criminal code --- but which sounds like something potentially bad (“contribution in the name of another”). Doing something (i.e., making a political contribution “on behalf of another”) that is lawful, nor even alleged to be unlawful, cannot be the basis for a criminal charge.

(2) **“Notice” and “Permission” Are Meaningless.**

Similarly, the Indictment alleges “that the other two clients had no knowledge of and did not authorize such contributions.” (Indictment ¶ 242). Like “contribution on behalf of another,” the concepts of “notice” and “permission” are meaningless as a matter of law and cannot support a criminal charge. Even if those allegations are true, there is nothing wrongful about the individual FGA clients’ lack of knowledge or authorization. There are no provisions in the Alabama political-contributions laws that require the manager of a PAC to inform his or its PAC contributors of any particular subsequent campaign contribution, nor does he or it have to receive their authorization, nor even do what they say:

There are no statutory provisions that prohibit the earmarking of political contributions for a specific candidate or election when the contribution is made to a political action committee (PAC). Nor are there any provisions that require that the earmarked funds be spent by the PAC for that particular candidate or election.

Op. Ala. Atty. Gen’l 91-00135 (Jan. 10, 1991) at p. 3. Not only is there no offense if a PAC does not inform a PAC contributor of the disposition of that contributor’s funds, or fails to seek the PAC contributor’s authorization for a particular disposition of the funds, there is not even a legal requirement that the PAC actually use the funds for any particular candidate or election as directed by the PAC contributor (i.e., by the firm’s client).

As with its “on behalf of another” coinage, this client-notice, client-permission concept in the Indictment is, as a matter of law, meaningless. They are made-up principles that the Government hopes will sound bad to the jury.

B. The Indictment fails to allege and the Government cannot prove that an “official proceeding” was foreseeable to Mr. Geddie.

As this Court has noted, “an ‘official proceeding’ must at least be foreseeable at the time of the obstructive act before a person can be liable for obstruction of justice under Section 1512.” *United States v. Dunn*, 434 F. Supp. 2d. 1203, 1206 (M.D. Ala. 2006) (Thompson, J.) (holding that defendant’s prosecution for firearms offenses was not foreseeable, and thus transfer of firearms was not obstruction). An “‘official proceeding’ is not foreseeable just because it is possible” *Id.* A criminal investigation --- like that in *Dunn* --- is by itself not an “official proceeding,” although of course a criminal investigation can be incident to an “official proceeding” such as federal court cases, grand jury testimony and the like. *Id.* at 1207-1208.

In this case, the earliest day that the grand jury investigation became known was March 31, 2010, when federal agents met with leaders of the Alabama House of Representatives and the Alabama Senate to inform them that an investigation was ongoing with regard to gaming legislation. (*See* Indictment ¶ 66) (“[O]n or about March 31, 2010 . . . after the existence of the instant criminal investigation became public”).

If, at the time Mr. Geddie caused the change in the ledger entry to be made, the “official proceeding” --- the grand jury investigation --- was not foreseeable, then he cannot be liable under § 1512(c)(2). In other words, if the change was made between February 16 (the first date identified in the Indictment for the change) and March 31, he cannot be charged as a matter of law with violating the statute. Like the defendant in *Dunn*, Mr. Geddie “was not under indictment, was not aware of the [gaming investigation], and was not even a subject of the [grand jury] investigation when he [allegedly caused the change to be made].” *Dunn*, 434 F. Supp. 2d at 1208. In response, the government will likely say that what matters is not the date of the change

but rather the date of the production, and that the “official proceeding” was open and obvious by the time the ledger was produced to the grand jury. (*See, e.g.*, Indictment ¶ 73).

If that is the government’s theory, however, then it would require, among other things, that the government prove that the change, made corruptly, had rendered the document “false” and that it was the understanding of Mr. Geddie that the submission of the ledger would have the “natural and probable effect of interfering with the due administration of justice.” *Aguilar*, 515 U.S. at 599. Here, the Indictment not only does not allege that the documents were actually “false,” it does not even identify how in theory the grand jury could have ever been deceived because, from the face of the document, the government always knew what was “true” (or at least what it thinks is “true”). There can be no prospect of a “natural and probable effect of interfering with the due administration of justice” in a document-alteration scenario where the government always knew what the “truth” is --- and cannot allege otherwise.

C. The Indictment does not allege and the Government cannot prove that the grand jury (or anyone else) was ever obstructed, deceived or misled.

Although an act intended to obstruct an “official proceeding” need not be successful, the indictment on its face nowhere says that the government agents, prosecutors or the grand jury at some point thought that the contributions were from anyone other than McGregor, and that they later learned the “truth.” Taking the Indictment’s allegations at face value, the government always knew what the “truth” was because the original entry is also visible, along with the amendment. (In fact, the amendment was made to the ledger promptly after the initial erroneous entry, in order to make the record accurate, but for purposes of this motion, Mr. Geddie travels under the government’s theory, as best he can understand it). If the

government always knew the “truth” --- in its view of the world --- then it was never obstructed. In that case, the government is charging Mr. Geddie --- at most --- with “attempt.”

D. The Indictment fails to allege whether Mr. Geddie completed an obstruction or that he attempted one.

On the face on the Indictment, it is impossible to determine whether the Government’s theory that it intends to prove against Mr. Geddie at trial is that he actually obstructed an “official proceeding” or that he merely tried to do so (or, perhaps, that he did both). The Indictment recites that the contribution ledgers were produced “in response to multiple grand jury subpoenas,” as though there were something criminal about responding to follow-up requests for documents. That fact that documents are produced in response to one or more than one document subpoena, or in response to one or more than one oral follow-up request to the document subpoena, does not mean that a proceeding is “obstructed.”

CONCLUSION

Mr. Geddie is entitled to dismissal of Count 49 or, at a minimum, a bill of particulars for the Count.

Dated: Friday, February 4, 2011

Respectfully submitted,

/s/ Jackson R. Sharman, III
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record through the Court's electronic filing system this 4th day of February, 2011.

/s/ Jackson R. Sharman, III
One of the Attorneys for Defendant,
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