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 CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

I. INTRODUCTION

The Government has not contested that Ms. Keleher, as the Secretary of Education, did not have authority to cede any of the land on which the Padre Rufo School sits. The determinative issue before the Court is, therefore, whether Ms. Keleher's alleged agreement, that in return for something of value (concessions on an apartment), she would sign a letter on Puerto Rico Department of Education ("PRDOE") letterhead to the CEO of Company C stating that she "authorizes" Company C to acquire 1,034 square feet of the Padre Rufo School nonetheless constitutes taking something of value *in return for an alleged "official act"* and therefore states an offense of conspiracy to violate §666(a)(1)(B). The parties have incongruent interpretations of what constitutes an official act, yet both parties agree that the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016) should guide the Court's analysis. Pursuant to *McDonnell*, however, Ms. Keleher's act of signing the letter is not an "official act" and the Court can make that determination at this stage of the proceedings, as it is a purely legal inquiry. The failure of the indictment to state an "official act" undermines the legal sufficiency of the charges and requires dismissal of the indictment pursuant to Federal Rule of Criminal Procedure 12.

II. ANALYSIS

A. The Indictment fails to state an offense and should be dismissed pursuant to Rule 12(b)(3).

In its response in opposition to the defendant's motions to dismiss the indictment (Docket No. 148), the Government spills considerable ink arguing that the indictment provides the defendant with "fair notice of the criminal conduct" and that Ms. Keleher's motion is merely a premature "challenge to the sufficiency of the evidence." (Docket No. 148 at 1-2). 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)). Pursuant to Federal Rule of Criminal Procedure 12(b)(3), however, 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).

Despite the government's disingenuous characterizations to the contrary, Ms. Keleher's motion does not target the sufficiency of the government's factual evidence. Instead, the success of Ms. Keleher's motion rests upon the Court's legal determination of whether the conduct alleged

in the indictment is, as a matter of law, sufficient to constitute an official act. *See United States v. Caceres—Prado,* 601 F. Supp. 468, 470 (D.P.R.1984) ("If a motion to dismiss raises a question of law, rather than fact, then the motion [may] be properly considered."); *United States v. Craft,* 105 F.3d 1123, 1126 (6th Cir. 1997) ("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.").

The allegations in the indictment here are simple. The indictment alleges that Ms. Keleher, during her tenure as Secretary of the PRDOE, accepted a thing of value (financial incentives related to her purchase of an apartment at the Ciudadela condominium in San Juan), in return for signing and agreeing to sign a letter on PRDOE letterhead to the CEO of Company C "authorizing" Company C to acquire 1,034 square feet of the Padre Rufo School, conduct which the indictment improperly characterizes as an "official act." (Docket No. 3 at 16-17).

The outcome determinative question therefore is whether Ms. Keleher's signing of the letter in question is an "official act" as a matter of law. As such, the Court's determination is one of law, not fact, as the Court need not go beyond the four corners of the indictment to determine as a matter of law that the conduct alleged is not an "official act". Supreme Court precedent overwhelmingly establishes that it is not. Most importantly, the United States is bound by its allegation that Ms. Keleher's signature on that letter is the "official act" required to state an offense. To allege otherwise would create a fatal variance. As will be demonstrated below, the signing of that letter is not an "official act" and, accordingly, the indictment should be dismissed pursuant to Federal Rule of Criminal Procedure 12.

B. The Indictment fails to allege an "official act" as a matter of law.

The indictment charges a conspiracy to commit honest services wire fraud, substantive counts of honest services wire fraud and a substantive violation of federal program bribery, under

18 U.S.C. § 666. *Skilling* held that honest services fraud must encompass a bribe or kickback, citing 18 U.S.C. § 201(b), which criminalizes bribery of federal public officials for the performance of official acts, and *McDonell* addressed the definition of an official act in the context of honest services fraud. In the context of 18 U.S.C. § 666, official action is also an element of the offense, although the statute does not use the term explicitly. "To sustain a conviction pursuant to section 666, the evidence must establish that [defendants] agreed to 'exchange something of value for influence over some official conduct of the recipient'." *United States v. Carrasco-Castillo*, No. 14-423 (FAB), 2020 U.S. Dist. LEXIS 33992, at *10-11 (D.P.R. Feb. 26, 2020) (citing *United States v. Gracie*, 731 F.3d 1, 3 (1st Cir. 2013); *United States v. Fernández*, 722 F.3d 1, 22 (1st Cir. 2013) ("[F]or bribery, there must be a quid pro quo — a specific intent to give or receive something of value [*11] in exchange for an official act.").

