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

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al., Defendants.	CRIMINAL NO. 20-19 (FAB)

MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM PRESENTING IRRELEVANT EVIDENCE AND RAISING LEGALLY ILLEGITIMATE DEFENSES

A public official cannot defend the solicitation and acceptance of a bribe by arguing that she never actually performed, never intended to perform, or never had the authority to perform the desired official act. Nor can the offeror of a bribe defend his criminal act on these grounds. Any such arguments have no bearing on whether a public official may be criminally liable for accepting a bribe, or on whether a non-public official may be criminally liable for offering a bribe.

Defendants Julia Beatrice Keleher and Ariel Gutierrez-Rodriguez raised an alleged "lack of authority" argument in seeking dismissal of the indictment. *See, e.g.*, Docket Nos. 57, 69, 85. In rejecting the defendants' arguments in support of their motions to dismiss, this Court was persuaded by the "ample authority holding or supporting that a briber and bribee may be guilty of bribery *even if the bribee lacked authority to accomplish the result the briber desired*." *United States v. Keleher*, No. 20-19, 2020 U.S. Dist. LEXIS 225991, at *13-14 n.2 (D.P.R. Dec. 1, 2020) (Besosa, J.) (citing cases) (emphasis added).

To minimize the need to relitigate the "lack of authority" issue in the middle of trial, the United States respectfully requests a ruling *in limine* pursuant to Federal Rules of Evidence 401, 402, and 403 precluding the defendants from arguing to the jury, and from presenting evidence

to suggest, that: (1) Defendant Keleher never actually ceded any portion of the Padre Rufo School because she lacked the authority to do so, (2) Defendant Keleher never intended to perform any official act, (3) Defendant Keleher lacked the authority or the ability to accomplish the outcome which the briber desired; and (4) Defendant Keleher's letter purporting to authorize Company C begin construction on Antonsanti Street was a meaningless gesture without any legally binding force. Such evidence would be irrelevant, and would risk misleading and confusing the jury.

I. ARGUMENT[1]

"Evidence is admissible only if relevant, probative, and not unfairly prejudicial." *United States v. Sweeney*, 887 F.3d 529, 538 (1st Cir. 2018) (citations omitted). To be relevant, evidence must have "a tendency to make a fact more or less probable than it would be without the evidence," and must be "of consequence in determining the action." Fed. R. Evid. 401. Even if relevant, courts "may exclude … evidence if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

As the United States previously argued, the law is clear that whether a public official actually performed an official act, intended to perform an official act, or had the authority to perform an official act and obtain a particular result has no bearing on whether the public official may be criminally liable for accepting a bribe, or on whether a non-public official may be criminally liable for offering a bribe. *See* Docket Nos. 148 at 10-15.

Honest services fraud, 18 U.S.C. §§ 1343 and 1346, and federal program bribery, 18 U.S.C. § 666, cover solicitations and agreements, even where the public official takes no action.

[1] The United States assumes the Court's familiarity with the factual allegations in the indictment.

See United States v. McDonnell, 136 S. Ct. 2355, 2370-71 (2016) (noting that "a public official is not required to actually make a decision or take an action on a question, matter, cause, suit, proceeding or controversy'; it is enough that the official agree to do so."); *see also United States v. Carrasco-Castillo*, 422 F. Supp. 3d 479, 490 (D.P.R. 2020) (Besosa, J.) ("Federal program bribery is triggered by a *quid pro quo* agreement, irrespective of whether an agent performs official acts in furtherance of a corrupt scheme.").

Honest services fraud and federal program bribery also cover solicitations and agreements even where the public official never intends to perform the official act, provided she simply agrees to do so. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2370 ("Nor must the public official in fact intend to perform the 'official act,' so long as he agrees to do so. A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return.") (emphasis added). And in the case of a briber, the intent of the public official has no relevance at all. *See, e.g.*, *Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942); *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974) ("The payment and receipt of the bribe are not interdependent offenses … Thus the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official duties, or even lacked the power to do so."); *United States v. Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973) (holding that the bribery statute "is violated even though the official offered the bribe is not corrupted, or the object of the bribe could not be attained . . .").

Finally, honest services fraud and federal program bribery cover situations where a public official is not actually able to perform the desired act because she lacks the authority to do so. *See, e.g.*, *United States v. Myers*, 692 F.2d 823, 850 (2d Cir. 1982) (holding that receipt of "a bribe

in return for [the defendant's] corrupt promise to take official action" is sufficient to constitute bribery because "[w]hether the promise was carried out is *irrelevant*, and it is *no defense* that the promise could not have been carried out either because the official act to be taken was beyond the defendant's authority, or had already been taken") (internal citations omitted) (emphasis added); *Cordaro v. United States*, 933 F.3d 232, 243 (3d Cir. 2019) (observing that under *McDonnell*, it 'does not matter' that the defendant may have '*lacked the authority*' to perform an official act "so long as he agree[d] to do so.") (emphasis added).

For all these reasons, a public official cannot defend her solicitation and acceptance of a bribe by arguing that she never actually performed, never intended to perform, or never had the authority to perform the desired official act. Likewise, it is no legitimate defense for a briber to argue that the public official lacked the authority to perform the official act for which he offered the bribe. Evidence to support such illegitimate defenses is irrelevant under Federal Rule of Evidence 401 because it has no tendency to make a fact of consequence more or less probable. Federal Rule of Evidence 402, therefore, mandates the exclusion of such evidence. Beyond that, the only purpose of such evidence and argument would be to confuse and mislead the jury. As such, the danger of unfair prejudice substantially outweighs any possible probative value, of which there is none. Accordingly, even if this evidence had any marginal relevance (it does not), Federal Rule of Evidence 403 would bar its admission.

II. CONCLUSION

For the foregoing reasons, and for those set forth in documents filed at Docket No. 148 at 10-15 and Docket No. 170, the United States respectfully request that this Court grant its motion *in limine* to exclude evidence and argument at trial in support of any "lack of authority" defense pursuant to Federal Rules of Evidence 401, 402, and 403.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of March, 2021.

W. STEPHEN MULDROW
United States Attorney

/s/ Alexander L. Alum
Alexander L. Alum – G01915
Assistant United States Attorney

CERTIFICATE OF SERVICE

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 send notification of such filing to all counsel of record.

/s/ Alexander L. Alum
Alexander L. Alum
Assistant United States Attorney