IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA

Case No. 5:20-cr-28-MW/MJF

v.

MARGO DEAL ANDERSON, et al.,

Defendants.
_____/

DEFENDANT ANDERSON'S
MOTION TO DISMISS COUNTS

Defendant, Margo Deal Anderson, moves to dismiss Counts 1 and 4 in the Third Superseding Indictment, and says:

I. COUNT 4

Count 4 charges Anderson with federal program bribery under section 666(a)(1)(B). Section 666(a)(1)(B) requires that an official corruptly accept or agree to accept something of value *in exchange for* intending to be influenced or rewarded in connection a particular item of business, a transaction, or a series of transactions. Count 4 fails to plead a particular item of business, transaction, or series of transactions for which Anderson corruptly intended to be influenced or rewarded when she allegedly accepted or agreed to accept a bribe.

Therefore, Count 4 fails to plead a bribery scheme with sufficient specificity to apprise Anderson of the specific charge. Fed. R. Crim. P. 12(b)(3)(B)(iii).

A. Federal Bribery Statutes and Honest Services Doctrine

Section 666 bribery is an extension of section 201 bribery and frequently travels parallel to section 1343 honest services fraud. The Supreme Court discusses the statutes using similar terms and themes and recently spoke collectively about federal fraud law in construing section 1343 and section 666. The Court's instruction and guidance was that in corruption cases premised on a deprivation of a state or local official's honest services, the fraudulent scheme must be a bribery or kickback scheme:

> The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Save for bribes or kickbacks . . . , a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property."

Kelly v. United States, 140 S. Ct. 1565, 1571-72 (2020) (discussing schemes to defraud, quoting section 1343, and citing section 666).

Therefore, recognizing the statutes have their differences, decisions construing and applying section 201 and section 1346 should be persuasive in construing and applying section 666 when involving common terms and themes.

18 U.S.C. § 201

Section 201 is the general federal bribery statute. It criminalizes bribery of an official occupying a position of public trust with federal responsibilities. An official commits bribery under section 201 if he or she "corruptly . . . accepts, or agrees to

accept anything of value . . . in return for being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2).[1]

The Supreme Court explained that an official's "corrupt intent" distinguishes a "bribe" from a "gratuity" (each proscribed by different subsections). The Court characterized corrupt intent as the intent to influence or be influenced and characterized bribery as a quid pro quo: "for 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 of Cal.*, 526 U.S. 398, 404-05 (1999); *see also United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978) (explaining that bribery requires proof of corrupt intent which amounts to a quid pro quo but an unlawful gratuity does not); *quid pro quo*, Black's Law Dictionary (11th ed. 2019) (defining "quid pro quo" as "[a]n action or thing that is exchanged for another action or thing").

In other words, the Supreme Court equated corrupt intent to a quid pro quo which it described as an "in exchange for" arrangement. The significance of the "corrupt intent-quid pro quo-in exchange for" analogy will become apparent later.

As to timing and specificity, the Supreme Court explained that an official must agree to influence an official act at the time of the alleged quid pro quo. The Court

[1] The Third Superseding Indictment charges Anderson with corruptly accepting and agreeing to accept (but not soliciting or demanding) a thing of value, so Anderson focuses on those statutory elements.

explained that a specific official act need not be identified at the time the official accepts or agrees to accept a thing of value but that the specific question or matter intended to be influenced must be identified at that time. *McDonnell v. United States*, 136 S. Ct. 2355, 2371, 2375 (2016). Although *McDonnell* does not preclude all "as the opportunities arise" theories of bribery, it precludes open-ended theories not tied to a focused and concrete question or matter identified at the time an official accepts or agrees to accept a thing of value. *See United States v. Silver*, 948 F.3d 538, 553 (2d Cir. 2020) ("Even though the particular *act* of influence need not be identified at the time of the official's promise, the particular *question* or *matter* to be influenced must be . . . . *McDonnell* clarifies that, to be convicted of bribery under the 'as the opportunities arise' theory, the public official must, at minimum, promise to influence a 'focused and concrete' 'question or matter.'" (citing *McDonnell*, 136 S. Ct. at 2369-70)).

