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

UNITED STATES OF AMERICA,	)	
	)	**Crim. No. 2:10cr186-MHT**
Plaintiff,	)	
	)	
v.	)	**[18 U.S.C. §§ 371, 666(a)(1)(B), 666(a)(2), 1341, 1343, 1346, 1951, 1956(a)(1)(B)(I) 1001(a)(2), 1512(c)(2), and 2]**
	)	
MILTON E. MCGREGOR,	)	
THOMAS E. COKER,	)	
JAMES E. PREUITT,	)	
QUINTON T. ROSS JR.,	)	
HARRI ANNE H. SMITH,	)	
JARRELL W. WALKER JR.,	)	
and	)	
JOSEPH R. CROSBY,	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANT MCGREGOR, SMITH, PREUITT, ROSS, COKER, CROSBY, AND WALKER'S MOTION TO DISMISS BASED ON GRAND JURY INSTRUCTIONS

The United States of America, through undersigned counsel, hereby opposes defendant McGregor, Smith, Preuitt, Ross, Coker, Crosby, and Walker's Motions to Dismiss Based on Grand Jury Instructions (see Dkt. Nos. 1212, 1213, 1217, 1218, 1226, 1228, and 1229). The defendants' motions erroneously assume that the United States premised the Indictment on a faulty interpretation of the law. Not only does this assumption misconstrue the government's positions regarding the law, it also conspicuously ignores binding authority regarding the charged offenses. Because the Indictment is facially valid, tracking the statutory elements of the offenses at issue, dismissal is unwarranted. The defendants' motions should be denied.

BACKGROUND

On October 1, 2010, the grand jury returned the Indictment, which, among other offenses, charged the defendants with multiple counts of paying or demanding bribes in the form of campaign contributions in violation of 18 U.S.C. § 1951 (the Hobbs Act), 18 U.S.C. § 666 (Federal Program Bribery), and 18 U.S.C. § 1346 (Honest Services Fraud) . See Indictment ¶¶ 2–33.

On November 12, 2010, February 2, 2011, February 4, 2011, and April 18, 2011, respectively, the defendants moved to dismiss the campaign-contribution-based bribery charges, see Dkt. Nos. 206, 408, 437, 441, 443, 450, 456, 463, 474, and 486, on grounds different from those presently in question. The motions to dismiss argued, among other things, that all forms of bribery charged in the Indictment require showing "explicit quid-pro-quos, " i.e. agreed upon exchanges, between things of value offered or demanded and reciprocal official acts. In response, the government pointed out that only Hobbs Act offenses charging bribery that takes the form of campaign contributions require an explicit quid-pro-quo. See, e.g., Dkt. No. 604, 4 n.2; 607, 5-6.

On April 4, 2011, the Magistrate Judge recommended denial of the defendants' previous motions to dismiss. Dkt. No. 862. On April 18, 2011, the defendants appealed the Magistrate Judge's recommendation. See Dkt. Nos. 917, 920, 928, 934, 935, 936, 942, 943, and 950. During oral argument on May 5, 2011, see Dkt. Nos. 1067-68, the government recommended that the explicit quid-pro-quo requirement should apply to all bribery offenses related to campaign contributions charged in the Indictment. The government made this recommendation in order to simplify jury instructions at trial, even though the law did not and does not impose an explicit quid-pro-quo requirement on Federal Program Bribery and Honest Services Fraud offenses. Transcript of May 5, 2011, Oral Argument ("Tr.") 8: 7-12. The defendants subsequently made the

extemporaneous leap of logic that the government had somehow conceded that the law mandated such a requirement. Id. 50: 12-25. The defendants further jumped to the conclusion that the government had never instructed the grand jury that Federal Program Bribery and Honest Services Fraud require showing an explicit quid-pro-quo. Id. The Court responded to these novel assertions by permitting the parties to submit briefs regarding the propriety of second-guessing the grand jury's probable-cause finding because of allegedly erroneous legal instructions. Id. 94: 8-10.

On May 23, 2011, the Court affirmed the denial of the defendants' motions to dismiss.[1] Dkt. No. 1173. Noting that the defendants had waited until oral argument to question the allegedly problematic legal instructions, the Court invited more comprehensive briefing regarding the issue. Id. 5. From June 1, 2011, through June 5, 2011, more than a week after the Court's invitation, and less than one week before the parties began picking jurors on June 6, 2011, the defendants filed the motions to dismiss at issue here. See Dkt. Nos. 1212, 1213, 1217, 1218, 1226, 1228, and 1229.