Title 18 U.S.C.A. § 201(a)(3) sets forth two requirements for conduct to constitute an "official act". "First, the Government must identify a 'question, matter, cause, suite, proceeding or controversy 'that may be pending' or 'may by law be brought' before a public official. Second, the Government must prove that the public official **made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so**." *McDonnell*, 136 S. Ct. at 2368 (emphasis ours). On this first prong, the Supreme Court concluded "that a 'question' or 'matter' must be similar in nature to a 'cause, suit, proceeding or controversy.'" *Id.* at 2369.

In *McDonnell*, as here, the government adopted an expansive reading of the term "official act". The United States alleged that the former governor of Virginia, Robert McDonnell, took official action when he invited Jonnie Williams, the CEO of Star Scientific, to meetings, introduced him to state employees, arranged meetings, hosted events, and made phone calls to

other state officials to endorse and support Star Scientific's pursuit of studies aimed at eventually securing the Food and Drug Administration's approval of Antabloc, an anti-inflammatory drug.[1]

The Supreme Court disagreed and held that "[s]imply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, **as long as the public official does not intend to exert pressure on another official or provide advice**, knowing or intending such advice to form the basis for an 'official act.'" *Id.* at 2371 (emphasis ours).

Therefore, in order for the indictment to comport with statutory requirements and applicable Supreme Court precedent, the Government must allege that Ms. Keleher, as Secretary of PRDOE, either herself took action on a PRDOE matter that is akin to a case, suit, proceeding, or controversy or exerted pressure on another public official to take such action. The indictment alleges neither.

C. The indictment fails to allege that Ms. Keleher as Secretary of PRDOE took any official action on behalf of PRDOE.

The indictment does not allege that Ms. Keleher took any official action on behalf of PRDOE, nor could it, as it is clear beyond belief PRDOE had no such power over the lands in

[1] Notably, McDonnell's interactions with businessman Jonnie Williams were shocking. Williams asked McDonnell for his help securing research studies at Virginia's public universities. He asked McDonnell, as governor, to make the appropriate introductions. Williams took the governor's wife on a shopping spree and gifted her with $20,000 worth of designer clothing. Williams was a frequent visitor at the Governor's Mansion. Mrs. McDonnell discussed family financial troubles with him, and asked him for a $50,000 "loan", which Williams gave, in addition to a $15,000 gift to help pay for the wedding. Two additional loans for $50,000 and $20,000 were also later made by Williams to McDonnell. McDonnell and his wife visited Williams' residence and used Williams' Ferrari during their stay. McDonnell's wife asked Williams for a Rolex watch for McDonnell which she then gifted to her husband. In total, the McDonnells received over $175,000 in gifts and loans from Williams. *McDonnell*, 136 S. Ct. at 2357-2362. These perquisites were received while the McDonnell's took action to favor Star Scientific and its business objectives. Despite these egregious interactions, the Court rejected the government's expansive definition of "official acts" because McDonnell's actions in favor of Williams did not qualify as such. The government, not having heeded the warnings of the Supreme Court in *McDonnell,* now attempts to mimic the government's failed attempts in *McDonnell* by characterizing Ms. Keleher's signing of the letter as official action.

question. Rather, this matter was before another government agency, a point the Government's opposition never contests.

In July 2018, Defendant Ariel Gutierrez-Rodriguez drafted a letter and sent it to Ms. Keleher; the letter was from Ms. Keleher to Individual A, the CEO of Company C, authorizing Company C to acquire 1,034 square feet of the Padre Rufo School for its business purposes. (Docket No. 3 at ¶ 29.) Ms. Keleher allegedly caused the letter to be placed on PRDOE letterhead and then affixed her signature to it. (*Id.*)[2]

Ms. Keleher's letter, however, had no legal force, did not adjudicate or affect anyone's legal rights or obligations, and, at most, was a non-binding statement of the Secretary of PRDOE supporting Company C's efforts to acquire the property from the Department of Transportation and Public Works ("DTOP" by its Spanish acronym), a government entity which is wholly independent of the PRDOE. *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.)