Notably, the Supreme Court also held that section 201 does not criminalize (neither under a subsection (b) bribery theory nor subsection (c) gratuity theory) gifts "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." *Sun-Diamond*, 526 U.S. at 405-06 (rejecting an argument that section 201(c) criminalizes "any effort to buy favor or generalized goodwill from an official" and rejecting an argument that section 201(c) only requires proof that a "'gift was motivated, at least in part, by the

recipient's capacity to exercise governmental power or influence in the donor's favor' without necessarily showing that it was connected to a particular official act").

This would never occur, of course, but assume a donee-congressman was raking in the loot with the intent to perform official acts favorable to the donors *on future unknown matters*. The congressman inevitably violated some law or regulation. However, if his or her acceptance of things of value was not tied to an intent to perform an official act on a focused and concrete question or matter (i.e., a bribe) and was not for or because of a specific official act (i.e., an illegal gratuity), there is no violation of section 201. It is not a matter of right, wrong, or fairness; it is purely a matter of law.

18 U.S.C. § 1346

Section 1341 and section 1343 criminalize schemes and artifices to defraud, and section 1346 defines "the term 'scheme or artifice to defraud' [to] include[] a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.[2] The statutes omit reference to the terms "bribery," "corrupt intent," "quid pro quo," or "in exchange for." Notwithstanding, the Supreme Court implied the requirement.

[2] Subsequent references to section 1346 are to an honest services fraud theory under section 1341 or section 1343.

The Supreme Court explained that "the honest-services doctrine had its genesis in prosecutions involving bribery allegations" and held "that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law." *Skilling v. United States*, 561 U.S. 358, 408-09 (2010); *see also United States v. Lindberg*, 39 F.4th 151, 167 (4th Cir. 2022) ("Although the statute [section 1346] does not speak in terms of *quids* and *quos*, the Supreme Court has interpreted the statute narrowly to forbid only 'fraudulent schemes to deprive another of honest services *through bribes or kickbacks*.'" (quoting *Skilling*, 561 U.S. at 404)).

Consistent with its analysis of section 201, the Supreme Court rejected arguments that section 1346 criminalized undisclosed self-dealing and conflicts of interests. The Court did not suggest the other conduct was permissible. Rather, to preserve the statute's constitutionality, it concluded that non-bribery conduct as a matter of law was outside the scope of section 1346. *Skilling*, 561 U.S. at 409-11 ("[O]ur construction of § 1346 . . . reach[es] only *seriously* culpable conduct . . . ." (emphasis added)).

Although neither the Supreme Court nor the Eleventh Circuit has expressly held that the section 201 bribery standard articulated in *McDonnell* is required for a section 1346 conviction, Anderson is aware of no circuit decisions holding that something less than quid pro quo bribery suffices for section 1346.

18 U.S.C. § 666

Moving to section 666. Anderson contends that section 666 also requires a quid pro quo bribery scheme and that anything less than quid pro quo bribery is not a violation of section 666(a)(1)(B). It may violate another law or regulation, but not section 666.

In pertinent part, a state or local official violates section 666(a)(1)(B) if he or she:

> *corruptly* . . . accepts or agrees to accept, anything of value . . . intending to be influenced or rewarded in connection with any business, transaction, or series of transactions . . . involving anything of value of $5,000 or more.

18 U.S.C. § 666(a)(1)(B) (emphasis added).

The Supreme Court explained that "§ 666(a)(1)(B) was designed to extend [section 201] federal bribery prohibitions to *bribes* offered to state and local officials" and that it criminalized the acceptance of anything of value "*in exchange for* the influence or reward." *Salinas v. United States*, 522 U.S. 52, 57-58 (1997) (emphasis added). The Court said nothing of section 666(a)(1)(B)'s extending section 201's prohibition on gratuities. Further, the "corruptly" term included by Congress in section 666(a)(1)(B), and the "in exchange for" term used by the Court in *Salinas* to describe section 666(a)(1)(B), are the same terms the Court roughly 16 months later equated to quid pro quo bribery. *Sun-Diamond*, 526 U.S. at 405-05. Therefore, although section 666 may proscribe different quids and quos than its

counterparts (i.e., something other than an "official act"), it requires a quid pro quo bribery scheme, and the quo must be something focused and concrete.

Not everyone agrees. Some courts construe section 666(a)(1)(B)'s phrase "intending to be influenced *or rewarded*" to mean that section 666 covers bribes *and gratuities*. However, that construction disregards the corrupt intent element and the Supreme Court's decision in *Kelly*.

