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

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| VS. | ) | CASE NO. 2:10cr00186-MHT-WC |
| | ) | |
| JOSEPH R. CROSBY | ) | |

**DEFENDANT JOSEPH R. CROSBY'S OBJECTIONS TO RECOMMENDATIONS (DOCS. 862 & 863) OF THE MAGISTRATE JUDGE**

Defendant Joseph R. Crosby filed a motion seeking dismissal of counts 1 (conspiracy to violate 18 U.S.C. § 666), count 16 (18 U.S.C. § 666), and counts 23 through 27 (18 U.S.C. §§ 1341 and 1343 premised on "honest services" allegations under 18 U.S.C. § 1346) as to him. (Doc. 456). United States Magistrate Judge Wallace Capel recommended that the motion be denied. (Docs. 862, 863)[1] Defendant Crosby objects and asserts that the charges against him should be dismissed because the indictment alleges conduct that is outside of the scope of the cited statutes, when the statutes are properly construed and kept within constitutional bounds. These counts further "fail[] … to state an offense," Rule 12(b)(3)(B), F.R.Crim.P. In making these objections, Defendant Crosby adopts those arguments made by Defendant Milton E. McGregor on these recommendations. Defendant Crosby further submits the following:

The Honest Services Allegations
(Counts 23 through 27)

Judge Capel stated that: [t]he crux of In Skilling [v. United States, ___ U.S. ___, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010)(hereinafter "Skilling")] was to eliminate non-bribery

[1] Other defendants filed separate motions addressing the charges premised on 18 U.S.C. § 666 in one motion and the charges premised upon 18 U.S.C. § 666 in another motion. (Docs. 206, 208, 408, 411, 441, 442, 443, 445, 450, 460, 463, 471, 474, 485, 486, 490). The Magistrate Judge addressed the various defendants' contentions on those charges in separate recommendations. (Docs. 862, 863). Defendant Crosby addressed all of the charges against him in one motion. (Doc. 456). He includes his objections in one document as well.

schemes from honest-services prosecutions The Government has alleged a bribery-and-kickback scheme in the Indictment in that money and things of value were given in exchange for passing favorable legislation." (Doc. 863, p. 3 , lines 15-16). He came to the conclusion that "the Government has made factual allegations sufficient to charge Defendants." (Doc. 863, p. 4, lines 3-4). He also concluded that "[i]f at trial the Government proves a core bribery-and-kickback case, as they have alleged, then due process is not offended," (Doc. 863, p. 5, lines 2-3), and that that "[if] at trial the Government can show that there was a bribery scheme to deprive the citizenry of honest services, then defendants' conduct, not their speech, will have been regulated by the statute." (Doc. 863, p. 6, lines 15-17). Judge Capel agreed with all the defendants that "any honest-services bribery must involve a personal benefit to the "offender." (Doc. 863, p. 8, lines 18-19). However, he concluded that "the court cannot now say, prior to the presentation of evidence, that the Government would be incapable to showing personal benefit simply because the bribes were made indirectly and through campaign contributions" and concluded that the allegations of the indictment in that regard were sufficient. (Doc. 863, p. 9, lines 14-16). He also rejected the contention that the indictment must allege that payments were made with the intent to influence a specific act. (Doc. 863, pp. 9-10) Judge Capel finally concluded that the law did not require that an honest services mail fraud charge alleging a bribery scheme required identifying a quid pro quo as an element of the offense. (Doc. 863, p. 11, lines 7-9). Defendant Crosby asserts that Judge Capel's conclusions and his recommendations do not square with legal thought leading up to and expressed in Skilling.

In Skilling, the defendant challenged 18 U.S.C. § 1346 as unconstitutionally vague. Three justices accepted that contention. The remaining six justices acknowledged that the "vagueness challenge ha[d] force," Skilling, 130 S. Ct. at 2905, but, concluded that 18 U.S.C. §

1346 could be "salvaged by confining its scope to a 'solid core'" and construing it to reach only schemes to obtain bribes and kickbacks. Skilling, 130 S.Ct.. at 2930. The Supreme Court held: "that § 1346 criminalizes only the bribery and kickback core of the pre-McNally [v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 272 (1987)(hereinafter "McNally")] case law." Skilling, 130 S.Ct. at 2931 (emphasis in original). In reaching this holding, the Supreme Court recognized the longstanding "rule of lenity" in the interpretation of unclear criminal law. Skilling, 130 S.Ct. at 2932. It stated: "In proscribing fraudulent deprivations of 'the intangible right of honest services,' . . . Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning . . . would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes." Skilling, 130 S.Ct. at 2907. The Supreme Court based this holding on constitutional concerns for due process of law. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)." Skilling, 130 S.Ct. at 2927-2928.

