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

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER**, Defendant.	**CRIMINAL NO.**: 20-0019 (FAB)

REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS COUNT 8

TO THE HONORABLE COURT:

COMES NOW Defendant Julia Beatrice Keleher, through her undersigned counsel, and files this reply to the Government's Response in Opposition to her Motion to Dismiss Count 8 (Docket No. 131).

I. INTRODUCTION

The Government contends that this count must proceed to trial, teasing the Court with the possibility that it will introduce evidence establishing, as it concedes it must, that the transaction in question in this case, Company C's acquisition of 1,034 square feet of the Padre Rufo School, is a transaction of the PR DOE. This matter, however, is ripe for adjudication in Ms. Keleher's favor because the Puerto Rico Department of Education ("PR DOE") does not administer lands or property belonging to the Government of Puerto Rico. The transaction alleged in the indictment is not, as a matter of law, one of the PR DOE, but is instead one of the Department of Transportation and Public Works ("DTOP"). Accordingly, the indictment fails to state an offense. This fatal infirmity, as well as others that will be discussed below, mandates the dismissal of Count 8.

II. ANALYSIS

A. Count 8 fails to allege a transaction of the Puerto Rico Department of Education

As was the case with its response to Ms. Keleher's motion to dismiss the indictment, the Government places considerable weight on the claim that the indictment provides the defendant with "fair notice of the criminal conduct" and is therefore sufficient. However, 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. *See* 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).

Count 8 fails as a matter of law to allege a transaction of the Puerto Rico Department of Education and, therefore, must be dismissed. At all times relevant to the indictment, Ms. Keleher was the Secretary of the Department of Education of Puerto Rico ("PR DOE"). Thus, to properly charge Ms. Keleher pursuant to Section 666, the Government has to allege that she sought a benefit "in connection with any business, transaction, or series of transactions, of [the Puerto Rico Department of Education]." 18 U.S.C. § 666(a)(1)(B). The Government, however, has not and could not allege that the transaction in question in this case, Company C's efforts to acquire 1,034 square feet of the Padre Rufo School, was a transaction of the PR DOE.

Company C's efforts to acquire property from the Padre Rufo School simply cannot be characterized as a transaction of the PR DOE. Instead, Company C was working to acquire the land from the Department of Transportation and Public Works ("DTOP" by its Spanish acronym), a government entity that operates wholly independently of the PR DOE. *See* 28 L.P.R.A. § 31(a) (Establishing that DTOP, as custodian of the Commonwealth of Puerto Rico's properties, is authorized to sell, exchange, or otherwise transfer the land, which is the property of the Commonwealth, as well as the buildings under its custody.).

In a desperate attempt to cure this fatal deficiency, the Government resorts to relying on out-of-context quotes from inapposite case law. For example, the Government includes a parenthetical cite from *United States v. Andrews*, 631 F.3d 509, 530 (3d Cir. 2012), which purportedly stands for the proposition that a bribee need not have the authority to complete the transaction in question.

In that case, the defendant (Andrews) was the potential contractor who paid out bribes to the governmental agent (Harris) with the intention that Harris influence the award of a contract. Andrews argued that Harris lacked the authority to influence the award of the contract and sought dismissal of his own conviction under Section 666. The Third Circuit held the following:

> Harris, who qualified as an "agent" under § 666, did not have to possess actual authority over the business, transaction, or series of transactions, that Andrews sought to influence. Rather**,** the Government had to prove only that Andrews intended, by offering a bribe to Harris, to influence the sewer contract. Moreover, even if actual ability to influence was required under § 666, Harris had the ability to influence the awarding of the sewer contract, as evidenced by the fact that he did exercise his influence and steer the sewer system repair contract to Andrews and GRM.

Id. (citations omitted). A proper reading of the case, therefore, prompts the conclusion that it is inapposite. In *Andrews*, it was undisputed that the sewer contract was a transaction of the

government agency of which the government official was an agent. The only question was what level of influence the government official needed to have over that agency transaction in order for the bribe payor to have intended, by giving something of value to the official, to influence the transaction. Here, on the other hand, as a matter of law, the transaction at issue was not a transaction of the government agency of which Ms. Keleher is alleged to have been an agent.