First, corrupt intent is the core of a bribery offense and is not unique to a section 201 bribery offense. In *Perrin v. United States*, the Supreme Court traced the evolution of bribery from its early common law application to the "corruption of judges" to its expansion to include the "corruption of any public official." *Perrin v. United States*, 444 U.S. 37, 43 (1979); *see also Wilkie v. Robbins*, 551 U.S. 537, 564 n.12 (2007) (construing the Hobbs Act to "retain[] the core idea of extortion as a species of corruption, akin to bribery"). Legal dictionaries likewise define bribery with an element of corrupt intent. *See bribery*, Black's Law Dictionary (11th ed. 2019) (defining "bribery" as "[t]he corrupt payment, receipt, or solicitation of a private favor for official action").

Second, a "reward" could be a bribe, an unlawful gratuity, or a lawful gratuity. It turns on intent. If an official acts *without knowledge* of the potential for a reward, the later acceptance of a reward (even if directly tied to a specific prior act) cannot be a bribe. An official cannot be corrupted by a reward of which he or she lacked

knowledge. Conversely, if an official corruptly acts on a known offer or promise to be rewarded, the later acceptance of the reward may be a bribe. This construction of the term "reward" as an inducement is not novel. *See Miller v. Dugger*, 838 F.2d 1530, 1537 (11th Cir. 1988) (discussing voluntariness of confession and whether "the police made any promises of reward to induce Miller's statement"); *Torres v. S.G.E. Mgmt., LLC*, 838 F.3d 629, 639 (5th Cir. 2016) (describing Ponzi scheme as "promises of lucrative rewards for recruiting others [that] tends to induce participants" (internal citations omitted)); *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 126 (S.D.N.Y. 1999) (describing "reward" cases involving "promises of reward, in which the alleged offer is intended to induce a potential offeree to perform specific action, often for noncommercial reasons").

A "reward" is even defined as a type of bribe, *bribe*, Black's Law Dictionary (11th ed. 2019) (defining "bribe" as a "price, reward, gift or favor given or promised with a view to pervert the judgment of or influence the action of a person in a position of trust"), and as "[s]omething of value, usu. money, given in return for some service or achievement," *reward*, Black's Law Dictionary (11th ed. 2019) (defining "reward"). The "in return for" term used to define a reward is the same term used by Congress in section 201 to criminalize a bribe. 18 U.S.C. § 201(b)(2). If it sounds like the analysis of bribery, corrupt intent, and quid pro quos is circular, it is.

Therefore, the logical distinction between corruptly "intending to be [1] influenced or [2] rewarded" is the timing of the official's acceptance or agreement to accept a thing of value. Say, for example, a contractor offers a thing of value to an official if the official acts favorably on an identified item of business, but the official ignores the offer. At that point, the offeror-contractor has violated section 666, but the offeree-official has not. The official has not run afoul of section 666 because he or she has not solicited or demanded anything, has not accepted anything, and has not agreed or promised to do anything. Nevertheless, the official knows that the offer exists. If the official later acts in accordance with the outstanding offer but does not accept the thing of value, he or she still has not run afoul of section 666. However, if the official later acts in accordance with the outstanding offer *and* accepts the thing of value, the acceptance of the thing of value may constitute a violation of section 666 if he or she acted corruptly with the intent to be rewarded.

This appears to be the approach taken by the Eleventh Circuit in *United States v. Jackson*, 688 F. App'x 685 (11th Cir. 2017). The indictment charged a bribery theory violation of section 666(a)(1)(B), and on appeal, the court reviewed whether the evidence demonstrated quid quo pro bribery. Although the court did not use the "quid pro quo" term, it used the equivalent "in exchange for" term and found evidence of corrupt intent from proof of an "in exchange for" scheme:

> The evidence supports the jury's finding that Jackson acted with a corrupt intent. He sought to appoint Majzoub as a police officer in exchange for bribes . . . .
>
> . . . Jackson "corruptly" accepted "anything of value" (money from Majzoub) with the intent to be influenced or rewarded (in exchange for illegally making Majzoub a police officer) in connection with any business or transaction of the City of Longwood (appointing Majzoub as a police officer . . . .).

Jackson, 688 F. App'x at 693.

