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

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	CRIMINAL CASE NO.: 20-019 (FAB)

JULIA BEATRICE KELEHER'S MOTION TO DISMISS COUNT EIGHT

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this motion to dismiss Count Eight of the Indictment against her, pursuant to Rules 12(b)(3) and 7(c)(1) of the Federal Rules of Criminal Procedure.

Count Eight alleges federal program bribery fraud, specifically that Ms. Keleher, who was the Secretary of Education of the Puerto Rico Department of Education ("PR DOE"), "did corruptly solicit and demand for her own benefit, and accepted and agreed to accept things of value from [2] ARIEL GUTIERREZ-RODRIGUEZ and others known and unknown to the Grand Jury, namely: a lease with a promise to purchase agreement allowing her to occupy an apartment in Ciudadela for $1.00, and a $12,000.00 incentive bonus to purchase an apartment in Ciudadela, intending to be influenced and rewarded in connection with a transaction that involved $5,000.00 or more, that is, Company C's acquisition of 1,034 square feet of the Padre Rufo School from the PR DOE. All in violation of Title 18, United States Code, Section 666(a)(l)(B)."

As discussed below, this allegation fails in several respects to state an offense under Rule 12 and fails under Rule 7 to provide a plain, concise, and definite written statement of the essential facts constituting the offense charged. Specifically, Count Eight fails to allege a transaction of PR

DOE, fails to allege that PR DOE received federal benefits from any federal program in excess of $10,000.00, fails to identify any such federal program(s), and fails to allege any action by Ms. Keleher that put federal funds at risk. Accordingly, Count Eight must be dismissed.

I. APPLICABLE STANDARDS

A. Rule 12

Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a pretrial motion, *inter alia*, to raise defects in instituting the prosecution and in the indictment, including failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The United States Supreme Court has interpreted Rule 12 to permit pretrial resolution of a motion to dismiss the indictment when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). Accordingly, "[i]t is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

Generally, "a motion to dismiss is 'capable of determination' before trial if it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997); *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) ("the district court did not err by considering the purely legal question at hand in Flores's pretrial motion"); *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977) ("'[t]he propriety of granting a motion to dismiss an indictment under [Fed. R. Crim. P.] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.'"); *United States v. Jones*, 542 F.2d 661, 664-65 (6th Cir. 1976) (Rule 12 and accompanying notes support decision to dismiss indictment on motion raising legal

questions); *see also United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b) is "conservation of judicial resources by facilitating the disposition of cases without trial").

"District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *Craft*, 105 F.3d at 1126; *see also* Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); Fed. R. Crim. P. 12(b)(3) (noting that certain "defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits").

B. Rule 7

Under Rule 7(c)(1), "[w]hen a defendant seeks dismissal of an indictment, courts take the facts alleged in the indictment as true, mindful that 'the question is not whether the government has presented enough evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense.'" *United States v. Ngige*, 780 F.3d 497, 502 (1st Cir. 2015) (quoting *United States v. Savarese*, 686 F.3d 1, 7 (1st Cir. 2012)). Where an indictment does not "contain[] the elements of the offense charged[,]" *United States v. Resendiz-Ponce*, 549 U.S. 102, 103 (2007), or otherwise fails to plead sufficient facts, however, it must be dismissed.

While the prosecution may set out the offense using statutory language, "[w]here guilt depends so crucially upon … a specific identification of fact … cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962). "[W]here the definition of an offence … includes generic terms,

it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." *Id.* at 765 (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)); *see also Hamling v. United States*, 418 U.S. 87, 117-18 (1974) ("[T]he language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.").

Thus, "[a]n indictment not framed to apprise the defendant 'with reasonable certainty[ ] of the nature of the accusation against him is defective, although it may follow the language of the statute.'" *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976) (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877)). It has long been the law that "any general description based on the statutory language must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which [s]he is charged." *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014).

II. SECTION 666

Section 666 is violated when someone

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more
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> [where] the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § (a)(1)(B) and § (b).

III. COUNT EIGHT FAILS TO STATE AND PROVIDE THE ESSENTIAL FACTS OF EACH ELEMENT OF THE OFFENSE

A. Count Eight fails to allege a transaction of an agency.

While Count Eight identifies a transaction, "Company C's acquisition of 1,034 square feet of the Padre Rufo School from the PR DOE," it does not allege Company C's acquisition of the Padre Rufo School property was a transaction of PR DOE. Indeed, the indictment fails to identify the governmental agency that has decision-making authority over the transaction.