D. The indictment does not allege that Ms. Keleher exerted pressure on DTOP to take official action.

In in its opposition, the Government quoted *McDonnell* and suggested it holds that, standing alone, setting up a meeting, hosting an event, or making a phone call (or, here, signing a letter) can be an "official act". In fact, the case stands for precisely the contrary premise. The

[2] The letter signed by Ms. Keleher on PRDOE letterhead was produced by the Government in discovery. A certified translation of the letter is attached as Exhibit A. The sentence in the letter that Paragraph 29 of the indictment characterizes as Ms. Keleher "authorizing Company C to acquire 1,034 square feet of the Padre Rufo School for its business-related purposes" states: "based on the endorsements issued by the Municipality [of San Juan] and the DTOP [the Spanish acronym for the Department of Transportation and Public Works] for the expansion of Antonsanti Street, we hereby endorse your request and we authorize you to proceed with the construction to provide better road way to the Padre Rufo School and to all the residents of the sector."

Supreme Court specifically stated that "[s]imply expressing support for other research study at a meeting, event or call-or sending a subordinate to such a meeting, event, or call-similarly does not qualify as a decision or action on the study…" *McDonnell* at 20. Under such circumstances *McDonnell* makes clear that the government would have to prove that the public official intended to exert pressure on another official intending that "such advice form the basis for an 'official act'".

The indictment in this case does not make this allegation, nor alleges facts to support the allegation. Indeed, this letter was not even addressed to DTOP, nor was it addressed to a DTOP official (whoever he or she may be) with the authority to cede the land to Company C or any other company. Nor has the Government otherwise alleged, in any manner whatsoever, that the letter was used to exert undue pressure or coercion on any other public officials.

The Government relies on two decisions, *Cordaro v. United States* and *Wilson v. United States*, in support of its argument that Ms. Keleher's lack of authority to dispose of Puerto Rico Government land is not dispositive in this case. Both decisions are wholly inapplicable to the facts of this case, however, because those cases did involve allegations and proof of efforts to exert influence over a public official who was taking official action.

In *Cordaro*, the defendant was a county commissioner who accepted bribes in exchange for awarding government contracts or interfering to award government contracts in favor of those who bribed him. *See Cordaro v. United States*, 933 F.3d 232 (3d Cir. 2019). The Circuit's guiding question was whether a reasonable juror, if instructed pursuant to *McDonnell*, could have concluded that Cordaro committed official acts. Cordaro argued no, as the contracts at issue were between the bribers and independent governmental agencies, not the county itself. The Court held the following:

> In sum, whatever the chain of technical legal authority in Lackawanna County, **there is ample evidence that Cordaro**

> **agreed to, could, and did influence who kept and lost contracts with county entities**. Again, it is probable — and indeed quite likely — that some reasonable juror would conclude that Cordaro agreed to exert that influence for cash.

Id. at 243–44 (emphasis ours). The *Cordaro* decision, then, does not support the Government's proposition that Ms. Keleher's lack of authority is meaningless in this case. In fact, it stands for the contrary proposition, as it specifically bases its ruling on the fact that Cordaro could and did influence the issuance of county contracts.

Wilson is equally inapplicable. There, in a case that long pre-dated *McDonnell*, the government relied on evidence that the defendant exercised influence over the person who was the actual decision-maker.

> Even though at the time herein involved, Wilson was no longer directly in the chain of supervision of the regulation of insurance sales, he was free and able to make any recommendation he might see fit to make to the Commanding General or to his friend Dean or to any other officer. **Regardless of his actual authority, it was still within his practical power to influence the regulation of insurance sales as it had formerly been, particularly with the illegal assistance of his co-conspirator Dean as Post Insurance Officer**.

Wilson v. United States, 230 F.2d 521, 526 (4th Cir. 1956) (emphasis ours). Clearly, the *Wilson* decision is as unsupportive of the Government's position as *Cordaro*. Ms. Keleher lacked the authority to cede Government land and the indictment is devoid of any allegations that Ms. Keleher, despite lacking in authority, intended to pressure DTOP to cede the land in question to Company C. Even assuming *Wilson* remains good law after *McDonnell*, it is plainly distinguishable where, as here, the Government has not alleged that Ms. Keleher exerted influence over DTOP.