The court also analyzed the intent "to be influenced or rewarded" phrase as describing a bribery theory and described a reward as a thing of value known before but received after the corrupt act on item of business or transaction occurred:

> [U]nder § 666(a)(1)(B), the bribe can be corruptly solicited with the intent "to be influenced *or rewarded*" . . . . A "reward" can come after the business or transaction occurred so long as the defendant intended to be rewarded for his conduct in that transaction.

Jackson, 688 F. App'x at 693.

B. Quid Pro Quo Definitions and Apparent Conflict

When Anderson uses the term "quid pro quo," it is a reference to an in exchange for arrangement between a donor and donee connected to a particular item of business, transaction, or series of transactions but requiring neither an official act nor a *specific* act referred to by some courts as a *specific* quid pro quo. A particular quo is essential to the relationship and the offense. Consistent with the Supreme Court's analysis in *McDonnell*, a specific act need not be identified at the time the official accepts or agrees to accept a thing of value, but the particular item of

business, transaction, or series of transactions intended to be influenced or reward for must be identified at that time. Anderson's argument is supported by decisions of the First, Fourth, and Fifth Circuits. *See United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022); *United States v. Lindberg*, 39 F.4th 151 (4th Cir. 2022); *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

Citing *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010), and *United States v. Roberson*, 998 F.3d 1237 (11th Cir. 2021), the Government previously argued that no quid pro quo is required for section 666. ECF No. 347. However, as the Eleventh Circuit cautioned in *McNair*, "confusion reigns in this area because courts often use the term *quid pro quo* to describe an exchange other than a particular item of value for a particular action." *McNair*, 605 F.3d at 1190; *see also United States v. Langford*, No. CR-08-CO-245-S, 2009 WL 10671369, at *16 (N.D. Ala. July 2, 2009) (recognizing party-created confusion by using the term "quid pro quo" to mean different things). It is necessary to understand the type of quid pro quo discussed in those decisions. In *McNair* and *Roberson*, the court defined the term quid pro quo to be an exchange of a thing of value for influence on an *official act*.

In *McNair*, defendants convicted of section 666 bribery argued that section 666 bribery included the "official act" requirement of section 201 bribery. On appeal, defendants argued their convictions should be vacated because the indictment failed to allege, and the government failed to prove, that the donor-

contractors or the donee-officials intended for the officials to perform a *specific official act*. The court defined the term quid pro quo to be the acceptance of a thing of value in exchange for, and with the intent of, performing of a *specific official act*, and concluded that section 666 required no quid pro quo involving an *official act*:

> All defendant-appellants argue that their bribery convictions under 18 U.S.C. § 666 must be vacated because the Indictment failed to allege, and the government failed to prove, the contractor-defendants gave specific benefits to County employees in exchange for, and with the intent that, the employees perform a *specific official act*, termed a *quid pro quo* . . . .
> . . .
> Importantly, § 666(a)(1)(B) and (a)(2) do not contain the Latin phrase *quid pro quo*. Nor do those sections contain language such as "in exchange for an *official act*" or "in return for an *official act*." In short, nothing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a *specific official act* . . . .
> . . .
> [W]e now expressly hold there is no requirement in § 666(a)(1)(B) or § 666(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*.

McNair, 605 F.3d at 1184, 1187-88 (emphasis added to "specific official act" term).[3]

In *Roberson*, defendants convicted of section 666 bribery again argued, this time relying on the Supreme Court's decision in *McDonnell*, that section 666 bribery included the "official act" requirement of section 201 bribery. The court determined

[3] The court emphasized that section 666 excludes language such as "in exchange for." Implicitly, the Eleventh Circuit would equate the term "in exchange for" to a quid pro quo, and the Supreme Court described section 666 bribery as an "in exchange for" arrangement. *Salinas*, 522 U.S. at 57.

that the parties in *McDonnell* agreed to the section 201 bribery standard (and its official act requirement) and that the decision in *McNair* declining to construe section 666 bribery to include an official act requirement remained good law:

> Appellants argue that under the standard set forth in *McDonnell v. United States*, the actions taken by Representative Robinson to promote Drummond's position on the EPA issue do not constitute "official acts" and thus do not satisfy 18 U.S.C. § 666(a)(2)'s requirement . . . . At base, they argue that bribery under § 666 requires an *official act* as is required for bribery under 18 U.S.C. § 201, the statute at issue in *McDonnell* . . . .
>
> . . .
>
> The only Circuit Courts of Appeals to directly consider the issue in published cases post-*McDonnell*, the Second and Sixth, have not imported an "*official act*" requirement into section 666 . . . . Consistent with the views of our sister Circuits, we hold that McDonnell does not disturb this court's holding in McNair and we do not read into section 666 limitations [an *official act* requirement] unsupported by the language of the statute.
>
> . . .
>
> . . . Roberson argues that the district court should have instructed the jury that a federal bribery conviction required an "*official act*" . . . .
>
> As noted above, the district court was not required to give an instruction on an "*official act*" at least as to the section 666 bribery count.