As noted in Ms. Keleher's motion to dismiss the indictment, the Government could not allege the sale of the Padre Rufo School property was a transaction of the PR DOE, because, as a matter of law, the Puerto Rico Department of Transportation and Public Works (or "DTOP" by its Spanish acronym) is the custodian of all property belonging to the Commonwealth of Puerto Rico. The indictment does not, however, allege that the sale of the Padre Rufo School property was a transaction of DTOP. Nor does it allege that DTOP was an entity covered by § 666(b).

In failing to allege that the transaction was a transaction of an "organization, government, or agency" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," Count Eight fails even to parrot the language of the statute. The statute requires that the "transaction" at issue is a transaction of a covered agency. By failing to identify the agency that was responsible for the transaction (the sale of the Padre Rufo School property), the indictment fails to allege the essential facts constituting each of the elements of the offense. For this reason alone, Count Eight must be dismissed.

B. Count Eight fails to allege PR DOE was a covered agency because it fails to allege it received more than $10,000 from a federal program.

Even if the indictment were read to allege that the sale of the Padre Rufo School property was a transaction of PR DOE, and even if as a matter of law that allegation could be made, the indictment fails in its efforts to allege that PR DOE was an agency covered by § 666. Paragraph 6 of the indictment, which is incorporated into Count Eight by reference, alleges that PR DOE received more than $10,000.00 in federal funding from various federal programs in the twelve months preceding December 31, 2018. For § 666 to be applicable, however, the agency at issue must be one that "receives, in any one year period, benefits in excess of $10,000 under a Federal program **involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance**." (emphasis ours) Count Eight is plainly attempting to assert that Company C's acquisition of 1,034 square feet of Padre Rufo School was a transaction of PR DOE and that PR DOE was a covered agency. Paragraph 6, however, alleges only that PR DOE received more than $10,000.00 in federal funding in aggregate, not that PR DOE received more than $10,000.00 from any single federal program. Accordingly, even if Count Eight were read to allege that the transaction at issue was a transaction of the PR DOE, and such allegation was not legally barred, the indictment nonetheless fails to allege PR DOE is a covered agency under § 666. Count Eight must be dismissed for that reason as well.

C. Count Eight fails to specify a federal program that received federal benefits.

Paragraph 6 also fails to provide any information whatsoever regarding the federal program(s) through which the indictment alleges PR DOE received federal benefits, and which allegedly make PR DOE a covered entity. The statute's express language makes clear that the agency's receipt of such federal benefits under a specified type of federal program is an element of the offense, and that a generalized allegation that an entity received payments from the Federal

Government is not sufficient to satisfy it. *See Fischer v. United States*, 529 U.S. 667, 676 (2000). Indeed, the Supreme Court has expressly rejected the argument that the word "benefit" in Section 666(b) is satisfied every time "the Federal Government [is] the source of the payment." *Id*. at 677. The Fourth Circuit recently applied this principle and explained:

> [W]hile a government "benefit" could come in many forms, like a "loan" or "contract" or "grant," the term d[oes] not include certain payments made "in the usual course of business." . . . Because any receipt of federal funds could "at some level of generality" be characterized as a benefit, and because the "statute does not employ this broad, almost limitless use of the term," . . . . [t]he key question is whether the funds are paid to the entity "for significant and substantial reasons in addition to compensation or reimbursement." To make this determination, courts should examine the recipient entity's "structure, operation, and purpose" as well as "conditions under which the organization receives the federal payments." Entities receive a "benefit" for purpose of § 666 when they are the subject of "substantial Government regulation" that helps them achieve "long-term objectives" or policy goals "beyond performance of an immediate transaction." In contrast, if the payment is made "simply to reimburse," then the recipient entity isn't receiving a "benefit."

United States v. Pinson, 860 F.3d 152, 166-67 (4th Cir. 2017) (*per curiam*) (quoting *Fischer*, 529 U.S. at 679–81); *see also United States v. McLean*, 802 F.3d 1228, 1237 (11th Cir. 2015) (Reversing conviction because government "failed to establish a connection to any identifiable federal program so that its 'structure, operation, and purpose' could be reviewed to permit a determination that the funds qualified as a federal benefit under the jurisdictional element of § 666(b)."); *United States v. Paixao*, 885 F.3d 1203, 1206 (9th Cir. 2018) ("[N]ot all payments under federal programs qualify as 'benefits'.... [T]he inquiry turns on the attributes of the federal program[.]") (citation omitted); *United States v. Zyskind*, 118 F.3d 113, 115 (2d Cir. 1997) ("[T]here must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives.") (quoting S. Rep. No. 98-225, at 370 (1983)).

