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.	**}**	

DEFENDANT ROBERT GEDDIE'S OBJECTIONS
TO THE RECOMMENDATIONS OF THE MAGISTRATE JUDGE

Defendant Robert Geddie respectfully objects to the Magistrate Judge's recommendation that his Motions to Dismiss Counts Three, Twenty-Three through Thirty-Three, and Thirty-Nine and his Motion to Suppress should be denied.

PROCEDURAL HISTORY

Count Three charges Geddie with federal programs bribery pursuant to 18 U.S.C. § 666(a)(2). (Indict. ¶¶ 193-94). On February 4, 2011, Geddie filed his Motion to Dismiss Count Three and his accompanying brief. (Docs. #460, 462). On February 14, 2011, the Government filed its response. (Doc. #608).

Counts Twenty-Three through Thirty-Three charge Geddie with honest services fraud pursuant to 18 U.S.C. §§ 1341, 1343, and 1346. (Indict. ¶¶ 233-36). On February 4, 2011, Geddie filed his Motion to Dismiss Counts Twenty-Three through Thirty-Three and his accompanying brief. (Docs. #460, 462). On February 14, 2011, the Government filed its response. (Doc. #608).

Count Thirty-Nine charges Geddie with obstruction of justice pursuant to 18 U.S.C. § 1512(c)(2). (Indict. ¶¶ 241-42). On February 4, 2011, Geddie filed his Motion to Dismiss Count Thirty-Nine and his accompanying brief. (Doc. #462, 464). On February 14, 2011, the Government filed its response. (Doc. #601). On February 24, 2011, Geddie filed his reply in further support of his Motion to Dismiss Count Thirty-Nine. (Doc. #663-1).[1]

On February 11, 2011, Geddie filed his Motion to Suppress (Doc. #556), which adopted those arguments advanced by McGregor and requested the Court to suppress all wiretap recordings and any evidence derived from them. On February 23, 2011, the Government filed its opposition. (Doc. #652).

On April 4, 2011, the Magistrate Judge recommended that Geddie's Motions to Dismiss and Motion to Suppress should be denied and entered the respective Reports and Recommendations. (Docs. #860, 862, 863, & 865).

OBJECTIONS: Count Thirty-Nine

Geddie makes the following objections to the legal conclusions contained in the Report and Recommendation (Doc. #860), entered April 4, 2011. Geddie incorporates his initial contentions in favor of dismissal and expressly highlights the following objections.

A. The Government asserts that Geddie obstructed justice by allegedly directing an employee to change an entry in his firm's internal ledger and, after the change, "caus[ing] [the ledger] to be produced" to the Grand Jury.

In Count 39, the Government has accused Geddie of obstructing justice by supposedly directing an employee to change a record in his firm's internal ledger:

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

[1] On February 24, 2011, Geddie requested leave to file his reply, (Doc. #663), and the Magistrate Judge granted that request on April 4, 2011, (Doc. #860).

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.

(Indict. ¶ 242).

Paragraph 70, however, clarifies that the two campaign contributions referenced in Count 39 were drawn from the bank accounts for political action committees (or "PACs") rather than personal or business accounts:

> 70. Later on or about February 15, 2010, GEDDIE and an employee of his lobbying firm delivered two checks, each in the amount of $2,500, drawn from GEDDIE-controlled PACs, to Legislator 3 at the fundraiser for Legislator 3 at a Tallassee, Alabama, restaurant.

(Indict. ¶ 70). Viewing the allegations together, therefore, Count 39 targets the supposed alteration of a "contribution ledger" that Geddie's firm internally maintained – a ledger, which according to the Government, recorded on whose "behalf" particular PAC contributions were made. (Indict. ¶¶ 70, 242).

The Government has charged Geddie, on the basis of the above allegations, with violating 18 U.S.C. § 1512(c)(2). In 2002, the Sarbanes-Oxley Act introduced 18 U.S.C. § 1512(c), which prohibits the following conduct as obstructive:

> (c) Whoever corruptly –

> (1) 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; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 1512(c).

B. Whether the contribution ledger is capable of being falsified – and, therefore, whether the Indictment has charged criminal conduct – is a question of law rather than fact.

Notably, and based solely on the allegations, the Government has relied on the supposed falsification of the contribution ledger – and, in particular, an alleged source misattribution – as the basis for its prosecution:

> Count 39 alleges that [Geddie] violated Section 1512(c)(2) when he caused falsified documents to be produced to the grand jury knowing those documents had been altered, at his direction, to attribute the illicit payments made to Legislator 3 to clients other than McGregor when in fact [Geddie] knew those payments should be attributed to McGregor.

(Doc. #601 at 4-5) (emphasis added).