In his recommendation, Judge Capel quoted from a law journal: "In Skilling, '[t]he Court did not resolve – or even discuss – whether a state law violation, economic harm, and/or private gain were necessary elements (though bribery and kickbacks by their very nature involve gain to the defendant.).' Sara Sun Beale, TERM PAPER: An Honest Services Debate, 8 Ohio St.J.Crim.L 251, 252 (2010)." (Doc. 863, p. 7, lines 14-17). However, that proposition is called into question by the Supreme Court's rejection of the Government's contention in Skilling that the non-disclosure of an alleged conflicting financial interest by a public official can justify

an honest services conviction as suggested in the indictment in this case, see e.g. Indictment, ¶ 156 (Doc. 3, p. 35, lines 4-9). Skilling, 130 S.Ct. at 2933-34. The Supreme Court also noted in Skilling that its construction of 18 U.S.C. § 1346 established "a uniform national standard." Skilling, 130 S.Ct. at 2933.[2] The establishment of a "uniform national standard" necessarily eliminates state law violations as bases for an honest services prosecution. Thus, honest services convictions cannot be predicated on violations of state law such as has been suggested in the indictment in this case. See e.g. Indictment, ¶¶ 33, 156 (Doc. 3, p. 8, lines 19-21, p. 9, lines 1-2, p. 35, lines 4-9) See also United States v. Ford, 2011 WL 1405109 at * 4 (6th Cir. 2011)("honest services" convictions based upon failure to disclose financial interests vacated); United States v. Coniglio, 2011 WL 791347 at * 2 (3d Cir. 2011)(based upon Skilling. concealed conflict instruction error). Violations of state law or ethical lapses are simply not within the scope of the statute.

The Supreme Court said in Skilling,130 S.Ct. 2896, "We perceive no significant risk that the honest-service statute, as we interpret it today, will be stretched out of shape. Its prohibition of bribes and kickbacks draws content not only from the pre-McNally case law, but also from

[2] Also, in Black v. United States, ___ U.S. ___, 130 S.Ct. 2963, 195 L.Ed.2d 695 (2010)(hereinafter "Black"), decided the same day as Skilling, 130 S.Ct. 2896, "the District Court informed the jury, over Defendants' objection, that a person commits honest services fraud if he misuses his position for private gain for himself and/or a co-schemer and knowingly and intentionally breaches his duty of loyalty." 130 S.Ct. at 2967. (internal quotations and alterations omitted). The Supreme Court held this instruction to be erroneous: "We decided in Skilling that § 1346, properly confined, criminalizes only schemes to defraud that involve bribery or kickbacks. … That holding renders the honest-services instructions given in this case incorrect." Black, 130 S.Ct. at 2968.

federal statutes proscribing – and defining – similar crimes." 130 S. Ct. at 2933.[3] But, in this case, the Government now presents that very risk.

Judge Capel's recommendation appears to accept the risk in agreeing with a decision Sorich, 129 S.Ct. at 1309. "[T]his expansive phrase ["honest services"] invites abuse by headline-grabbing prosecutors in pursuit of local officials, out of the Middle District of Florida that he "'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.' United States v. Nelson, 2010 WL 4639236 at *2 (M.D.Fla. Nov. 8, 2010). (Doc. 863, p. 11, lines 7-9) But, ready or not, that is what the law now requires.

"[F]or bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." United States v. Sun-Diamond Growers, 526 U.S. 398, 404-405, 119 S.Ct. 1402, 1406, 143 L.Ed.2d 576 (1999) (hereinafter "Sun-Diamond")(emphasis in original). This requirement of a quid pro quo has been explicated in Supreme Court decisions as well as in courts of appeals decisions cited in Skilling.

The Supreme Court articulated this requirement in McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991)(hereinafter "McCormick). In that case, the Supreme Court reversed a Hobbs Act conviction of a West Virginia state legislator who had procured illegitimate campaign contributions from an association of temporary licensed

[3] Concern about this risk was expressed earlier by Justice Scalia in his dissent from the denial of certiorari in Sorich v. United States, ___ U.S. ___, 129 S.Ct. 1308, 173 L.Ed.2d 645 (2009)(hereinafter "Sorich"): "Though it consists of only 28 words, the [honest services] statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries." state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." Sorich, at 1310. Justice Scalia pointed out the fundamental unfairness of convictions gained under such a vague standard. "It is simply not fair to prosecute someone for a crime that has not been defined until judicial decision that sends him to jail." Sorich, 129 S.Ct. at 1310.

physicians without making any direct promise of benefit to the group. The Supreme Court held that the Hobbs Act required an explicit quid pro quo in order to convict elected officials who extort campaign contributions. The Supreme Court accordingly found a jury instruction that the jury simply had to be convinced that "the payment . . . was made . . . with the expectation that such payment would influence McCormick's official conduct, and wish the knowledge on the part of McCormick that they were paid to him with that expectation" insufficient. McCormick, 500 U.S. at 261 n.4

The Supreme Court reiterated what it called "the quid pro quo requirement of McCormick" in Evans v. United States, 504 U.S. 255, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992)(hereinafter "Evans"). It stated, "[T]he offense is complete at the time when the public official receives a payment in return for his agreement to perform specific official acts." Evans, 504 U.S. at 268 (Emphasis added).