Just last year, the First Circuit reversed two defendants' federal program bribery convictions precisely because the Government failed to establish that a relevant Puerto Rico agency received a benefit of more than $10,000 from federal monies. *United States v. Bravo-Fernandez,* 913 F.3d 244 (1st Cir. 2019). In *Bravo-Fernandez*, the defendants were charged with federal program bribery based on "payments that [Defendant] Bravo made in 2005 involving a trip to Las Vegas to which he invited [Defendant] Martínez, then a Puerto Rico senator." *Id*. at 246. The Government alleged "Bravo used the trip to bribe Martínez in exchange for his support of pending legislation that would have favored Bravo's business, Ranger American, a local security company." *Id*. At trial, however, the Government did not present "evidence showing disbursement of federal 'benefits' to the Senate of Puerto Rico or even to the Commonwealth as a whole." 913 F.3d at 248. Instead, the Government sought to rely on a "stipulation the parties accorded prior to trial providing that . . . from October 1, 2004, to September 30, 2005, the Commonwealth of Puerto Rico received over $4.7 billion in federal funds." *Id*.

On appeal, the First Circuit rejected the Government contention "that the stipulation specifying the amount of federal funds received by the Commonwealth was sufficient to satisfy the § 666 jurisdictional element." *Id*. at 249. Because not all federal funding constitutes a "benefit," it was not sufficient, as the Government argued, for the jury to "reasonably infer that the federal funds constituted 'benefits.'" *Id*. Rather, it was incumbent upon the Government "to put forth evidence about the [relevant] federal program's 'structure, operation, and purpose' in order to make ascertainable whether an entity received "benefits" under § 666(b)." *Id*. at 250.

Here, the indictment fails even to specify a federal program from which it contends PR DOE received federal benefits or specify those benefits, as it must in order to allege the essential

facts and circumstances that could make PR DOE a covered entity. Count Eight must be dismissed for this reason, as well.

D. Count Eight fails to allege that any federal funds were put at risk.

Section 666 is constitutional under the Spending Clause and the Necessary and Proper Clauses of the Constitution. The Spending Clause and Necessary and Proper Clause, taken together, authorize Congress to give money to the States to "promote the general welfare" and enact federal legislation to ensure the recipient actually spends those federal funds in furtherance of the "general welfare." *See* U.S. CONST. art. I, § 8, cls. 1, 18; *Sabri v. United States*, 541 U.S. 600, 605 (2004). The Supreme Court has explained that Section 666(a) is "an instance of necessary and proper legislation" to implement Congress's Spending Power because it "addresses the problem [of local and state improbity] at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars." *Id.* Because money is fungible and federal funds received by a state agency may be commingled with funds of the state agency that came from other sources, if the federal government provides funding to a state agency, and then funds are diverted from the agency, there is no way of knowing whether federal funds were affected.

Accordingly, the Supreme Court has held that there is no need under § 666 to trace the funds at issue to the federal program that funded the agency. *Id.* at 604–05 (no requirement for an indictment to allege a connection between the giving or receiving of a bribe and an agent's misuse of the federal monies her agency received). It is enough that federal funds were put at risk. If an entity receives federal funds and an agent of that entity with control over its funds is corruptly influenced, then federal dollars are at risk of being "frittered away in graft." *Id.* at 605.

This rationale fails, however, and an application of § 666 would be unconstitutional if applied to an allegedly corrupt decision by a state official that did not involve the use of any agency funds and, therefore, necessarily, the state official's allegedly corrupt decision did not put any funds that the federal government had provided to the state agency at risk. Section "666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute." *United States v. Frega*, 933 F. Supp. 1536, 1542-43 (S.D. Cal. 1996), *aff'd in part, rev'd in part on other grounds*, 179 F.3d 793 (9th Cir. 1999). *See also United States v. Phillips*, 219 F.3d 404, 411 (5th Cir.2000) (reversing defendant's conviction under § 666 because, *inter alia*, "Phillips's actions did not and could not have threatened the integrity of federal funds or programs"); *United States v. Kranovich*, 244 F. Supp. 2d 1109, 1120 (D. Nev. 2003), *aff'd*, 401 F.3d 1107 (9th Cir. 2005) ("There is a requirement under Section 666 that a connection exist between the offense conduct and the federal funds disbursed or that the integrity of a federal program is threatened."). Consequently, while a bribe need not "be traceably skimmed from specific federal payments or show up in the guise of a quid pro quo for some dereliction in spending a federal grant," *see Sabri* at 605–06, the statute still requires, and is constitutional only because it requires, that a federal interest is implicated by the possibility that a bribe could affect federal dollars.