Roberson, 998 F.3d at 1245, 1247, 1252 (emphasis added to "official act" term) (internal citation omitted).

Anderson's argument has nothing to do with an official act. As proscribed by section 666, the quo could be any act connected to an item of business, a transaction, or a series of transactions. Therefore, *McNair*, *McDonnell*, and related decisions turning on the official act requirement are not on point. The relevant questions are

whether any quid pro quo is required for section 666 and, if so, the requisite specificity of the quid pro quo.

In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the First Circuit considered whether section 666 criminalized gratuities in addition to bribes. The court identified a quid pro quo requirement as the key differentiating factor between bribes and gratuities and determined section 666 only applied to quid pro quo bribery.

The court looked to the statute's text and legislative history. It noted that section 666 "was born as the stepchild" of section 201 when enacted in 1984, that the legislative purpose of enacting section 666 was to enable "the United States to vindicate significant acts of theft, fraud, and *bribery* involving Federal monies[,]" and that the legislative directive for construing section 666 was "to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and *undue influence by bribery*." *Id.* at 20-21 (emphasis added) (internal citation omitted). The court identified two significant amendments in 1986: section 666's original "for or because of language" that was consistent with a section 201(c) gratuity was changed to "with the intent to be influenced or rewarded" that is closely aligned with the language of section 201(b) for bribery; and the term "corruptly" was added making is consistent with the intent element of section 201(b) for bribery.

Id. at 21-22. As noted previously, the corrupt intent element is also consistent with common law bribery.

The court acknowledged that the term "reward" was ambiguous and construed by some courts to encompass gratuities. However, the court explained that the traditional meaning of a reward was "something offered to induce another to act favorably on one's behalf (for example, a bounty offered for the capture of a fugitive)." *Id.* at 23 (quoting *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998)). The court found this traditional construction of a reward consistent with the corrupt intent element:

> "Influence" would be used in situations in which, for instance, a payment was made to a local government commissioner in order to induce him to vote a certain way on a particular matter. "Reward" would be used if a *promise* of payment was made, contingent upon that commissioner's vote; once the commissioner voted in the way the payor requested, a "reward" would follow. Both of these situations involve a quid pro quo, and both therefore constitute bribes. What matters, of course, is that the *offer* of payment precedes the official act.
>
> [This] interpretation would help to explain the presence of the "corruptly" language in § 666(a)(1)(B) and (a)(2).

Id.

Finally, the court looked at the 10-year maximum penalty for violating section 666, found it aligned with the 15-year maximum penalty for violating section 201(b) for bribery, and found it disproportionate to the 2-year maximum penalty for violating section 201(c) for gratuities. *Id.* at 24.

Thus, the court vacated the conviction based on instructions that permitted a conviction for violating section 666 for something less than quid pro quo bribery. *Id.* at 25-26; *see also id.* at 40 (Howard, J., concurring) (applying the rule of lenity to limit section 666's application to bribery because "I can make no more than a guess as to what Congress intended Section 666 to mean").

In *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022), the Fifth Circuit considered whether section 666 required a quid pro quo. "The district court believed that § 666 criminalized mere gratuities and did not require a quid pro quo . . . . [but the Fifth Circuit] conclude[d] that § 666 does, in fact, require a quo; a quid alone will not suffice." *Id.* at *4.

In reaching that conclusion, the court quoted the Supreme Court for the proposition that section 666's purpose was "to extend federal bribery prohibitions to *bribes* offered to state and local officials." *Id.* (emphasis added) (quoting *Salinas*). The court acknowledged a circuit split, considered the competing analyses, adopted the First Circuit's analysis in *Fernandez*, and concluded that "by its plain terms[] § 666(a) applies only to quid pro quo bribery." *Hamilton*, 46 F.4th at *4-7; *see also id.* at *6 n.2 (applying rule of lenity in the alternative to resolve doubts about section 666 in favor of its application only to quid pro bribery).