In Sun-Diamond, 526 U.S. 398, the Supreme Court held that the gratuity statute, 18 U.S.C. § 201, requires proof of "a specific 'official act' for or because of which [a gratuity] was given." 526 U.S. at 414 (emphasis added). The Supreme Court rejected the government's argument that it was sufficient to prove that the gratuity was given because of the official's position and ability to do favors as needed reasoning that the gratuity statute "prohibits only gratuities given or received 'for or because of any official act performed or to be performed.'" Sun-Diamond, 526 U.S. at 406 (emphasis in original). The Court explained:

> It seems to us that this means "for or because of some particular official act . . . . Why go through the trouble of requiring that the gift be made "for or because of any official act performed or to be performed by such public official," and then defining "official act" (in § 201 (a)(3)) . . . when, if the Government's interpretation were correct, it would have sufficed to say "for or because of such official's ability to favor the donor in executing the functions of his office"? The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.

Sun-Diamond, 526 U.S. at 406. (emphasis added). Like the gratuity statute, the bribery statute referenced in the indictment in this case, 18 U.S.C. § 666, uses the language –"any official act" – that the Supreme Court interpreted in Sun-Diamond. See 18 U.S.C. § 201(b)(2)(A) ("in the performance of any official act" (emphasis added)). Moreover, the bribery statute contemplates proof of a specific official act because the sine qua non of bribery is "'a specific intent to give or receive something of value in exchange for an official act.'" United States v. Quinn, 359 F.3d 626, 673 (4th Cir. 2003), (quoting Sun-Diamond, 526 U.S. at 404-405) (emphasis in Sun-Diamond). Hence, the bribery statute referenced in the indictment in this case requires proof that a public official agreed "perform[]" an official act. As a matter of logic and in order to comport with constitutional concerns, it follows that the act to be performed must be identifiable.

Court decisions cited by the Supreme Court in Skilling, 130 S.Ct. 2896, also illustrate the primacy of this proposition. United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.).( mayor agreed to steer city contracts to the clients of a lobbyist and the lobbyist agreed to give the mayor one-third of the fees he received for obtaining these contracts); .United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) (lawyer arranged a large bank loan for a judge and regularly paid the interest needed to keep the loan in place and judge agreed to rule in favor of the lawyer's clients whenever he reasonably could); United States v. Kemp, 500 F.3d 257 (3d Cir. 2007)(bank officer approved substantial loans for an uncreditworthy city treasurer as well as the treasurer's uncreditworthy friends and his church and agreed to dispense with the bank's usual investigations and fees and city treasurer told the officer, "You are my guy, so you get special treatment" and steered city business to the bank and gave the officer confidential information about bids submitted to the city by competing banks). In all of these cases in which

the defendants were convicted of honest services fraud, the defendants' convictions were upheld with recognition of the quid pro quo requirement.

Additionally, when the Supreme Court laid out the standard in McCormick, 500 U.S. 257, it held that a link between a political contribution and an official act would constitute the crime of extortion only if there was an "explicit quid pro quo." McCormick, 500 U.S. at 271 & n. 9. It stated:

> Political contributions are of course vulnerable if induced by the use of force, violence or fear. The receipt of such contributions is also 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. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

McCormick, 500 U.S. at 273 (emphasis added). Thus, the proscribed situations are those in which there is an "explicit promise or undertaking" by the official to act in exchange for the contributions, in which "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." McCormick, 500 U.S. at 273.

Justice Stevens, in dissent, would have allowed a conviction based on an "implicit" quid pro quo linkage between a contribution and a "specific" official action. McCormick, 500 U.S. at 282-283 (Stevens, J., dissenting). But, he did state: "I agree with the Court that it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver . . . . In this sense, the crime does require a 'quid pro quo.'" McCormick, 500 U.S. at 283 (Stevens, J., dissenting). Justice Stevens added that "the crime . . . was complete when petitioner accepted the cash pursuant to an understanding that he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise to take favorable action on behalf of the unlicensed

physicians . . . When the petitioner took the money, he was either guilty or not guilty." McCormick, 500 U.S. at 283 (Stevens, J., dissenting)

In his recommendation, Judge Capel rejected the contention that an honest services charge must allege that bribes were made with intent to influence a specific act. (Doc. 863, pp. 9-11) However, the McCormick majority opinion's use of not only the word "explicit," but also the word "asserts," indicates that only those situations in which there has been an expressly stated quid pro quo are covered and not those situations involving only a potential of some benefit or favor. Additionally, the Supreme Court's discussion of due process and the rule of lenity in Skilling, 130 S.Ct. 2896, indicates that "explicit" in this context means the same thing as "explicit" in its ordinary usage – "fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent." http://www.meriam-webster.com/dictionary/explicit. This comports with the due process concern expressed in Skilling, 130 S.Ct. 2896, of interpreting criminal statutes to reduce the chance of prosecutorial arbitrariness or discrimination. 130 S.Ct. at 2927-2928, 2933. This also comports with the other due process concern expressed in Skilling , 130 S.Ct. 2896, of the importance of fair warning in criminal statutes. See, 130 S.Ct. at 2927 ("To satisfy due process, 'a penal statute [must] define the criminal offense … with sufficient definiteness that ordinary people can understand what conduct is prohibited."); 130 S.Ct. at 2932 ("Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"). Obviously, a governing legal standard that requires proof of actual communication – an explicit quid pro quo standard – would lessen this danger appreciably. An interpretation that "explicit" does not mean "express" and that an implied agreement or state of mind can count as an explicit quid pro quo is an example of what Justice Scalia warned against: in his dissent from

the denial of certiorari in Soreich, 129 S.Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

Under this rationale, a payment is not an "honest services" bribe unless the Government alleges and proves that the payment was made with intent to influence an identifiable official act. If the allegation is only that a payment was made, it does not come within "honest services." At most, that is all the indictment in this case alleges – in particular, as to Crosby.