ARGUMENT

In their motions to dismiss, the defendants contend that the Indictment should be dismissed because the United States hampered the grand jury's probable-cause determination through defective legal instructions. McGregor Mot. at 1-2.[2] Specifically, the defendants claim that the United States failed to instruct the grand jury that an explicit-quid-pro-quo standard applies to all bribes made in the form of campaign contributions–not just Hobbs Act bribery. Id. The defendants imply that the United States conceded that it misinterpreted the law when it suggested to the Court in oral argument

[1] Three days later, on May 26, 2011, the Court later revoked this order and substituted it with a materially identical order. See Dkt. No. 1190.

[2] Defendant Smith, Preuitt, Ross, Coker, Crosby, and Walker have adopted McGregor's motion. See Dkt Nos. 1213, 1217, 1218, 1226, 1228, and 1229.

that jury instructions for this case should apply an explicit quid-pro-quo to all bribery charges in the Indictment. Id. at 2. This is an implication that the Court has already rejected. Dkt No. 1190, p. 3.

Dismissing an indictment because of alleged infringement of the grand jury's judgement is an "extreme sanction which should be infrequently utilized." United States v. Hyder, 732 F.2d 841, 845 (11th Cir. 1984). The defendants' motions fail to justify such radical action for two reasons.

First, with respect to offenses charged under Honest Services Fraud and Federal Program Bribery, the law does not require an explicit quid-pro-quo between bribes comprised of campaign contributions and official acts. Nor has the government stated otherwise; the United States' proposed jury instructions include the explicit-quid-pro-quo requirement in an effort to utilize a single standard that jurors can easily apply cross boards when they deliberate. Second, the Indictment fulfills the Eleventh Circuit's criteria for constitutional sufficiency, which in these circumstances requires nothing more than facial validity. By tracking the statutory elements of the charged offenses and pleading facts that clearly link bribes with official acts, the Indictment on its face makes it possible to infer that the grand jury had a sound basis for indicting the defendants.

I. The Government Has Consistently Prosecuted This Case Based on A Correct View of The Law.

The defendants' entire argument rests on the single unproven assumption that the government incorrectly views Federal Program Bribery and Honest Services Fraud as not requiring explicit qui-pro-quos with respect to bribes relating to campaign contributions. McGregor Mot. at 2. The defendants are wrong.

To be sure, the United States did, in fact, inform the Court during oral argument that jury instructions should apply that requirement to all bribery offenses charged in the Indictment. This

was no concession to a requirement of law, however; it was merely an attempt to aid the jury in its deliberations through consistent legal standards. No controlling law mandates such a standard, and the defendants fail to cite any caselaw to the contrary. Indeed, the Eleventh Circuit very recently issued a binding opinion, United States v. Siegelman, — F.3d —, 2011 WL 1753789 (11th Cir. 2011), that left unanswered whether those offenses require a quid pro quo, id. at *21 ("[E]ven if a quid pro quo instruction was required [for § 666 bribery cases], such an instruction was given"); id. at *28 ("Without deciding whether a quid pro quo must be proved in an honest services bribery prosecution, we hold that any error in the honest services instructions … was harmless").

The defendants likewise contend that the government has incorrectly rejected the need for a quid-pro-quo showing with respect to bribes based on things other than campaign contributions. McGregor Mot. at 2. But no caselaw requires such a showing. At least one court in the Eleventh Circuit has refused to require a quid-pro-quo for cases charged under § 1346 that did not involve campaign contributions. See United States v. Nelson, No. 3:10-cr-23-J-32TEM, 2010 WL 4639236, at *2 (M.D. Fla. Nov 8, 2010) ("the Court 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"), vacated in part on other grounds, United States v. Nelson, No. 3:10-cr-23-J-32TEM, 2011 WL 1560587, at *1 (M.D. Fla. Apr. 25, 2011). With respect to non-campaign-contribution bribery charged under § 666, the defendants point to the United States' Response to Defendant Ross's Motion to Strike, Dkt. No. 1018, in which the government harmonized its reading of United States v. McNair, 605 F.3d 1152 (11th Cir. 2010), with the position taken by the Solicitor General opposing McNair's petition for a writ of certiorari, Brief for the United States in Opposition, McNair v. United States, Nos. 10-516, 10-528, 10-533, 2011 WL 767565 (Feb. 4, 2011).