Thus, the court vacated the conviction based on a gratuity theory and accompanying instructions that permitted a conviction for violating section 666 for something less than quid pro quo bribery. *Id.* at *7-8.

Finally, in *United States v. Lindberg*, 39 F.4th 151 (4th Cir. 2022), the Fourth Circuit moved past whether section 666 required quid pro quo bribery to consider the timing and specificity of the quids and quos.[4]

The court heard and rejected the argument that section 666's quo must be an official act. The court explained that section 666 described the proscribed quo and that the proscribed quo was not limited to official acts. *Lindberg*, 39 F.4th 167-68. However, that was not the only argument, and it was not the end of the court's analysis. Anderson makes this point because the official act argument in *Lindberg* was comparable to the official act argument heard and rejected in *McNair* and *Roberson*. This distinction demonstrates that Anderson's argument differs from the arguments heard and decided in *McNair* and *Roberson*.

More importantly, the court spoke to the corrupt intent element. The court explained that corrupt intent requires an intent to engage in a fairly specific quid pro quo:

> [A] bribe under § 666 must be made "corruptly." . . . "One has the intent to corrupt an official [or an official the intent to be corrupted]

[4] The government prosecuted the case solely under a bribery theory. The court expressed doubt that section 666 criminalized gratuities based on reasoning consistent with *Fernandez*. *Lindberg*, 39 F.4th at 171 n.17.

> only if he makes [or accepts] a payment or promise with the intent to engage in a fairly specific quid pro quo with that official [or donee]." . . . [T]he defendant must have intended for the official to engage in some specific act (or omission) or course of action (or inaction) *in return for* the charged payment" because, otherwise, we "mistakenly suggest that § 666 prohibits any payment made with a generalized desire to influence or reward (such as a goodwill gift), no matter how indefinite or uncertain the payor's hope of future benefit."

Id. at 172 (quoting *Jennings*, 160 F.3d at 1018-19, 1021).

The court also addressed alleged ambiguity in the term "business" of a covered organization, government, or agency. The court construed a transaction to be a "discrete act or event," construed business to be "something relatively concrete and circumscribed like an action item," and concluded "the *quo* could not be something as general as broad policy matters." *Id.* at 174 (internal citations omitted).

Numerous circuits are cited as departing from the quid pro quo requirement recognized by the First, Fourth, and Fifth Circuits, but most appear to be the product of the arguments presented and do not account for the Supreme Court's decision in *Kelly* limiting section 666 prosecutions based on a deprivation of honest services to bribery schemes. *Kelly*, 140 S. Ct. at 1571-72.

For example, the Sixth Circuit, like the Eleventh Circuit, heard and rejected an argument that section 666 required a quid pro quo defined to include an official act. *United States v. Porter*, 886 F.3d 562, 565-66 (6th Cir. 2018). The Sixth and Seventh Circuits heard and rejected an argument section 666 required identification of a specific act, characterized as a "specific quid pro quo." *United States v. Boender*,

649 F.3d 650, 654-55 (7th Cir. 2011); *United States v. Abbey*, 560 F.3d 513, 519-21 (6th Cir. 2009). Although *Lindberg* purports to require a specific quid pro quo, *McDonnell* rejected that argument for section 201 bribery, and, at this time, Anderson does *not* argue that section 666 requires a specific quid pro quo. Therefore, those decisions dispose of arguments that are different than the argument advanced by Anderson, and their holdings are not necessarily inconsistent.

The Second, Seventh, and Eighth Circuits concluded that section 666 criminalized gratuities, in addition to bribes. *United States v. Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015); *United States v. Bahel*, 662 F.3d 610, 638 (2d Cir. 2011); *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007). If construed to encompass gratuities, section 666 would presumably not require a quid pro quo. However, these decisions predated *Kelly*. Their recognition of a gratuity theory as the basis for prosecuting a deprivation of honest services should carry no weight in other circuits after *Kelly*. *Kelly*, 140 S. Ct. at 1572 ("Save for bribes or kickbacks . . . , a state or local official's fraudulent schemes violate that law [section 1343 and section 666] only when, again, they are 'for obtaining money or property." (internal citations omitted)). The Eleventh Circuit has recognized that section 666(a)(1)(B), like section 1346, criminalizes fraudulent schemes and thus falls within the limiting guidance of *Kelly*. *United States v. Dawson*, 428 F. App'x 933, 934 n.1 (11th Cir.