If 18 U.S.C. § 666 did not require proof of intent to influence a specific act, as indicated in McNair, 605 F.3d 1152, 1188 (11th Cir. 2010)(hereinafter :McNair") -- a pre-Skilling decision -- but 18 U.S.C. § 201 does, then at best there is ambiguity about the standards. Where there is ambiguity in the criminal law, it must be resolved against the Government, and in favor of the accused. Skilling, 130 S.Ct. at 2932-2933.

In this case, as the Government has framed the indictment, there is no allegation that any payment was made to Crosby (or anyone else) with the intent to influence a specific act. The indictment suggests that there were various payments to Crosby over the course of years and that that there were various acts. But, it does not allege that any payment was intended to influence any act in particular. And, it alleges no connection between payments made to Crosby and actions taken by Crosby. See Indictment ¶¶ 156-161 (Doc. 3, p. 35, lines 3-22, p. 36, lines 1-21, p. 37, lines 1-22, 1-14) Moreover, as discussed hereinbelow, the indictment fails in its allegations of a violation of 18 U.S.C. § 666. Therefore, the indictment has not alleged any bribery in the sense that it is encompassed by honest services law after Skilling. 130 S.Ct. 2896 Accordingly, the honest services charges should be dismissed.

The Bribery Allegations
(Counts 1 and 16)

Skilling, 130 S.Ct. 2896, is pertinent to consideration of the bribery charges in this case as well. First, Skilling, 130 S.Ct. 2896, manifested the Supreme Court's expectation that, at least in some respects, "honest services" law and 18 U.S.C. § 666 would receive similar interpretations. See, Skilling, 130 S.Ct. at 2933. Second, Skilling, 130 S.Ct. 2896, emphasized the Supreme Court's concern with fair warning and due process in the interpretation of criminal laws in general. "To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)." Skilling, 130 S.Ct. at 2927-2928. The operative due-process concerns, as the Supreme Court stated in Skilling, are "(1) fair notice, and (2) arbitrary and discriminatory prosecutions." 130 S.Ct. at 2933.

In 18 U.S.C. § 666, questions arise from the word "corruptly." There is a crime under 18 U.S.C. § 666 only if (among other elements) a thing of value is solicited or accepted "corruptly." There may be questions as to what is covered by the term "corruptly." This defendant submits that the term must be limited to situations where there is an expressly stated quid pro quo. This defendant does acknowledge that the Eleventh Circuit held in McNair, 605 F.3d 1152, 1188, that "there is no requirement in § 666(as)(1)B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a quid pro quo." However, with the subsequent rationale, discussion, and constitutional lessons of Skilling in mind, it is reasonable to conclude that, prosecutors must satisfy the McCormick "explicit quid pro quo" standard rather than an implied quid pro quo or no standard at all. Otherwise, one is deprived of fair notice and arbitrary and

discriminatory prosecutions are a significant risk. Further, such an interpretation would run up against the rule of lenity. See, Skilling, 130 S.Ct. at 2932.

Moreover, an examination of the history and wording of 18 U.S.C. § 666, which is captioned "Theft or bribery concerning programs receiving Federal funds," leads to the conclusion that it does not even cover the type of situation referenced in the indictment in this case. "[18 U.S.C. §] 666 proscribes theft and bribery in connection with programs of local governments receiving federal funds." McNair, 605 F.3d at 1185. It "'was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." Salinas v. United States, 522 U.S. 52, 58, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997)(hereinafter "Salinas"). It is not a general purpose, catch-all "bribery" statute covering every aspect of state and local governments. In particular, it does not cover the drafting or consideration of state regulatory legislation.

18 U.S.C. § 666, which was enacted under Congress' "spending clause" power, out of concern about the ways in which state and local governments and private beneficiaries of federal assistance used their funds and other property. It concerns itself with the use of funds – the business and transactions by which covered entities (state and local governments and private recipients of federal funds), spend money or otherwise take part in commerce. As the Supreme Court put it, "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain," Sabri v. United States, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947, 158 L.Ed. 2d 891 (2004)(hereinafter "Sabri")(emphasis added). The archetypal 18 U.S.C. § 666 case might be, for instance, about allegations of bribery in awarding government contracts See e.g., McNair, 605 F.3d 1152. In this case, however, the supposed object of alleged bribes, the thing supposedly to be influenced or rewarded, was not a decision

about how a state agency would use federal money or other property. The supposed object of the alleged bribes in this case was the drafting and consideration of legislation that would amend the Alabama state constitution.