This is particularly true provided that, as is readily apparent from the letter signed by Ms. Keleher that the indictment alleges to have constituted official action, was not addressed to DTOP,

the owner of the lands, nor any other agency or public official. Ms. Keleher's letter was essentially a meaningless gesture that did not have the force of law and which was not alleged to have been used to exert undue pressure or coercion on other officials who did have authority to adjudicate the issue. Faced with this dire reality, the Government simply mischaracterizes the allegation by claiming Ms. Keleher "**agreed** to make a decision and take action on a matter pending before her, and that she actually did so." (Docket No. 148 at 9) (emphasis in the original). As *McDonnell* makes clear, there was no matter pending before her.[3]

In sum, the acquisition of 1,034 square feet of the Padre Rufo School is not and was never a case, suit, proceeding, or controversy of the PRDOE. Therefore, Ms. Keleher's action "on" that acquisition could not be construed as "official action", particularly since the letter was not alleged to have been used to exert undue pressure or coercion on other officials. The "official act" alleged in the indictment, therefore, is, as a matter of law, not an "official act" of PRDOE at all and the Court should dismiss the indictment as a result. *McDonnell* makes clear that all action by a public official does not constitute "official action". *See McDonnell*, 136 S. Ct. at 2367-2368 ("The Government concludes that the term 'official act' therefore encompasses nearly any activity by a public official… [W]e reject the government's reading of §201(a)(3) and adopt a more bounded interpretation of 'official act.' Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act'.").

E. Ms. Keleher's lack of authority to take action regarding the premises of the Padre Rufo School is dispositive in this case.

[3] To the extent the government is arguing that Ms. Keleher accepted something of value from Company C by falsely claiming that there was a matter before her and that she would take official action on that matter in return for the thing of value, 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).

The text of §201(a)(3) requires that "the Government …prove that the public official made a decision or took action 'on' that question, matter, cause, suit, proceeding or controversy, or agreed to do so," which "connote[s] formal exercise of governmental power such as a lawsuit, hearing, or administrative determination." *McDonnell*, 136 S. Ct. at 2368. Here, the Government has not charged Ms. Keleher with an attempt to commit an "official act", nor has it charged Ms. Keleher with agreeing to take an "official act", but instead having taken action that was not in and of itself "official". *See e.g.* Indictment at ¶ 5 (noting that Article 4.3 of the Puerto Rico Governmental Ethics Act prohibits a public servant from: "(1) accepting or maintaining contractual or business relationships which undermine the independence of the public servant's discretion *in carrying out her official functions*); (2) maintaining contractual or business relationships with private individuals or entities who have a contractual, financial, or commercial relationship with the agency for which the public servant works when the public servant has the authority to *decide or influence official acts of the agency* with respect to that particular private individual or agency"); (3) intervening or participating in perfecting a contract with a private individual or entity in which the public servant, a member of her family, or friend has, or has had, a direct or indirect financial interest over the two years preceding her appointment as a public official *if the public official has the authority* to recommend or approve a contract on behalf of the agency in which she works); *id.* at ¶ 20 ("It was a purpose of the conspiracy for [1] JULIA BEATRICE KELEHER to *use her official position as the Secretary of Education* to enrich herself by soliciting and accepting gifts, payments, and things of value from others, known and unknown to the Grand Jury, and for others to enrich themselves *by obtaining favorable official action* for themselves and their companies through corrupt means.") (emphasis added)

Intellectual honesty thus requires that the Government concede that Ms. Keleher's signing of the letter to *Company* C, which had no legal force to "decide" the issue, was likewise not of the same "stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee," *McDonnell*, 136 S. Ct. at 2368, and, therefore, that she was not carrying out her official functions or taking action on behalf of her agency by deciding a matter before her agency.

The facts in *McDonnell* presented a more subtle legal determination than the facts before the Court today, as McDonnell was at the time the governor of Virginia, and presumably enjoyed broad decision-making authority that Ms. Keleher did not. Indeed, it is a matter of well settled statutory law in Puerto Rico that Ms. Keleher, acting as the Secretary of the Department of Education, did not and could not have any legal or official authority to make a "decision" on the matter of the ceding of the land. Even in light of McDonnell's broad authority as Governor, meanwhile, including his authority to determine the economic plan of Virginia, the Supreme Court emphatically rejected efforts to couch his conduct as official acts under circumstances where the matter or controversy was ordinary, and was not the functional equivalent of a lawsuit before a court, administrative determination, or hearing before a committee. *Id.* Clearly, pursuant to *McDonnell*, Ms. Keleher's action in signing the letter, does not rise to the level of an "official act" as a matter of law, under the more stringent definition mandated by the Supreme Court.

III. CONCLUSION

Ms. Keleher urges the Honorable Court to heed the unambiguous decision of the Supreme Court in *McDonnell* and dismiss the indictment in this case, as Ms. Keleher did not, as a matter of law, carry-out an "official act".

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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