2011) (identifying the scheme to solicit or accept bribes as the unit of prosecution for section 666(a)(1)(B)).

C. Purpose and Constitutional Concerns

Construing section 666(a)(1)(B)'s application to only quid pro quo bribery is consistent with its purpose and avoid constitutional concerns.

The Supreme Court has affirmed Congress's authority to enact section 666 under the Necessary and Proper Clause "to see to it that taxpayer dollars appropriated under that power [the Spending Clause] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Sabri v. United States*, 541 U.S. 600, 605 (2004). If an official acts in the best interest of his or her organization, the official has not acted corruptly. Nothing has been frittered away. That does not abruptly change because an official, after acting in the best interest of his or her organization, later accepts a thing of value intending to be rewarded for a prior act (i.e., a gratuity).

The Eleventh Circuit has rejected a void-for-vagueness challenge to section 666 charges based on bribery and kickback scheme. *See United States v. Nelson*, 712 F.3d 498, 508 (11th Cir. 2013). Anderson is aware of no similar Supreme Court or Eleventh Circuit authority concerning section 666 charges based on a gratuity. In fact, *Nelson* acknowledged that an as-applied challenge to section 666(a)(1)(B) has

not been foreclosed. *Nelson*, 712 F.3d at 508 ("*Skilling* does not foreclose an as-applied challenge to the § 1346 (or other statutes [section 666] under which criminality may depend on whether the defendant intended to violate his or her duty of honest services) . . . ."). Again, if an official acts in the best interest of his or her organization, the official has not violated his or her duty of honest services. And again, that does not abruptly change because an official, after acting in the best interest of his or her organization, later accepts a thing of value intending to be rewarded for a prior act (i.e., a gratuity).

The void-for-vagueness doctrine requires that crimes be defined with definiteness for two purposes: (1) to ensure ordinary people understand what is prohibited, and (2) to discourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("[T]he more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." (internal citation omitted)). Section 666(a)(1)(B) contains no dollar value threshold for the prohibited "thing of value." Courts have also construed section 666(1)(1)(B)'s prohibition to include intangible things of value. Literally anything to which an official may attach value is potentially covered. *United States v. Townsend*, 630 F.3d 1003, 1010-11 (11th Cir. 2011).

In short, if section 666(a)(1)(B) criminalizes gratuities, something as harmless as accepting unsolicited flowers intending to be rewarded for a prior act taken in the best interest of the organization becomes a federal crime. The hypothetical flower scheme is not a threat to federal funds, is not something an ordinary person would understand to be prohibited, and is something that could lead to arbitrary enforcement. All that stands between the flower scheme and a federal crime would be the discretion of law enforcement and prosecutors. *See McDonnell*, 136 S. Ct. at 2372-73 ("[T]he Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will use it responsibly." (internal citation omitted)).

Even if section 666(a)(1)(B) criminalized only bribery, but included non-quid pro quo bribery (if such a thing exists), section 666 runs into the same issue as section 1346 that was addressed by *McDonnell* and *Silver*. Remember, section 666, like section 1346, criminalizes schemes, and a scheme without a connection to a particular item of business or transaction is no scheme at all. The Supreme Court previously found that buying favors from an official intending that the official may be positioned to acts on his or her unknown, unspecified interests is not a violation of section 201; neither a bribe nor an unlawful gratuity. *Sun-Diamond Growers*, 526 U.S. 406. Yet, the Government would have us believe that Congress's extended

section 201 to prohibit the bribery of state and local officials and, in doing so, imposed a maximum 10-year sentence for conduct that was not criminalized at all by section 201.

However, the constitutional underpinning raised by the cited decisions as to vagueness and overbreadth can be avoided, if not eliminated, by construing section 666 to require a quid pro bribery element. *See League of Women Voters of Fla., Inc. v. Lee*, -- F. Supp. 3d -- , 2022 WL 969538, at *65, 65 n.55 (N.D. Fla. Mar. 31, 2022).

D. Pleading Sufficiency

Count 4 charges Anderson with violating section 666(a)(1)(B). Count 4 alleges that Anderson corruptly accepted and agreed to accept a motorhome from James Finch on or about February 14, 2018, with the intent to be influenced and rewarded in connection with a business, transaction, or series of transactions of the City. However, Count 4 does not identify a particular item of business or transaction that is the subject of the alleged bribery scheme. ECF No. 355, ¶ 19.