Questions of statutory interpretation, for purposes of this argument, are (1) whether a legislative analyst of the Legislative Reference Service,[4] such as Crosby, or a state legislator is an "agent" of the State of Alabama with respect to the matters at issue in this case and within the meaning of the statute and (2) whether the allegations of the indictment come within the statute's coverage in terms of "any business, transaction, or series of transactions of such … government.. involving anything of value of $5,000 or more." The answer to both questions is "no."

The answer is supported by the same interpretive tools that the Supreme Court and the Eleventh Circuit have used to answer other questions about 18 U.S.C. § 666: (a) the natural and most common meaning of the words that Congress used in the statute, see McNair, 605 F.3d at 1178, & n. 40 (interpretation begins with the words that Congress used in the statute); (b) the history of what led Congress to write 18 U.S.C. § 666 (specifically involving a concern over the existing coverage of the federal sector bribery statute, 18 U.S.C. § 201), See Salinas, 522 U.S. at 58-59 (same); and (c ) a comparison between the language of 18 U.S.C. § 666 and the language of 18 U.S.C. § 201, noting that Congress chose to use different words on critical aspects of 18 U.S.C. § 666 than it had used in 18 U.S.C. § 201, see McNair, 605 F.3d at 1190-1191 (relying on the difference in language used in the two statues, as a guide to interpreting 18 U.S.C. § 666)

18 U.S.C. § 666 provides in pertinent part:

[4] The Legislative Reference Service is an agency of the State of Alabama tasked with assisting various parties in legislative matters. See, Ala. Code § 29-7-1, et seq.

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> …
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

((Emphasis added.) The statute further provides a definition of "agent" in 18 U.S.C. § 666(d)(1): "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."

This statutory language is limited to efforts to influence people in connection with "business" or "transaction[s]" of the entity receiving federal funds. See, McNair, 605 F.3d at 1185 ("§666 proscribes theft and bribery in connection with programs of local governments receiving federal funds."). Those words – "business" and "transaction" – call to mind an exchange involving the purchase or provision of goods or services. That is the ordinary meaning of those words. See e.g., Hawthorne v. Mac Adjustment,140 F.3d 1367, 1370 (11th Cir. 1998)("The ordinary meaning of 'transaction' necessarily implies some type of business dealing between the parties… In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements…."); Flava Works, Inc. v. City of Miami, 609 F.3d 1233, 1239 (11th

Cir. 2010)("This seems to comport with the common definition of a business, which is '[a] commercial enterprise carried on for profit.' Black's Law Dictionary 211 (8th ed. 2004)).

In this regard, the words "business" and "transaction" reflect a distinction between two sorts of roles that a government occupies. That is the distinction between government as regulator (writing and enacting rules, i.e., laws to govern citizens' conduct) and government as market-participant (buying, selling and otherwise providing or obtaining goods and services). As market-participants, governments buy goods and services, just like private entities do. Sometimes they sell or otherwise provide goods and services, just like private entities do. There is a settled legal understanding that this role as market participant is conceptually different from the role as regulator, in various ways, with various legal consequences. See, e.g., Department of Revenue of Kentucky v. Davis, 553 U.S. 328, 113 S.Ct. 1190, 170 L.Ed.2d 685 (1993)(exploring this distinction in terms of its effect on labor law preemption doctrine).

By using the words "business" and "transaction" to describe the category of decision-making topics in which 18 U.S.C. § 666 prohibits corrupt attempts to influence, Congress was using words that point toward the market-participant side of this distinction. Drafting legislation to amend the constitution does not constitute a "transaction" or a "business." Also, an alleged "bribe" is not itself that sort of transaction that can trigger the statute's applicability. The "transaction" or "business" must be "of" the entity that is receiving the federal funds, not just a "transaction" or "business" of the allegedly influenced person himself.

The statute also requires the Government to allege and prove that the person to be influenced or rewarded was an agent of the entity that receives federal funds. The statute uses the word "agent" in a way that parallels its focus on "business" and "transaction" that has been discussed above: an agent is one who acts on behalf of the entity receiving funds, with regard to

"business" or "transaction." This is the ordinary meaning of the first part of the statutory definition of "agent' in § 666(d): "the term 'agent' means a person authorized to act on behalf of another person or a government." A legislative analyst, in drafting a bill, is not acting on "behalf" of the government of State of Alabama but on behalf of a legislator or legislators. And, legislators, when voting or deciding how to vote on a bill, are not acting "on behalf of" the government of the State of Alabama.

The second part of the statutory definition of "agent" in § 666(d) confirms its focus on agency in connection with the "business" or "transaction." In drafting legislation, legislative analysts of the Alabama Legislative Reference Service are outside of that focus. There is no allegation in the indictment that the Alabama Legislative Reference Service has been a recipient of federal funds. In drafting legislation, a legislative analyst is not an agent of any entity in regard to "business" or "transactions." The same goes for legislators. Legislators and legislative analysts, such as Crosby, are simply not agents in that sense.