Under the Government's theory, Geddie did not obstruct justice unless the contribution ledger, insofar as the campaign contributions to Legislator 3 are concerned, was "true" before the alleged alteration and "false" thereafter. In his Reply and building on the Motion to Dismiss, Geddie argued that the contribution ledger, as a matter of law, reflects only judgments about how to attribute particular contributions drawn on his firm's PAC accounts. (Doc. #663-1). As Geddie contended, "[t]he ledger – while factually accurate – is a legal fiction because it is an exercise of discretion or personal judgment. A judgment – even if memorialized in writing – is not falsifiable and, accordingly, cannot be obstructive." (Doc. #663-1 at 2).

The Magistrate Judge concluded that whether the contribution ledger can be falsified is a question of fact for the jury:

> Geddie's Reply brief merely argues about the term "attribution" and how PAC funds are "attributed," and how Geddie's conduct does not constitute falsification. Those arguments are to be presented before the trier of fact, because such determinations would require a trial of the general issue of guilt or innocence, and, hence, are the province on a jury.

(Doc. #860 at 3 n.1) (citation omitted).

Respectfully, Geddie objects to the Magistrate Judge's conclusion that whether the contribution ledger is legally capable of falsification is a question of fact for the jury. As the Eleventh Circuit has explained, dismissing the indictment is appropriate "where there is an infirmity of law in the prosecution." United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987). In particular, "as when confronted with a motion to dismiss a civil complaint for failure to state a claim, the court must look to the allegations and, taking the allegations to be true, determine whether a criminal offense has been stated." United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1082 (5th Cir. 1978). Here, Count 39's allegations are unsustainable because the targeted contribution ledger is not susceptible, as a matter of law, to falsification.

1. PAC Funds are not Segregated.

A PAC is a creature of statute, separate and apart from those who contribute to it. Under the Alabama Fair Campaign Practices Act ("FCPA"), a PAC must utilize a single checking account, and any contributions from the PAC are drawn on that account.[2] When a PAC makes a campaign contribution, that contribution is necessarily from the PAC, not one of the members

[2] See ALA. CODE § 17-5-6 ("A political action committee and a principal campaign committee shall maintain a checking account and shall deposit any contributions received by such committee into such account. No expenditure of funds may be made by any such committee except by check drawn on such account, or out of a petty cash fund from which it may make expenditures not in excess of one hundred dollars ($100) to any person in connection with a single purchase or transaction.").

who contributed funds into the PAC. Given money's fungible nature, it is impossible to verify or otherwise determine whether a particular campaign contribution from a PAC represents one donor's money, another donor's money, or a combination thereof.

For example, suppose that A and B each contribute $100 to a PAC. The PAC thereafter makes a $100 campaign contribution to candidate C. In the absence of segregation, "attributing" that $100 to A, B, or both A and B presents endless permutations (e.g., $0.01 "attributed" to A and $99.99 "attributed" to B; etc.). Critically, no single permutation is "true" because the political contribution came from the PAC as a matter of law.

Accordingly, "attributing" the contribution to particular donors is plainly a matter of discretion, which the FCPA implicitly acknowledges. Specifically, a PAC's management must track and report monetary inflows and outflows.[3] Conspicuously absent is any obligation to match an inflow against an outflow on account of donor identities, and thus there is no requirement that a contribution ledger like the one at issue here be created or even maintained.

2. The Funds Belong to the PAC, Not to the Donor.

A donor does not "own" the funds that he or she contributes to a PAC. Under Alabama law, a PAC is a standalone entity that owns outright its assets.[4] According to the Government,

[3] See ALA. CODE § 17-5-3(c)(1)-(2) ("It shall be the duty of the treasurer of a political action committee to keep a detailed, exact account of . . . [a]ll contributions made to or for such committee [and] [a]ll expenditures made by or on behalf of such committee . . . .").

[4] See ALA. CODE § 17-5-8(c)(1) (requiring a PAC to disclose publicly the "amount of cash or other assets on hand"); see also ALA. CODE § 17-5-3(b) (requiring a PAC's property to be "segregated from" and "not commingled with" its officers and members' funds); ALA. CODE § 17-5-3(c)(2) (requiring a PAC's treasurer to record all contributions "made by or on behalf of such committee").

the funds at issue were contributed to the PACs via check, (Indict. ¶ 121), and under well-established law, the recipient of a check becomes the sole owner of the transmitted funds.[5]

Conceptually related, federal law recognizes that (1) PACs are entities taxable according to their operation rather than with reference to their management or donors and (2) PACs have standing to sue and be sued in their own names.[6] Moreover, the FCPA, by withholding any fiduciary responsibilities, grants PACs unfettered discretion over management of its funds without a donor's recourse (i.e., a donor could not sue the PAC for "mismanaging" contributions). A donor's interest in the money, therefore, is extinguished upon transfer to the PAC, which operates independently from its donors and analogously to an incorporated entity.[7]

Given a PAC's exclusive ownership over all funds received, any contribution made by the PAC is made in only the PAC's name and solely on account of the PAC.[8] Accordingly, the Government's allegation that the contributions to Legislator 3 "were made on behalf of" McGregor, (Indict. ¶ 242), is without foundation in the law. The contribution's source (i.e., the PAC) remains unchanged even if the PAC's management internally and privately "attributes" a contribution to a particular donor.