As explained in the United States' Response to the Motion to Strike, when the government filed its pre-trial responses addressing McNair's § 666 analysis on Feb 14, 2011, it was unaware that the Solicitor General had filed his briefs opposing McNair's petition for a writ of certiorari just ten days earlier. In its Response to Defendant Ross's Motion to Strike, Dkt. No. 1018, p. 1-2, the government clarified its reading of McNair in light of the position taken by the Solicitor General. The United States explained that under McNair, "prosecutions under § 666 need not establish a specific quid pro quo." Id. (emphasis in original). Put differently, McNair merely stands for the proposition that the Eleventh Circuit does not require in every case proof of a specific link to a specific official action to sustain a conviction for Federal Program Bribery. That proposition does not help the defendants' motion, however, because it says nothing regarding the government's persistent view that Federal Program Bribery involving campaign contributions does not require an explicit quid-pro-quo.

Regardless of McNair's precise holding, the Indictment pleads a clear connection between things of value other than campaign contributions involving the Defendants, and official acts that the bribes were intended to influence. As explained in greater detail below, this clear connection is enough to overcome any challenge to the Indictment's constitutional sufficiency.

In sum, the defendants cannot point to any misinterpretation of the law on the government's part. This failure thwarts the defendants' inference that the government improperly instructed grand jurors, and their motions necessarily fail.

II. Because It Is Facially Valid, the Indictment Cannot Be Dismissed.

Even if the government does misunderstand the quid-pro-quo requirement applicable to the charge offenses, the Indictment's facial validity still satisfies the defendants' concerns.

The Eleventh Circuit has held that an indictment is constitutionally sufficient if it 1) presents the essential elements of the crime charged, 2) notifies the accused of the offenses to be defended against, and 3) enables the accused to rely upon a conviction as a bar against double jeopardy. United States v. Wayerski, 624 F.3d 1342, 1349 (11th Cir. 2010). An indictment need only refer specifically to essential statutory elements of charged offenses and track the statutory wording, so long as the wording provides the essential elements of the crime, in order to permit the inference that the grand jury found those elements to be present. Id. at 1349-50. Such facial validity ensures the indictment's constitutional soundness regardless of the legal instructions provided to the grand jury. Id. ("These requirements satisfy the Sixth Amendment's guarantee of notice to the accused of the nature and the cause of the accusation, and the Fifth Amendment's assurance that a grand jury will return an indictment only when it finds probable cause for all elements of the crime."); 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."); see also Costello v. United States, 350 U.S. 359, 409 (1956) (an indictment, "if valid on its face, is enough to call for trial of the charge on the merits").

Here, as the government has repeatedly emphasized in filings and in argument, the Indictment tracks the statutory language of the charged offenses and includes factual allegations that plead clear connections between bribes charged under §§ 666 and 1346 and official acts. The Court has already recognized those connections with respect to § 666, ruling that, "all the § 666 counts [in the Indictment] are sufficient to make out explicit-quid-pro-quo charges, regardless as to any reasonable definition of the term employed." See Dkt. No. 1190. With respect to § 1346, the Indictment clearly maps links between bribes and official acts in over 158 paragraphs, see

Indictment ¶¶ 29-190, and incorporates each of those 158 paragraphs counts into the defendants' Honest Services Fraud charges, (see Indictment ¶¶ 233-236.)

Notably, the Defendants are not entitled to have the Indictment read in a manner that makes best sense to them: No mandate requires the charging document to include the Latin phrase "quid pro quo." See United States v. Seminerio, 2010 WL 3341887, at *6 (S.D.N.Y. Aug. 20, 2010) ("[T]he Indictment need not utter the 'magic words' 'quid pro quo' or even 'bribe' or 'bribe receiving' or'kickbacks'—so long as a jury could find that Seminerio understood what was expected as a result of the payments to exercise particular kinds of influence as opportunities arose."); see also United States v. Giles, 246 F.3d 966, 973 (7th Cir. 2001) (upholding bribery instruction in a Hobbs Act extortion despite that "the magic words quid pro quo were not uttered [in a challenged charge]"); United States v. Cincotta, 689 F.2d 238, 242 (1st Cir. 1982) ("But, to be sufficient, these elements need not always be set forth in haec verba. Indictments must be read to include facts which are necessarily implied by the specific allegations made."). This is especially true where the statutory test implies a required element. United States v. Aliperti, 867 F. Supp. 142, 145 (E.D.N.Y. 1994) ("[T]he requirement of a quid pro quo, rather than amounting to an additional element unspecified in the [Hobbs Act], is encompassed within the language of the statute itself."); United States v. Malone, 2006 WL 2583293, at *2 (D. Nev. Sept. 6, 2006) ("Although it is necessary to show quid pro quo where it is alleged that a campaign contribution is part of the illegal conduct, . . . a criminal indictment does not need to specifically allege quid pro quo.").

Nevertheless, the defendants assert that the Court should dismiss the Indictment. They attempt to sidestep the Eleventh Circuit's criteria for assessing the constitutional sufficiency of indictments announced in Wayerski, 624 F.3d at 1349-50, by creating their own dismissal standard.