In *United States v. Frega*, an attorney and two state judges were charged with violating § 666 for a scheme in which the attorney allegedly bribed the judges in exchange for favorable rulings in cases pending in their courts. 933 F. Supp. 1536. The district court dismissed the § 666 count of the indictment because it failed to "allege that federal funds were corruptly administered, were in danger of being corruptly administered, or even could have been corruptly administered." *Id*. at 1543; *see also United States v. Whitfield*, 590 F.3d 325, 345-47 (5th Cir. 2009) (where judge was an agent of the Administrative Office of the Courts (AOC), which was provided federal

funding to "assist in the efficient administration of the nonjudicial business of the courts of the state," an allegation of kickbacks paid to judge in return for favorable judicial decisions did not put the federal funding of the AOC at risk; the lack of a nexus to federal funding was fatal to the § 666 charge).

"As the terms of Section(s) 666(a)(1)(B) and 666(b) make plain, not all bribe-taking by an agent of the state falls within the scope of Section(s) 666." *United States v. Foley*, 73 F.3d 484, 489 (2d Cir. 1996). In *Foley*, a State of Connecticut legislator was bribed to help Fleet Bank, a private entity, obtain an exemption to a legislative divestiture requirement following a merger. The Second Circuit reversed the defendant's conviction under § 666(a)(1)(B): "Though it is undisputed that the State of Connecticut, during the pertinent period, was a recipient of more than $10,000 in federal assistance, the government did not show that the exemption legislation had any financial value to the State of Connecticut; nor did it show that the exemption had any connection whatever with a federal program." *Id.* at 493.

As set forth in Ms. Keleher's motion to dismiss the indictment, as a matter of law, the Padre Rufo School property did not belong to the PR DOE, the only agency that the indictment even attempts to characterize as a covered agency. Accordingly, even if the property were acquired for a below market rate (which the indictment does not allege), the acquisition of the Padre Rufo School could not and would not affect PR DOE funds or property. Thus, a decision authorizing Company C to acquire school property could not have placed federal funds provided to PR DOE at risk either.

There was no danger that federal benefits extended to PR DOE under a federal program would be diverted from their intended use by Ms. Keleher signing a letter expressing no objection to Company C's efforts to acquire a portion of Padre Rufo School property. Accordingly, Section

666 was not intended to reach, and constitutionally could not reach, a decision by the Secretary of PR DOE to support this acquisition, as, regardless of whether the acquisition occurred, no PR DOE funds would be implicated in the transaction, either funds PR DOE received from other sources or funds it received from federal programs. Even if Ms. Keleher provided her support for the acquisition corruptly, in return for a thing of value, no funds of the alleged covered agency were put at risk. *See United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998) (dismissing indictment alleging bribe of a local police officer to prevent further investigation of state crimes; application of § 666 would be unconstitutional since the alleged conduct was not related to a legitimate national problem or the statute being applied to protect the integrity of federal funds given to the local police department); *see also, e.g., Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (doctrine of constitutional avoidance dictates that when courts are faced with two plausible interpretations of a statute, one of which raises constitutional concerns, they are to choose the construction that does not run afoul of the Constitution).

IV. CONCLUSION

Count Eight fails to allege a transaction of the PR DOE, fails to allege the federal program(s) that allegedly made PR DOE a covered entity under § 666 and fails to allege the federal benefits that allegedly made PR DOE a covered entity. Count Eight also fails to allege action by Ms. Keleher that allegedly put any PR DOE agency funds at risk and, therefore, necessarily put no federal funds at risk. Accordingly, no federal interest is put at issue by the allegations in the Count Eight. Section 666 was therefore not intended to apply to the allegations made in Count Eight and could not constitutionally be applied to these allegations. Each of these failings individually, and certainly in aggregate, warrant the dismissal of Count Eight under Rule 12 for failure to state and

offense and under Rule 7 for failing to set forth the essential facts that put Ms. Keleher on notice of the charge against her.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests that the Court GRANT this motion to dismiss Count Eight.

Respectfully submitted on this 1st day of June 2020, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

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