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[5] See ALA. CODE § 7-3-104(a) (defining a "negotiable instrument" as an "unconditional . . . order to pay"); ALA. CODE § 7-3-103(a)(6) (defining an "order" as a "written instruction to pay money").

[6] See 26 U.S.C. § 527(a)-(c) (subjecting PACs to income tax requirements on account of only the PAC's gross income); N.H. Right to Life PAC v. Gardner, 99 F.3d 8, 17 (1st Cir. 1996) (holding that a political action committee had standing to assert constitutional challenges against a state statute).

[7] The parallels between a PAC and a corporation are manifest. Under the FCRA, a PAC – like a corporation – forms only after filing a "statement of organization" with the Secretary of State. ALA. CODE § 17-5-5(a). Similarly, the PAC's existence is perpetual or until it publicly files a notice of termination. ALA. CODE § 17-5-5(d).

[8] See ALA. CODE § 17-5-6 (requiring a PAC's campaign contributions to be made from its checking account).

3. A PAC is not a Trust or a Trust Account.

Contrary to the Government's unstated premise, a PAC does not function like a trust or as a trust account. Property held in trust or a trust account is legally owned by the beneficiary and, as a consequence, must be ascertainable. Correspondingly, the law requires trustees or trust account holders to segregate and earmark the property to which the beneficiary is separately entitled.[9] For a trust, therefore, a disbursement is verifiably "attributable" to a particular beneficiary's account. As described above, however, a PAC's operation is factually and legally distinct. A PAC does not segregate funds like a trust, and a donor's right to funds is extinguished upon transfer to the PAC. Critically, in the absence of those constraints, the only verifiable certainty is that a campaign contribution, drawn on a PAC's bank account, is attributable to the PAC. In this sense, a PAC is similar to a corporate charity, like the Salvation Army. A donor to the charity loses any control over the contributed funds. Because the political contributor loses control of the contribution, it does not make a difference – as a matter of law – how the PAC manager internally attributes the contribution.

4. "Attributions" are Judgments, and Judgments cannot be Falsified.

"Attributing" campaign contributions to constituent donors is simply a judgment – a matter within the discretion of the PAC's management. As a judgment, it is neither true nor false nor capable of being made true or false. Indeed, even if the PAC's management "re-attributes" a previously "attributed" contribution, one "attribution" is not truer than the other.

A personal judgment – even if memorialized on paper – cannot be falsified and, consequently, cannot be obstructive. As the cases to which the Government cited illustrate,

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[9] See generally ROUNDS & ROUNDS, LORING: A TRUSTEE'S HANDBOOK 456 (2009) ("It is the duty of the trustee to earmark the trust property and to keep it separate from the trustee's own property and from other property not subject to the trust (including funds of different trusts).") (citing Uniform Trust Code § 810(b); RESTATEMENT (THIRD) OF TRUSTS § 84; RESTATEMENT (SECOND) OF TRUSTS § 179)).

representations must be factually verifiable before they can be falsified.[10] Count 39, however, involves a record without a fixed point of reference; instead, the document memorializes only judgments at particular points in time. For the sake of argument, and accepting the allegations in Count 39, a change in a judgment would not render the first judgment false. The only discernible "truth" is that a change occurred, but a change on its own does not constitute falsification, as the Government suggests.

Here, Count 39 necessarily assumes that (1) the ledger had verifiable "truth" and (2) Geddie allegedly impeded the grand jury's access to that "truth" by directing an employee to "attribute" a contribution to two clients rather than to McGregor. (Indict. ¶ 242). As described, however, any record of "attribution" is an exercise of judgment built upon a legal fiction. A change in "attribution" – from or to McGregor – is correspondingly incapable of falsification. Count 39, therefore, fails to charge criminal conduct and should be dismissed.

C. The Government has not alleged a nexus between Geddie's conduct and an official proceeding.

In Pettibone v. United States, 148 U.S. 197, 206 (1893), the Supreme Court 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

[10] See United States v. Mintmire, 507 F.3d 1273, 1290-92 (11th Cir. 2007) (defendant made numerous representations susceptible to factual verification); United States v. Carson, 560 F.3d 566, 584 (6th Cir. 2009) (defendant misrepresented that he did not witness particular events when, in fact, he did witness them); United States v. Perez, 575 F.3d 164, 166 (2d Cir. 2009) (defendants "gave false accounts of the incident").