This interpretation is confirmed by another part of the statute's text: the requirement of proof that the "business, transaction, or series of transactions" in connection with which the agent was intended to be influenced, "involve[d] anything of value of $5,000 or more." When the statute is applied to things that naturally come within the words "business" or "transaction" – such as government contracts for sewer rehabilitation work, as in McNair, 605 F.3d 1152, the inclusion of that monetary-valuation element is sensible. Not so with respect to the drafting of a statute such as in this case. No amount of prosecutorial indictment drafting creativity gets around the statute's simply not covering the situation as alleged in the indictment.

The Supreme Court has repeatedly explained and has drawn guidance from the history of 18 U.S.C. § 666's enactment. Sabri, 541 U.S. at 606-607; Salinas, 522 U.S. at 58-59. That

history confirms that Congress meant to use the words "business" "transaction" and "agent" in the normal ways described above – as having to do with the ways the recipients of federal funds use money or property in securing or providing goods or services – and that Congress was not attempting to reach such things at the drafting of regulatory legislation.

That history began with a "bribery" statute that was already on the books, 18 U.S.C. § 201, which covered only people acting on behalf of the federal government

> Before § 666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. § 201. Section 201 by its terms applied only to "public officials," which the statute defined as "officers or persons acting for or on the behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch." § 201(a).

Salinas, 522 U.S. at 58. Prosecutors argued that those people acting on behalf of state and local governments which received federal funds were acting "on behalf of" the United States and could be prosecuted under § 201. But, some courts disagreed. This is what led Congress to enact § 666. Salinas, 522 U.S. at 58; Sabri, 541 U.S. at 606-607.

Three cases in particular that came to the attention of Congress, as representing these perceived problems with the coverage of § 201: United States v. Del Toro, 513 F.2d 656, 661-662 (2d Cir. 1975)(hereinafter "Del Toro"); United States v. Mosley, 659 F.2d 812, 814-816 (7th Cir. 1981)(hereinafter "Mosley"); and United States v. Hinton, 683 F.2d 195, 197-200 (7th Cir. 1982)(hereinafter "Hinton"), aff'd, sub nom., Dixson v. United States, 465 U.S. 482, 104 S.Ct. 1172, (1984). The Supreme Court has recognized this, see Salinas, 522 U.S. at 58, 112 S.Ct. at 474. It is clearly reflected in the legislative history of the statute, wherein these three cases are mentioned by name. See S. Rep. No. 225, 98th Cong., 1st Sess. 1983 ("The concept [to be enacted in the new provision § 666], is not unlimited. … It is, however, the intent to reach thefts

and bribery in situations of the type involved in the Del Toro, Hinton, and Mosley cases cited herein.")

Looking to those cases – representing the "types" of "situations" that Congress meant to cover in the new and "not unlimited" statute, § 666 – confirms that Congress was intentionally focusing on the very sorts of situations that are encompassed within the ordinary meaning of the statutory words "business," "transaction," and "agent" as explained above. Congress was intending the activities of recipients of federal funds, when those activities had to do with the expenditure of funds or other use of property in a business or transaction like sense. Congress was not trying to and did not create a broader statute that would over all activities – such as the drafting of state regulatory legislation.

Del Toro, 513 F.2d 656, for instance, involved a bribe to influence a real estate deal – a classic sort of business transaction – where the bribed person was an employee of a municipal entity that received federal funds.

> Evidence introduced by the Government allowed the jury to find that Del Toro and Kaufman had conspired to bribe Pedro Morales, Assistant Administrator of the Harlem-East Harlem Model Cities Program. Kaufman, a lawyer and real estate broker, hoped that Morales would use his official position to secure for Kaufman a lease by Model Cities of significant office space for one of the buildings for which Kaufman was a renting agent. The benefit to Kaufman would be a lucrative commission. Del Toro, the Executive Director of an East Harlem anti-poverty agency, Massive Economic Neighborhood Development, Inc. (MEND), acted as a middle man in the transaction.

Del Toro, 513 F.2d at 658.

Hinton, 683 F.2d 195, likewise, involved bribery to influence the awarding of contracts, to housing rehabilitation contractors; again this sort of government contracting is a classis sort of "transaction" or "business." The appellants, Arthur Dixson and James Lee Hinton, were found guilty by a jury of … soliciting money in exchange for the awarding of housing rehabilitation

contracts funded under the Housing and Community Development Act of 1974… Dixson and Hinton were, respectively, the Executive Director and Housing Rehabilitation Coordinator of a community-based, non-profit corporation called United Neighborhoods, Inc. (UNI). … During 1979 and 1980, the City of Peiris received a Community Development Block Grant and Metro Reallocation Grant from the rehabilitation of residential structures. … [T]he city contracted with UNI to administer the grant funds. For housing that met the statutory and regulatory criteria for the funds, UNI had the responsibility of soliciting bids from contractors to perform the housing rehabilitation. After the receipt of bids, the Housing Committee of UNI was responsible for awarding the contract to the successful bidder.

Hinton, 683 F.2d at 196-197.

The last of the three, Mosley, 659 F.2d 812, also had to do with "business" or "transaction" in the normal sense of those words: it concerned bribery to influence the decision of a federally-funded agency that acted as an employment referral service (i.e., a classic sort of multi-lateral contractual "business" arrangement engaging in "transaction" by arranging for the connection between particular job applicants and particular employers.)

