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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
QUINTON T. ROSS, JR.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the court is Defendant Ross's Motion to Dismiss Regarding Hobbs Act Charges (Doc. #469). Defendant filed a Brief in Support (Doc. #470), to which the Government has filed a Response (Doc. #606). For the reasons that follow, the undersigned RECOMMENDS that the Motion be DENIED.

I. BACKGROUND

Counts Seventeen and Eighteen of the Indictment allege Ross committed extortion "under color of official right," and aided and abetted extortion under color of official right, as defined by 18 U.S.C. §§1951 (Hobbs Act) and 2 (aiding and abetting).

II. DISCUSSION

A. Quid pro quo

Ross argues that the Indictment fails to state an offense under 18 U.S.C. §§ 1951 and 2, because it fails to set forth "an explicit *quid pro quo* linking any contribution Senator Ross received with his specific official action, as necessary to distinguish prohibited criminal activity under the Hobbs Act from legitimate campaign fundraising." Def.'s Brief (Doc. #470) at 12. Ross argues that, because there is no allegation of a *quid pro quo*, the

Government cannot show an "extortion under color of official right." The Government counters that, even though the indictment does not contain "the Latin phrase, it clearly conveys the critical charge of an exchange of things of value for a specific official." Response (Doc. #606) at 5.

"By now, it is axiomatic that an indictment is sufficient if it '(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.'" *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002) (quoting *United States v. Steele*, 178 F.3d 1230, 1233-34 (11th Cir.1999)). "The Hobbs Act imposes criminal sanctions on those who affect interstate commerce by extortion." *United States v. Pendergraft,* 297 F.3d 1198, 1205 (11th Cir. 2002); *see* 18 U.S.C. §1951(a). Under the Act, extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951(b)(2).

In *McCormick v. United States*, 500 U.S. 257, 273 (1991), the Supreme Court held that "[t]he receipt of [campaign] contributions is [] vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." "[T]o hold otherwise 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 contributions or expenditures, as they have been from the beginning of the Nation." *Id*. Ross adds the additional concerns of "two significant constitutional values, protected by the First Amendment and Due Process." Def.'s Brief (Doc. #470) at 16. However, Ross admits that those concerns are satisfied if the explicit *quid pro quo* requirement is met. *See id*. at 16-18.

Ross argues that the Indictment fails to allege, even generally, an explicit *quid pro quo* between any contribution Senator Ross received and any specific official action of his." Def.'s Brief (Doc. #470) at 18-19. Ross admits the indictment alleges conversations between himself and others named in the indictment concerning campaign contributions, but asserts that "as alleged, ***none*** [of the conversations] discussed or addressed in any way 1) his vote or his position on SB380, or even other "pro-gambling legislation; 2) any future official action by Senator Ross; 3) any request that Senator Ross take any action, specific or otherwise; or 4) Senator Ross' intentions regarding SB380 or even other 'pro-gambling legislation.'" *Id*. at 19 (emphasis in original). The Government counters by pointing this court to *Evans v. United States*, 504 U.S. 255 (1992), and outlining portions of the indictment it contends sufficiently allege a *quid pro quo*. Resp. (Doc. #606) at 9-12.

In *Evans*, the Court held"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" in order to sustain a conviction un the Hobbs Act. *504* U.S. at 269. The Government contends that, in addition to Counts 17 and 18 of the Indictment tracking

the statutory elements, the Indictment sets forth the *quid pro quo*.

> 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.
>
> 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.

Indictment (Doc. #3) at ¶¶ 222 & 224. The Government further highlights specific facts stated in the Indictment regarding the alleged *quid pro quo* which were incorporated by reference. Response (Doc. #606) at 4-5. The court need not restate the Government's recitation of the facts in the Indictment relevant to Ross and these charges. Those facts specifically address the steps Ross is alleged to have taken in return for the campaign contributions, *i.e.*, certain actions towards specific legislation. The court agrees with the Government, and the Circuit Court opinions set forth in their Brief, 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). "*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.*; *see also 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).

Certainly the Government's burden at trial is significantly higher where there is no express statement between the parties. However, the Government has alleged a *quid pro quo*, and while Ross may wish to challenge whether an actual *quid pro quo* was proven after a trial, the issue before this court is whether the Indictment is sufficient. The court finds it is.[1]

The court does not find Ross's concerns regarding the First Amendment and Due Process to be persuasive. Certainly, two Supreme Court cases, *McCormick* and *Evans*, involving the prosecution of campaign contributions under the Hobbs act, as well as the Circuit Court cases cited above, assuages any due process or fair notice argument. Further, as more fully set forth in this court's Recommendation regarding the motions to dismiss the honest-services charges, filed contemporaneous with this Recommendation, First Amendment protection does not extend to illegal conduct. *See Garrison v. Louisiana*, 379

[1] Further, Ross's concerns over this issue can be addressed through jury instructions. In *Evans*, the Court affirmed a jury instruction stating that "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." 540 U.S. at 257-58. Thus, the jury would have had to find that Evans acted in exchange for a "specific requested exercise."

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.").

B. Aiding and abetting extortion under color of official right

Ross states that, the Indictment alleges extortion under the color of official right, and that he is alleged to have done this by "'solicit[ing] and … pressur[ing]' specified others for campaign contributions, for his 'benefit' and 'which money was not due to' him. Def.'s Brief (Doc. #470) at 21 (quoting the Indictment). Ross argues that there are no allegations in the Indictment that he aided and abetted others in extortion under the color of official right. *Id.*

Here again, Ross's challenge is inopportune. "Aiding 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." *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984).

III. CONCLUSION

For the reasons stated above, the Magistrate Judge RECOMMENDS that the Motion to Dismiss Regarding Hobbs Act Charges (Doc. #469) be DENIED.

Further, it is

ORDERED that the parties are DIRECTED to file any objections to the said Recommendation **by April 18, 2011**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that

this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); *see also Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

DONE this 4th day of April, 2011.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE