

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL PEREZ-OTERO,

Defendant.

CRIM. NO.: 21-474(ADC)

MOTION TO DISMISS

TO THE HONORABLE COURT:

COMES NOW Defendant Angel Perez-Otero, through the undersigned attorney, and very respectfully alleges and prays as follows:

For the reasons set forth herein, the appearing defendant request the dismissal of the indictment in the instant action.

Although the prosecution charged ex-mayor Angel Antonio Perez-Otero (Perez-Otero) with bribery and extortion alleging that he awarded contracts to company “A “in exchange for bribes and kickbacks paid by Oscar Santamaria in cash, the evidence provided by the government, during discovery, clearly suggests that the payments took the form of campaign contributions.

Perez-Otero requests the dismissal of the indictment because it fails to allege an essential element of the charged violations of law and because it fails to allege a crime since it is missing

an allegation of an explicit quid pro quo, as required by the Supreme Court¹ in McCormick v. United States, 500 U.S. 257 (1991).

McCormick was a member of the West Virginia House of Delegates who received campaign contributions in cash payments from a lobbying group, which he did not report as campaign contributions. After receiving the payments, he went on to sponsor legislation that eventually passed, and which benefited the lobbying group. After the favorable bill was enacted, the group provided McCormick with another cash payment.

McCormick was eventually charged and convicted of, among other things, extorting payments under color of official right in violation of the Hobbs Act. The Supreme Court vacated the conviction holding that receipt of a campaign contribution violated the statute only if the government could prove an explicit quid pro quo — that is, “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. “This,” the Court concluded, “defines the forbidden zone of conduct with sufficient clarity.” *Id.*

In McCormick The Court expressed its concern with criminalizing common political conduct: [s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. . . . [C]ampaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have

¹ In preparing this motion, Perez-Otero borrowed substantial text from the opinion and order dismissing the charges in United States v. Benjamin, USDC SDNY, 21-CR-706 (JPO).

done. . . . [T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion. . . . The receipt of [political] contributions is . . . 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.”

Whatever an “explicit” quid pro quo might entail, it must be more explicit than the exchange in McCormick, in which the Court reversed the conviction for lack of a sufficiently “explicit” quid pro quo. The basic structure of the exchange in McCormick is analogous to that alleged in this case. In McCormick, there is a clear quid in the form of cash contributions to the politician’s campaign; a clear quo, in the politician’s sponsoring of particular legislation favorable to the lobbyist’s clients); and circumstantial evidence supporting a pro. There is really no question that the quid and the quo were clear and unambiguous in McCormick’s case. Therefore, McCormick’s holding was that the pro itself must be clear and unambiguous and characterized by more than temporal proximity, winks and nods, and vague phrases like “let me see what I can do.”

Therefore, to allege criminal liability for bribery in the context of campaign contributions, there must be allegations of a quid pro quo that is clear and unambiguous, meaning that (1) the

link between the official act and the payment or benefit, the pro, must be alleged, or shown, by something more than mere implication, and (2) there must be a contemporaneous mutual understanding that a specific quid and a specific quo are conditioned upon each other.

Additionally, this Honorable Court must consider the Indictment in the larger context of the Supreme Court's rulings on the First Amendment and campaign finance. The Supreme Court has made clear on numerous occasions that campaign contributions are political speech implicating fundamental constitutional guarantees. See McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 204 (2014) (characterizing campaign contributions as an exercise of one's "expressive and associational" rights under the First Amendment); Buckley v. Valeo, 424 U.S. 1, 24–25 (1976) (observing that campaign contributions implicate "the contributor's freedom of political association" under the First Amendment). This is a case where First Amendment principles are not tangential to the validity of the prosecution, but rather central to it. In drawing the line between quid pro quo corruption and general influence, "the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it." McCutcheon, 572 U.S. at 209 (quoting Federal Election Comm'n v. Wisconsin Right to Life, 551 U.S. 449, 457 (2007)).

The Supreme Court has also made clear that principles of due process require "fair warning . . . in language that the common world will understand" as to what conduct is prohibited by law. McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 267, 266 (1997). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

The Supreme Court has clearly stated, repeatedly and explicitly, that a quid pro quo in this context must be “explicit” or “express.” It has not further explained what that standard means. At a minimum, the governing precedents were not clear enough to give Perez-Otero fair notice of what behavior was illegal at the time he acted. To charge criminal liability where the conduct did not clearly involve an “explicit” quid pro quo would create a significant fair-warning problem. These considerations weigh in favor of a stricter interpretation of the “explicit” quid pro quo requirement.

Applying the principles laid out above, the Indictment fails to charge an explicit quid pro quo. The prosecution was required not just to track the language of each relevant statute, but also to explicitly allege any implicit element of each statute. Here, the bribery statute (18 U.S.C. § 666(a)(1)(B)) and extortion statute (18 U.S.C. §§1951) do not, on their face, contain any requirement to show an explicit quid pro quo agreement. But an explicit quid pro quo is an “implicit element” of each statutory offense charged here, given that through McCormick the “courts have added a significant refinement” in how these statutes may be interpreted against public officials facing prosecution over campaign fundraising. See US v. Pirro, 212 F.3d 86 (CA2 2000); LAFAVE et al., *supra*, § 19.3(b).