> Appellant Jerry Mosley was found guilty by a jury of violating 18 U.S.C. § 201(g) and 18 U.S.C.§ 665(b) by soliciting through threats and receiving money in exchange for giving preferential treatment to certain individuals seeking jobs under the Comprehensive Employment and Training Programs Act, 29 U.S.C. § 801, et seq. (CETA). Mosley was employed in Chicago, Illinois as a CETA Intake and Eligibility Officer by the State of Illinois Bureau Employment Section Manpower Representative II, and his duties were to interview applicants for CETA jobs, evaluate their CETA eligibility, and, if appropriate, refer them to employers offering CETA-funded jobs.

Mosley, 659 F.2d at 813.

All of these examples are far removed from the issues in this case, which is an exercise of the State's legislative core and sovereign regulatory law-making functions. Congress chose the

words of 18 U.S.C. § 666 – especially the words "business" and ""transaction" and "agent" – because they cover the types of situations that Congress was intending to cover. As the Supreme Court has stated, Congress had those cases in mind, as what it wanted to cover – and those cases were all situations in which entities that received federal funds were using money or property in a commercial or business-transaction like case. Congress did not intend to write and did not write a statute that speaks to the very different sort of things alleged in this case. The legislative history confirms, quite clearly, what the ordinary meaning of the statutory words suggest the limitation of 18 U.S.C. § 666 to "business" or "transaction" was an intentional choice, a choice with meaning, a choice not to cover the purely regulatory and sovereign exercise of state power such as voting on and drafting legislation.

The argument above that 18 U.S.C. § 666 does not cover things so close to the core of sovereign legislative action as the indictment alleges is further confirmed by a comparison between the language of 18 U.S.C. § 666 and the language of 18 U.S.C. § 201. The Eleventh Circuit has instructed that it is important to recognize the distinctions in language, as between 18 U.S.C. § 666 and 18 U.S.C. § 201, when interpreting 18 U.S.C. § 666. McNair, 605 F.3d at 1190-1191. If it is important to note the difference in language when it points to a more expansive interpretation of § 666 in some respects, as it did in McNair, 605 F.3d 1152, it is important to note the difference in language when – as in the present matter – it points toward a narrowing of 18 U.S.C. § 666 in another respect.

A comparison between 18 U.S.C. § 201 and 18 U.S.C. § 666 is important because Congress was reacting to perceived problems in the reach of 18 U.S.C. § 201, when it enacted 18 U.S.C. § 666. If Congress had wanted to write 18 U.S.C. § 666 in a way that would reach as broadly as 18 U.S.C. § 201 in all respects – if Congress had wanted merely and simply to make

the same anti-bribery mandate of 18 U.S.C. § 201 applicable to every aspect of the operations of every recipient of federal funds – that would have been easy enough to write. The fact is, Congress chose to do something different from that. Congress had 18 U.S.C. § 201 in mind, when writing 18 U.S.C. § 666. Thus, difference in language between the two statues are a direct insight into the intended and actual meaning of 18 U.S.C. § 666.

A difference to note is that 18 U.S.C. § 201(b)(1) speaks of prohibiting payment of things of value to federal officials "with intent – (A) to influence any official act." But, 18 U.S.C. § 666, by contrast, was not written that broadly. Instead, Congress chose to make a prohibition in 18 U.S.C. § 666(a)(2) that applies only to payments made with the intent to influence or reward "in connection with any business, transaction, or series of transactions of such organizations, government, or agency involving anything of value of $5,000 of more." Congress spoke only to influencing or rewarding in connection with "business" or "transaction" of governmental or private entity that receives federal funds. The restriction to "business" or "transaction" – the decision not to cover all "official acts" – has meaning.

A second difference to note is that when defining the range of public officers and employees who are covered by the statute, 18 U.S.C. § 201 specifically identifies members of Congress in its definition of "public official", 21 201(a)(1). It was not enough, Congress concluded to set out a broad and general definition and assume that members of Congress would come within that; recognizing the importance of speaking clearly when creating crimes touching the legislative branch of government itself, Congress made a clear statement in that instance. But in 18 U.S.C. § 666, there is no such clear indication that legislative analysts or state legislators are covered. This is still further indication that Congress did not mean that by giving

federal grant moneys, the government of the United States was given the power to police the ethics of all state employees.

Due process requirements under the Fifth Amendment, as well as the related doctrine of the "rule of lenity," require the narrow construction of criminal laws when there is ambiguity. As the Supreme Court explained in Skilling, 130 S.Ct. at 2927-2928, due process in the interpretation of criminal laws has two crucial components: the laws must be clearly written in order to provide that warning as to what is prohibited, and the laws must also be clear enough to reduce the chance of prosecutorial arbitrariness in the choice of targets. See also Skilling, 130 S.Ct. at 2933(noting these twin requirements of due process); Skilling, 130 S.Ct. at 2932 (relying on the related "rule of lenity" in the same vein).