'nexus' requirement – that the act must have a relationship in time, causation, or logic with the judicial proceedings." Id. at 599.

"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." Id. (citations omitted). Although the Court in Aguilar was construing § 1503, at least three courts have applied the nexus requirement to § 1512(c)(2). 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).

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 and grand jury proceedings. Id. at 1207-1208.

Regarding Count 39, the Government partially clarified its scope and offered the following as the purported satisfaction of the nexus requirement:

> Here, the Indictment does allege a clear and direct nexus between the obstructive act and the grand jury proceeding. Count 39 specifically alleges that the defendant corruptly did or attempted to obstruct, influence, or impede a grand jury proceeding by "caus[ing]" altered ledgers "to be produced to law enforcement officials, in response to multiple grand jury subpoenas." Indict. ¶ 242. Those allegations plainly charge the defendant with conduct that bears a "relationship in

> time, causation or logic" to an "official proceeding." See 18 U.S.C. § 1515(a)(1)(C) (defining the "official proceeding" language of Section 1512 to include any "proceeding before . . . a Federal grand jury").

(Doc. #601 at 9). The Magistrate Judge agreed and "[found] that the allegations do indeed allege a nexus and the allegations in the Indictment are sufficient." (Doc. #860 at 5). Geddie respectfully objects to that conclusion.

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. (Indict. ¶ 66) ("[O]n or about March 31, 2010 . . . after the existence of the instant criminal investigation became public . . . ."). If, at the time 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 guilty 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, and based solely on the Indictment, 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. Moreover, as described above, the submitted document was legally incapable of falsification and, in fact, the Government has never even alleged that Geddie or anyone else, for that matter, vouched for its accuracy before the grand jury.

Given the obvious difficulties in sustaining Count 39 exclusively on the basis of the ledger's supposed "falsification," the Government has resisted that theory and focuses, instead, on the act of production. (Doc. #601 at 9) ("Count 39 specifically alleges that the defendant

corruptly did or attempted to obstruct, influence, or impede a grand jury proceeding by 'caus[ing]' altered ledgers 'to be produced to law enforcement officials, in response to multiple grand jury subpoenas.'") (emphasis added). The Magistrate Judge agreed that the allegation of production, on its own, is sufficient to charge criminal conduct. (Doc. #860 at 5).

On that basis, however, the Indictment's allegations internally collapse. Specifically, as the Second Circuit reasoned in United States v. Moon, document production, on its own and solely in response to a subpoena, does not reveal corrupt intent sufficient to support an obstruction of justice conviction. 718 F.2d 1210, 1236 (2d Cir. 1983) ("But here the ledger and loan agreements were produced pursuant to subpoena and even though there was ample proof of their being falsely backdated, there was no evidence of Kamiyama's corrupt intent in producing them."); see also United States v. Brand, 775 F.2d 1460, 1470 (11th Cir. 1985) (approvingly citing to Moon).

Here, the Government has claimed only that (1) Geddie, before any alleged expectation of an impending official proceeding, directed an employee to alter the contribution ledger and (2) at some point thereafter, Geddie "caused [the ledger] to be produced to law enforcement officials" by complying with a grand jury subpoena. (Indict. ¶ 242). Essentially, therefore, the Government suggests that an otherwise non-obstructive act (i.e., the ledger's alteration) transformed into an obstructive act (i.e., the ledger's production) solely because Geddie's firm received a document subpoena. But as Moon illustrates, subpoena compliance alone is inadequate.

No doubt, the Government will point to its summary allegation that Geddie acted "corruptly," (Indict. ¶ 242), but as Geddie initially observed, "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 . . . ." (Doc. #464 at 8). Accordingly, because Count 39 confusedly charges that a ledger was changed without any anticipation of or in connection with an official proceeding and later produced in compliance with a grand jury subpoena, Count 39 fails to charge criminal conduct and, therefore, should be dismissed.

OBJECTIONS: Counts Three and Twenty-Three through Thirty-Three

Geddie adopts McGregor's objections to the Magistrate Judge's Reports and Recommendations (Docs. #862 & 863), entered April 4, 2011, which recommended that the Motions to Dismiss Counts Three and Twenty-Three through Thirty-Three should be denied. On April 18, 2011, McGregor filed those objections. (Docs. #917 & 918).

OBJECTIONS: The Wiretap Suppression

Geddie adopts McGregor's objections to the Magistrate Judge's Report and Recommendation (Doc. #865), entered April 4, 2011, which recommended that the Motion to Suppress should be denied. On April 18, 2011, McGregor filed those objections under seal.

Respectfully submitted,

Dated: Monday, April 18, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following counsel of record through the court's electronic filing system this 18th day of April, 2011:

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