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
	)	
MILTON E. MCGREGOR	)	
THOMAS E. COKER	)	
ROBERT B. GEDDIE JR.	)	
LARRY P. MEANS	)	
JAMES E. PREUITT	)	
QUINTON T. ROSS JR.	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER JR.	)	
JOSEPH R. CROSBY	)	

UNITED STATES' NOTICE OF SUPPLEMENTAL AUTHORITY

On May 5, 2011, the Court conducted a hearing on the defendants' various motions to dismiss counts in the Indictment charged pursuant to 18 U.S.C. § 666(a)(2) & (a)(1)(B). During the hearing, the Court inquired whether an evaluation of the Indictment's sufficiency requires scrutiny of the grand jury's underlying decision-making process with respect to these counts, in light of the United States' stated position that it will not oppose a quid-pro-quo instruction under McCormick v. United States, 500 U.S. 257 (1991), and Evans v. United States, 504 U.S. 255 (1992), for contribution-based bribe payments. The answer is no.

In general, "courts lack authority to review the sufficiency of evidence supporting an indictment, even when a mistake was mistakenly made." United States v. Wills, 346 F.3d 476, 488 (4th Cir. 2003). Indeed, "[w]hen the facts alleged in the indictment permit an inference that the grand jury found probable cause, the indictment satisfies the Fifth Amendment." United States v. Wayerski, 624 F.3d 1342, 1350 (11th Cir. 2010). "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the

merits." Costello v. United States, 350 U.S. 359, 363 (1956) (emphasis added); see also United States v. Calandra, 414 U.S. 338, 344-45 (1974) ("The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." (citations omitted)).

As the government has argued at length, both in its pleadings and during oral argument, the Indictment sufficiently alleges as to each defendant a violation of § 666. The charges track the statutory language and incorporate a multitude of factual allegations that provide adequate notice to the defendants of the conduct at issue. See United States v. Fern, 155 F.3d 1318, 1325 (11th Cir. 1998) ("If an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge."); United States v. Poirier, 321 F.3d 1024, 1029 (11th Cir. 2003) (noting that when"analyzing challenges to the sufficiency of an indictment, courts give the indictment a common sense instruction, and its validity is to be determined by practical, not technical, considerations"). The Constitution and the Federal Rules of Criminal Procedure require no more.

Further, although the Eleventh Circuit has not adopted the McCormick/Evans quid-pro-quo requirement for contribution-based prosecutions brought under § 666 (or any other corruption statute outside the Hobbs Act)—as the government has noted previously—the Indictment in this case sufficiently alleges the requisite connection between the offer and payment of contributions and a specific official action—a vote in favor of pro-gambling legislation. As such, because the

Indictment is "valid on its face" even assuming McCormick applied, the government's stated position that it would support a jury instruction similar to the one upheld in Evans, 504 U.S. at 257-58, for the contribution-based § 666 charges, does not require a review of the grand jury's charging decision.[1] The sufficiency inquiry is satisfied within the Indictment's four corners, permitting the inference that the evidence presented to the grand jury established probable cause consistent with the defendants' Fifth Amendment protections. Wayerski, 624 F.3d at 1350; cf. United States v. Seher, 562 F.3d 1344, 1357 (11th Cir. 2009) ("[T]he Fifth Amendment is satisfied if the indictment makes a specific statutory reference to an essential element of the offense and contains some other indication from which we can infer that the grand jury found that element to be present."). Any further challenge to the charging decision improperly would invade the sacrosanct province of the grand jury.[2]

Respectfully submitted,

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Assistant Attorney General, Criminal Division
Attorney for the United States
Acting Under Authority of 28 U.S.C. § 515

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[1] The defendants do not claim that the empaneling of the grand jury was deficient or that it was somehow biased. Costello, 350 U.S. at 363.

[2] Indeed, when a change in the law occurs post-indictment, courts focus their review on the indictment itself and, post-conviction, on the evidence adduced at trial—and not on the grand jury's deliberative process. Cf., e.g., United States v. Skilling, — F.3d —, 2011 WL 1290805, at *8 (5th Cir. 2011) (upholding conspiracy conviction despite indictment and jury instruction premised, in part, on legally flawed theory of honest-services liability under 18 U.S.C. § 1346). This is true despite the fact that the grand jury almost certainly was not instructed on the later-recognized state of the law. By analogy, therefore, even if the Eleventh Circuit affirmatively were to hold that the McCormick/Evans quid-pro-quo applied under § 666, the proper focus of the Court's review would be the substance of the indictment (or, following trial, the character of the evidence), and not the evidence or legal instructions considered by the grand jury.

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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 6th day of May, 2011.

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