Paragraph 6 alleges that Anderson performed acts on matters before the City that were favorable to James Finch and alleges a number of *non-exclusive* acts and matters. ECF No. 355, ¶ 6; *see also* ECF No. 355, ¶ 12(d). However, Count 4 does not identify which, if any, of these matters is the item of business, transaction, or series of transactions for which Anderson allegedly accepted or agreed to accept the

motorhome with the intent to be influenced or rewarded. This is not insignificant. A couple of matters (e.g., the 17th Street ditch project and the half-cent sales tax project) came to fruition before February 14, 2018. No factual basis is alleged to suggest that Anderson knew of an offer of the motorhome "reward" at the time those matters were before the City, and thus Anderson's conduct connected with those matters could not have been corrupted by the unknown motorhome reward. Conversely, other matters (e.g., the debris cleanup project and the City rebuild project) were results of Hurricane Michael's landfall in October 2018. Neither were known or foreseeable on February 14, 2018, and thus Anderson could not have accepted or agreed to accept the motorhome with the intent to influence these unknown and unforeseen matters.

The Government previously cited *McNair* for the proposition that a quid pro quo, if required by section 666, is satisfied by proving a series of payments intended to influence an official's decisions. ECF No. 347, p. 6. The cited language was *McNair*'s recharacterization of a decision in *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996). At no time did the decision in *Paradies* make the finding attributed to it by *McNair* and quoted by the Government. The argument presented to the court, and the decision rendered, in *Paradies* concerned a *specific* quid pro quo requirement: namely, a specific corrupt payment in exchange for a *specific official act*. The court in *Paradies*, like the court in *McNair*, determined that section

666(a)(1)(B) did not require a *specific official act*. Anderson is not peddling a specific quid pro quo or specific official act argument and those decisions are not dispositive.

For the reasons stated, section 666(a)(1)(B) requires a quid pro quo bribery scheme with an intent to corrupt a particular item of business, transaction, or series of transaction. Count 4 fails to charge a particular item of business, transaction, or series of transaction. Count 4 likewise fails to plead facts of the bribery scheme with sufficient specificity to apprise Anderson of the specific charge. Therefore, Count 4 should be dismissed. *See United States v. Schmitz*, 634 F.3d 1247, 1260-64 (11th Cir. 2011) (finding indictment failed to plead fraudulent scheme with sufficient specificity and vacating conviction); *United States v. Bobo*, 344 F.3d 1076, 1084-86 (11th Cir. 2003) (same).

II. COUNT 1

Count 1 charges Anderson with participating in a "Finch business interest" conspiracy with James Finch *and Antonius Barnes* to commit federal program fraud in violation of section 371.

A cornerstone of a single, unified conspiracy is interdependence amongst co-conspirators. *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998); *see also United States v. Perez*, 489 F.2d 51, 57 (5th Cir. 1973) ("The necessity for drawing this distinction [between single or multiple conspiracies] derives from our interest,

clearly our duty, in jealously protecting those accused from the possible transference of guilt to others accused."). The fact that conspiracies share the "*same* goal" does not mean they share a "*common* goal." *United States v. Chandler*, 376 F.3d 1303, 1320 (11th Cir. 2004).

Count 1 lacks any allegations that the alleged Finch-Anderson and Finch-Barnes conspiratorial agreements shared a common goal greater than themselves. There is no allegation that Anderson knew of the alleged Finch-Barnes agreement. There is no allegation that the alleged Finch-Barnes agreement was dependent on, facilitated by, or furthered by Anderson. The alleged goal of influencing Barnes' performance of acts "was an end upon itself." *Chandler*, 376 F.3d at 1321. The same can be said of Barnes regarding the alleged Finch-Anderson agreement. The alleged agreements are independent and, if anything, constitute independent, disconnected alleged conspiracies.

Therefore, Count 1 is duplicitous and should be dismissed or, alternatively, the Government should be compelled to elect and pursue a single alleged conspiracy.

Dated this 28th day of November, 2022.

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CERTIFICATE OF WORD COUNT

I certify that the foregoing document contains 6,659 words.

/s/Anthony L. Bajoczky, Jr.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served electronically via the CM/ECF System on this 28th day of November, 2022.

/s/Anthony L. Bajoczky, Jr.