The same is true for this Court's decision in *United States v. Carrasco-Castillo*, 442 F.Supp.3d 479, 490 (D.P.R. 2020). In that case this Court held that "[r]estricting the scope of section 666 to those who control federal funds would expose the public fisc to corruption by employees who wield influence but lack final decision-making authority." Again, this holding is inapplicable here. If the acquisition of 1,034 square feet of the Padre Rufo School were a transaction of PR DOE, which the Government has alleged received federal funding, the Government would need not prove nor allege that Ms. Keleher had final decision-making authority over the federal funding PR DOE received. Here, however, the issue is not whether the Government has alleged Ms. Keleher in her capacity as Secretary of PR DOE controlled federal funds, but rather, that the Government has not alleged that the transaction in question was a transaction of PR DOE *at all*. As a matter of law, it indisputably was not a transaction of PR DOE; it was a transaction of DTOP. Moreover, the indictment is conspicuously devoid of any allegation that Ms. Keleher sought to **influence** the transaction in any way, as the letter at issue was directed to Company C, not DTOP.[1]

[1] To the extent the government is arguing that Ms. Keleher accepted something of value from Company C by falsely claiming that the acquisition of 1,034 square feet of the Padre Rufo School was a transaction of the PR DOE, such a theory would not state an offense. *See United States v. Hawkins*, 777 F.3d 880, 884 (7th Cir. 2015) (if defendants "were lying" about taking action in exchange for payment, they "were scamming [the payor] rather than" the public); *Blunden v. United States*, 169 F.2d 991 (6th Cir. 1948) (the "official act" element of the offense has not been met where the public official has no authority at all to act in the matter and his or her acts in response to the payment of a bribe are unauthorized).

In sum, the land transaction at issue is under the decision-making umbrella of DTOP, not the PR DOE. The Court can take judicial notice of this fact. Indeed, the Government in its opposition to the motion to dismiss Count 8 never argues to the contrary. The Government implicitly concedes that, as a matter of law, the acquisition at issue was a transaction of DTOP and not PR DOE. This deficiency strikes a mortal blow to the flawed indictment in this case, and mandates dismissal of Count 8.

The Government cannot hide behind the fact that this is a pretrial motion to tease the possibility that it may introduce evidence at trial that this transaction was one of PR DOE. Conceivably, there may be cases where the ultimate question of whether a transaction is of a particular agency is an issue of fact for the jury. But that is not the case here. The infirmity in the Government's allegation does not turn on an issue of fact. It turns on an issue of law. The law in Puerto Rico is clear and unambiguous. Puerto Rico Government land transfers fall entirely under the purview of DTOP, not the PR DOE. Whether the PR DOE operated the school itself is immaterial to the transaction. The land on which the school rested and the transfer of any portion of that land were governed by DTOP. Count 8 must therefore be dismissed for failure to state an offense since it alleges that PR DOE received federal funds and Ms. Keleher was an agent of PR DOE, but fails to allege that she accepted something of value in return for exercising influence over a transaction of PR DOE .

B. Count 8 fails to adequately plead the jurisdictional requirement tied to an agency's receipt of $10,000.00 in federal benefits

As the Government correctly notes, Paragraph 6 of the indictment alleges that the "PR DOE received federal benefits through various financial assistance programs funded by the United States Department of Education. The value of the federal benefits the PR DOE received from the US DOE exceeded $10,000 during the twelve months preceding December 31, 2018, and during the twelve months following December 31, 2018." (Docket No. 3 at 2). The Government, however,

goes on to demonstrate its misapprehension of the law governing this motion by relying on inapplicable law to bolster its argument that the jurisdictional requirements of Count 8 are adequately pleaded. First, the Government argues that the $10,000.00 need not originate from a single federal program or grant and may, instead, be aggregated. Second, the Government alleges Count 8 fairly apprises Ms. Keleher of the charge against her and that it need not identify the precise federal program or grant under which the PR DOE received the jurisdictional amount.