If the government must prove the existence of an explicit or express promise to sustain a conviction, then it constitutes an essential element of the crime that must be alleged in the indictment. Otherwise, there is no assurance that the grand jury considered that essential element. In United States v. Donagher, 520 F. Supp. 3d 1034 (N.D. Ill. 2021), Judge John Z. Lee dismissed an indictment’s federal bribery charges on precisely this ground. As he explained, ensuring that the grand jury considered the explicit quid pro quo element in the context of campaign contributions is anything but a technicality; to the contrary, given the controlling law, doing so is

necessary to shield ordinary, constitutionally protected campaign financing activities from criminal prosecution.

Therefore, Counts One, Two, and Three of the Indictment must be dismissed because they do not allege as an element of any of the three counts that Perez-Otero made an “explicit” agreement with Santamaria that his conduct as mayor would be controlled in exchange for campaign contributions. To be sure, the indictment contains phrases that gesture toward an agreement, most convincingly at:

- Paragraph 8: “The purpose of the conspiracy was for defendant Perez-Otero to benefit and enrich himself by accepting bribes and kickbacks from Individual A in exchange for securing municipal contracts for Company A as opportunities arose.”
- Paragraph 11: “In exchange for cash payments from Individual A, defendant Perez-Otero took steps benefitting Individual A and his business, Company A, including advising pressuring and directing municipal officers to ensure that Company A was awarded municipal contracts in Guaynabo and was paid pursuant to those contracts.
- Paragraph 15: “In exchange for these payments, Perez-Otero agreed to award, facilitate, and protect contracts for Company A. Perez-Otero continually reassured Individual A that he would obtain and retain contracts for Company A and ensured that Company A’s invoices were promptly paid.”

“In exchange for” is not synonymous with explicit or express. A person gives something “in exchange for” something else in any quid pro quo. The existence of an exchange or agreement does not necessarily imply the existence of an explicit or express agreement. The use of “exchange” was thus insufficient to fully apprise the grand jury of a necessary element of Counts Two and Three (and, therefore, Count One, which charges a conspiracy to commit the latter two counts).

Counts One, Two, and Three of the Indictment must be dismissed for failure to charge an essential element.

Even if true, the indictment fails to establish criminal liability as to these counts. The government’s recitation of the timeline of events between Perez-Otero and Santamaria does not

allege the existence of any agreement between the two at the time that Company A was awarded a contract by the municipality. The Indictment therefore fails to allege any offense under the statutes, as interpreted through the lens of McCormick.

“Since federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute.” Dowling v. United States, 473 U.S. 207, 213 (1985) (holding indictment insufficient where allegation that defendant stole digital property did not allege a crime under the relevant statute) (cleaned up))

McCormick holds that an elected official’s acceptance of campaign contributions is sanctionable “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.” 500 U.S. 257, 273 (emphasis added). The second sentence is key to understanding the limits of the McCormick rule: the explicit agreement must precede the official conduct.

The timeline of events set forth in the Indictment does not meet this basic requirement of McCormick: the Indictment does not allege any offer from Santamaria, nor a response from Perez-Otero to an offer, and certainly no explicit promise that Santamaria would be awarded contracts only if he would later pay campaign contributions.

The Court need not look beyond the face of the Indictment or take any inferential steps to conclude that the facts alleged in the indictment do not allege a violation of the given statutes, as modified by McCormick. The Indictment recites seven pages of factual allegations, drawing a clear picture of the government’s theory about the allegedly illegal agreement between Perez-Otero and Santamaria and fails to provide an “explicit” quid pro quo.

Because the facts alleged in Counts One, Two, and Three of the Indictment do not constitute an offense under McCormick, those counts must be dismissed.

WHEREFORE, the Defendant requests that the Honorable Court take notice.

Respectfully Submitted

I hereby certify that on this 9th day of January, 2023 I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will notify restricted parties of record.

In San Juan, Puerto Rico, this 9th day of January, 2023.

S/Osvaldo Carlo-Linares

Oswaldo Carlo-Linares
USDC P.R. No. 126602
Tel. (787) 300-6483
Fax (787) 726-6456
Email: ocarlo@carlolaw.com

S/José R. Olmo-Rodríguez

José R. Olmo-Rodríguez
USDC 213405El Centro I,
suite 215, SJ, PR 00918
[Tel.787.758.3570](tel:787.758.3570)/jrolmo1@gmail.com

S/Eduardo Ferrer Rios

Eduardo Ferrer Rios
USDC 228101
PO Box 194985
San Juan, P.R. 00919-4985
Tel. (787) 810-2710
Fax. (787) 200-7050
eduardo.ferrer.rios@gmail.com