Due process also requires fair notice. As the Supreme Court has explained, that doctrine is equivalent to the familiar civil-law protection of qualified immunity, which shields against suits under 42 U.S.C. § 1983 unless the defendant violated "clearly established law." See United States v. Lanier, 520 U.S. 259, 270-271, 117 S.Ct. 1219, 1227 (1997); Hope v. Pelzer, 536 U.S. 730, 739-740 & n. 10, 122 S.Ct. 2508, 2515 & n. 10 (2002). The doctrine of "qualified immunity" is particularly strong in the Eleventh Circuit. See e.g., Rehberg v. Paulk, 611 F.3d 828, 846, n. 15 (11th Cir. 2010) (describing the limited ways in which previously-untested questions of law can become "clearly established") It is not "clearly established" in the qualified immunity sense, that 18 U.S.C. § 666 applies to the drafting of legislation as alleged in this indictment. There are, at least, reasonable arguments as set forth above that it does not apply. This is dispositive under the "fair warning" doctrine and its equivalent "qualified immunity."

Further, the "clear statement" rule of statutory construction based upon the understanding that Congress will not be assumed to have encroached on matters that are at the core of State

sovereign function, through enactment of generally-phrased laws. Congress is expected to speak clearly and plainly when it has an intent to alter the state/federal balance of power in such a way. See e.g. Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 543, 122 S.Ct. 999, 1006 (2002)("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statue."(internal quotation marks omitted).

The doctrine of constitutional avoidance – the rule that statutes will be read when possible so as to avoid serious constitutional concerns. That rule is important in this case because if 18 U.S.C. § 666 were read as imposing a federal norm on the operation of state legislatures it would raise serious questions under the Tenth Amendment and under substantive boundaries of Congressional power to make laws. See e.g. Gregory v. Ashcroft, 501 U.S. 452, 460-463,111 S.Ct. 2395, 2400-2402 (1991)(discussing the state's authority, reserved to them under the Tenth Amendment, to control structure of their own governments) This is a case in which 18 U.S.C. § 666 just does not apply.

Judge Capel rejected these contentions. In doing so, he relied almost exclusively on the Eleventh Circuit's recent decision in Townsend v. United States, 630 F.3d 1003 (11th Cir. 2011) (hereinafter "Townsend").[5] Defendant Crosby submits that Townsend does not foreclose these contentions.

In Townsend, a state corrections officer had been convicted in an 18 U.S.C. § 666 prosecution for having accepted a bribe for relaxing supervision of a defendant on pre-trial release in a state criminal case. The defendant's argument on appeal in Townsend, was a

[5] Judge Capel also cited United States v. Ostolaza, 2011 WL 976736 (M.D.Fla. 2011) (Doc. 862, p. 4, lines 3-4) That decision, like Judge Capel's recommendation, relied almost exclusively upon Townsend.

sufficiency of the evidence challenge which "focus[ed] on whether the government proved that the value of what she provided was $5,000.00 or more, as required by 18 U.S.C. § 666(a)(1)(B)." Though the Court did state that intangibles can be things of value for purposes of 18 U.S.C. § 666, the focus of discussion and, thus, the issue for decision before the Eleventh Circuit concerned the value of an intangible obtained through bribery. As to this issue on which the defendant focused, the Court adopted a market value approach for determining the value of an intangible obtained through bribery stating: "[u]nder this approach, the value of an intangible in the black market of corruption is set at the monetary value of what a willing bribe-giver gives and what a willing bribe-taker takes in exchange for the intangible." Because the corrections officer had received more than $5,000.00, the Court upheld the conviction.

The assertion that the Townsend, forecloses these contentions is based, at most, upon dicta. "The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case that produced the decision." United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000)(quotations marks and citation omitted). Though dicta about a question in a prior decision may be given "fresh consideration," "dicta is not binding on anyone for any purpose." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010), That is particularly so when the point at issue was not fully debated, as it appears was the situation in Townsend with respect to the issue now under consideration from the quoted focus of the defendant's sufficiency argument. See, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 737, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007)("'[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.' Central Va. Community College v. Katz, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006).") As stated earlier in footnote 2 of Defendant Milton E. McGregor's Third Motion to

Dismiss, "Townsend does not address the meaning of the word 'business' in § 666 (in particular, whether drafting and voting on legislation is 'business'), does not address the meaning of the word 'agent' in § 666, does not address the sovereignty concerns that are implicated in a case about State legislative activity, and does not address the legislative history of § 666 (history which demonstrates that the statute was not meant to cover a case such as this). Even if Townsend addressed the legal issues of whether enforcing conditions of pretrial release was 'business' within the meaning of § 666, that would not give an answer to the question whether writing and voting on legislation is 'business' too. Enforcing conditions of pretrial release is much closer to the sort of service function that can be covered by § 666's term 'business,' than to the purely regulatory/sovereign function of creating legislation." (Doc. 450, p. 3, 19-24, p. 4, lines 16) Accordingly, these contentions are not foreclosed and the bribery charges should be dismissed as well.

BASED UPON THE FOREGOING, Defendant Joseph R. Crosby urges this Court to reject the recommendations and to dismiss the charges against him in this case.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 18th day of April, 2011, electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification to all counsel of record.

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