In support of its first argument, that the jurisdictional amount may be aggregated, the Government relies on inapposite decisions from several district courts. First, the Government cites *United States v. Kranovich*, 244 F.Supp.2d 1109 (D. Nev. 2003) to persuade the Court that the United States may aggregate federal funds to meet the jurisdictional requirement. But that case is clearly inapplicable here. Kranovich was a county official in a county that received federal benefits under two distinct programs—the Bulletproof Vest Partnership Grant and the Federal Equitable Sharing Agreement. Kranovich argued that his charge, embezzlement under Section 666, should be dismissed because he did not embezzle money from the Bulletproof Vest Partnership Grant, pursuant to which the county received benefits in excess of $10,000.00 and, instead, embezzled funds from the Federal Equitable Sharing Agreement, which did not receive benefits meeting the jurisdictional amount. The Court held that the fact that one county program received benefits in excess of $10,000.00 was sufficient to give it jurisdiction under Section 666 and found that "there is no requirement that jurisdictional funds be the funds to which the offense conduct is linked to create the needed nexus." *Id.* at 1117. Clearly that case does not stand for the proposition that the Government is entitled to aggregate an agency's federal benefits to meet the jurisdictional amount. The language included in the Government's response was simply taken out of context.

United States v. Hooks, No. 05-20329 B, 2005 U.S. Dist. LEXIS 37466, at *31-32 (W.D. Tenn. Dec. 12, 2005) and *United States v. Dransfield*, 913 F. Supp. 702, 706 (E.D.N.Y.1996) are equally inapplicable here, as both cases described the receipt of "assistance" from the federal government, not "benefits" and therefore run afoul of First Circuit precedent. Specifically, the holdings in *Hooks* and *Dransfield* are irreconcilable with the First Circuit's decision in *United States v. Bravo-Fernandez*, which held that an agency must receive $10,000.00 in federal benefits and "not all federal funds constitute 'benefits' under the [Section 666]." 913 F.3d 244, 247 (1st Cir. 2019); *see Fischer v. United States*, 529 U.S. 667, 681 (2000) ("Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term."). Thus, the United States' argument lacks merit pursuant to binding First Circuit precedent.

The United States' second argument, that it has properly placed Ms. Keleher on notice of the nature of the charge in Count 8, is similarly infirm. Admittedly, 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)). However, pursuant to the Supreme Court's holding in *Fischer*, ascertaining whether a particular receipt of benefits triggers jurisdiction under Section 666 mandates "an examination […] of the program's structure, operation, and purpose[]" and an "inquiry […] [into] the conditions under which the organization [or agency] receives the federal payments[]," and because "[t]he answer could depend, […] on whether the recipient's own operations are one of the reasons for maintaining the program[.]"

Fischer, 529 U.S. at 681. Without information regarding the nature of the benefit, or from which program it stems, Ms. Keleher is not in a position to properly defend herself at trial and, accordingly, Count 8 must be dismissed.

C. Count 8 fails as a matter of law to allege that federal funds were placed at risk

"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). 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," *Sabri v. United States*, 541 U.S. 600, 605–06 (2004), 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.

As established in Section II-A, *supra*, the transaction in question in this case, Company C's efforts to acquire property from the Padre Rufo School, was not and cannot be characterized as a transaction of the PR DOE. It was, and remains, a transaction between Company C and DTOP as a matter of law. Accordingly any action by Ms. Keleher with respect to this transaction

did not put any federal funds of PR DOE at risk. While it may have put funds or property of DTOP at risk, the indictment alleges that PR DOE, not DTOP was the recipient of federal funding, and that Ms. Keleher was an agent of PR DOE, not DTOP. Since money is fungible, any transaction of an agency that receives federal funding puts federal funds at risk, whether or not the transaction at issue was itself directly funded by the federal government. Here, however, the indictment does not allege any transaction of PR DOE. Therefore, necessarily, no federal funds that were extended to PR DOE were put at risk. Since, based on the allegations in the indictment, no federal funding to PR DOE was put at risk, Count 8 fails to state an offense and must be dismissed.

III. CONCLUSION

Count 8 fails to allege a transaction of the PR DOE, fails to properly plead the jurisdictional requirement, and fails to allege that any federal funds extended to PR DOE were placed at risk by the transaction in question in this case. Accordingly, it must be dismissed.

Respectfully submitted on this 4th day of November 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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