McGregor Mot. at 3-5. The defendants do so by claiming that there is "grave doubt" under Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), whether the grand jury would have returned the Indictment if not for the government's allegedly erroneous jury instructions. See Bank of Nova Scotia, 487 U.S. at 256 ("[A]t least where dismissal is sought for non-constitutional error, . . . dismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." (internal quotation marks and citation omitted)). The defendants go one step further in avoiding the Wayerski criteria by arguing that a vitiated "grave doubt" standard should apply here because erroneous legal instructions supposedly violated the defendants' constitutional rights. McGregor Mot. at 5 (contending that "the standard should be something less than 'grave doubt'").

Looking to support from non-binding caselaw and misleading quotes, the defendants allege that their novel standard calls for dismissal of the Indictment. They rely principally on a crimped reading of United States v. Larrazolo, 869 F.2d 1354 (9th Cir. 1989), for the proposition that the government has infringed on the grand jury's "ability to exercise independent judgement." See McGregor Mot. at 4-5. Contrary to the defendants' arguments, however, Larrazolo makes clear that the defendants "must show that the grand jury's independence was so undermined that it could not make an informed and unbiased determination of probable cause"—something the defendants have failed to do. What is more, Larrazolo goes so far as to hold that not even erroneous instructions to the grand jury warrant dismissal of an indictment. Id., 869 F.2d at 1359. Notably, the Eleventh Circuit has adopted the Ninth Circuit's strict standard for the dismissal of indictments: "[O]nly in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been

presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased grand jury." United States v. Hyder, 732 F.2d 841, 845 (11th Cir. 1984) (citing United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977)). As explained above, the defendants fail to establish any error in the government's understanding of the charged offenses, let alone "flagrant" error, such as knowing perjury that relates to a material matter.

The defendants' reliance on United States v. Stevens, — F.2d —, 2011 WL 1033707 (D. Md. 2011) is likewise unavailing. See McGregor Mot. at 4. Stevens, unlike Wayerski, carries no precedential force in this Court. Furthermore, it is inapposite. Stevens concerned a squarely erroneous instruction by the government to grand jurors regarding the defendants' ability to assert a valid advice-of-counsel defense. Stevens, 2011 WL at *7-*11. But here, as explained above, the United States has charged the defendants based on a correct understanding of the need for explicit quid-pro-quos with respect to §§ 666 and 1346 when campaign contribution are at issue. The defendants are therefore unable to establish any question regarding the government's grand-jury instructions. Moreover, because it presents all the essential statutory elements of the charges and pleads sufficient facts to describe the links between the bribes and official acts that underlie the charges, the Indictment is facially valid. The Constitution requires nothing more.[3]

III. The Defendants' Motions Are Untimely.

[3] The defendants also move for disclosure of the grand jury instructions without clearly citing what authority governs such a request. The only conceivable authority for disclosure would fall under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii). Yet since the defendants have not shown a reasonable ground to dismiss the Indictment, that avenue is closed. Additionally, it should not be forgotten that there is a "long-established policy of [grand jury] secrecy, older than our Nation itself." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (observing that "the indispensable secrecy of the grand jury proceedings… must not be broken except where there is a compelling necessity.") (internal quotation marks omitted).

The defendants allege that their motions to dismiss are timely because the United States did not make clear before February 4, 2011, the general deadline for the filing of motions in this case, its views regarding the need to show explicit quid-pro-quos under §§ 666 and 1346. According to the defendants, without knowing the government's views regarding explicit quid-pro-quos, they could not infer that the United States had improperly instructed the grand jury regarding the law. That argument misses the point, and ignores the record.

The defendants received clear notice of the government's position regarding explicit quid-pro-quos as early as February 14, 2011. On that date, the United States filed its Opposition to Defendant Gilley's Motion to Dismiss on Free Speech and Due Process Grounds. See Dkt. No. 604. In its Opposition, the United States cast doubt on the need for an explicit quid-pro-quo to violate §§ 666 and 1346. Id. at 4, 4 n.2. Thus, the defendants could easily have filed the motions at issue months before the Court invited them to do so during oral argument on May 5, 2011, see Dkt. Nos. 1067-68, and then again on May 23, 2011, see Dkt. No. 1173. Even if the defendants had nevertheless overlooked the United States' Opposition, this fails to explain why they waited until less than a week before jury selection commenced on June 6, 2011, to file their motions. Their tardiness should not be rewarded.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that defendants' Motion to Dismiss Based on Grand Jury Instructions be dismissed.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Barak Cohen
BARAK COHEN