UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Case No. 5:20-CR-28-MW/MJF

UNITED STATES OF AMERICA

v.

JAMES D. FINCH,

Defendant.
_____/

REPLY IN SUPPORT OF DEFENDANT FINCH'S
RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

In response to Defendant Finch's Renewed Motion for Judgment of Acquittal, the government stretches the law, facts, and evidence to illogical and unreasonable ends. The government's response is saturated with bare, conclusory statements that require impermissible inference stacking. Accepting the government's logic and arguments would in effect render all Rule 29 motions superfluous. Indeed, no court would ever be permitted to grant a Motion for Judgment of Acquittal if a juror was allowed to be as unreasonable as the government suggests.

I. The government failed to present sufficient evidence of an agreement and corrupt intent.

The government claims that it presented "direct evidence of both" Mr. Barnes's and Mr. Finch's corrupt intent. ECF No. 548 at 4. Yet, the government does not cite to documents, exhibits, or portions of testimony of the so-called "direct

evidence." The government then leaps to a conclusion that the so-called non-specific, unidentified direct evidence is also evidence of a "conspiratorial agreement." *Id.* Surely, this cannot satisfy the legal requirements under Rule 29.

To make an appropriate determination as to the sufficiency of the evidence, it is necessary for the Court to analyze the ***specific*** evidence presented at trial and draw reasonable inferences from that evidence. Without specific citations to the record, it is virtually impossible to evaluate the government's claims of sufficiency of the evidence. Nonetheless, we will attempt to address the government's arguments.

First, the government claims it presented the following direct and circumstantial evidence:

- "Beginning in September 2015, and continuing until December 2017, the Commissioner solicited and received $45,000 in checks, purportedly as business loans, from Defendant." ECF No. 548 at 5.
- "The allegedly loaned monies were never repaid." *Id.*

Based on this summary, the government then argues that a rational juror could conclude that the $45,000 in checks to Mr. Barnes from Mr. Finch are not actually business loans. *Id.* at 5. Not only is this an unreasonable and unsupported interpretation of the evidence and testimony, but the government has already conceded the legitimacy of the loans to this Court and to the Jury. Gov't Ex. 5N ¶ 20 ("Had IFCU known that Barnes had outstanding ***loans of $45,000 to [Finch]*** . . . IFCU would not have extended a loan to Barnes." (emphasis added)). The

government should be estopped from taking inconsistent positions in separate judicial proceedings. To protect the integrity of the judicial process, this Court should not permit the government to take diametrically inconsistent positions according to the exigencies of the moment.[1]

Second, the government claims it presented direct and/or circumstantial evidence that "Defendant [Finch] was actively pressing City officials to expand his contracts and to implement them in a way that maximized the work and payments to Defendant's company." ECF No. 548 at 5. Notably, the government does not include any citation to an exhibit or testimony to support this reckless claim. The government does not include a citation because there was no testimony or evidence to support it.

In fact, the trial testimony supports the opposite conclusion. The government's witnesses testified favorably to Mr. Finch, indicating that they had no problems with Mr. Finch and that he never offered them anything of value in exchange for official action. *See* Trial Tr., vol. 1, 145:11-12 (Schubert); Trial Tr. vol. 2, 252:16-17 (White). The same was consistent with all former public officials that testified during Defendant's case-in-chief. *See* ECF No. 542 at 8-9 (detailing the

[1] *See generally United States v. Campa*, 459 F.3d 1121, 1152 (11th Cir. 2006).

unrebutted, favorable testimony from former City Commissioner Judy Tinder and former Bay County Sheriff and FDLE Director Guy Tennell).

Also, as expected, the government almost exclusively relies on Mr. Barnes's Statement of Facts that in and of itself is ***not*** evidence—direct or circumstantial—of Mr. Finch's intent. ECF No. 548 at 6. In its response, the government does not contest or rebut the fact that:

1. The Statement of Facts does not contain Barnes's actual statements.
2. The document was a government-drafted summary of items it believed it could prove should Mr. Barnes have gone to trial.
3. The statement in Paragraph 13 relates to Mr. Barnes, not Defendant Finch.
4. Mr. Finch was not a participant in the Barnes's change of plea hearing.

Thus, Mr. Barnes's Statement of Facts is ***not*** evidence of Finch's state of mind, which is a necessary element for Count 1, nor is it evidence of Finch's intent or understanding, which are necessary elements for Count 2. Indeed, the only evidence of state of mind comes from Barnes' trial testimony. Here, he denied any allegation of a bribery agreement between himself and Mr. Finch. Trial Tr. vol. 2, 352:20-22; 358:23-25 (Mr. Barnes did not sell his vote); *id.* at 325:23-24 (Mr. Finch did not buy Mr. Barnes's vote); *id.* at 325:25–326:2 (no corrupt state of mind); *id.* at 362:3-5 (Finch never said anything or did anything at any point to make Mr. Barnes think Defendant Finch intended to bribe him.).

When weighing the possible theories supported by the evidence, the Court "must 'reject those evidentiary interpretations and illations that are unreasonable,

insupportable, or overly speculative.' " *United States v. Rodríguez-Martínez*, 778 F.3d 367, 371 (1st Cir. 2015) (quoting *United States v. Spinney*, 65 F.3d 231, 234 (1st Cir. 1995)).

The government has failed to cite any evidence that supports the conclusion that there is reliable, reasonable, and nonspeculative evidence upon which a reasonable jury could find that Mr. Finch conspired with Mr. Barnes to violate 18 U.S.C. § 666(a)(2), and that Mr. Finch ***knew*** the unlawful purpose of the plan and willfully joined in it. Likewise, the government has failed to cite any evidence that supports the conclusion that there is reliable, reasonable, and nonspeculative evidence upon which a reasonable jury could find corrupt intent of Defendant Finch in December 2017, when he provided the $5,000 check to Antonius Barnes, to convict on Count 2. As a result, the Court should grant Defendant Finch's Renewed Motion for Judgment of Acquittal.

II. The government recklessly misstates the evidence and Michael White's trial testimony.

Defendant Finch argued in his Renewed Motion for a Judgment of Acquittal that the government's case hinged entirely on the discredited and inconsistent testimony of Michael White, the former City Manager, and his recollection of a single uncorroborated statement purportedly made by Defendant Finch. ECF No. 542 at 10-14. As the Court will recall, Michael White testified that there was "an occasion" while he was City Manager where he was "out at Sheffield Park with

Mr. Finch." Trial Tr. vol. 2, 206:13-16. Michael White testified that at Sheffield Park with Mr. Finch they "got to talking about the 17th Street ***ditch*** a little bit." *Id.* at 207:13 (emphasis added). Michael White testified on direct and cross that the context of his discussion with Mr. Finch in Sheffield Park concerned "funding" and that the alleged conversation in Sheffield Park was about "financing on the 17th Street ***ditch***." *Id.* at 206:3-12; 279:13-7 (emphasis added).

Based on Michael White's testimony, the date he started as City Manager, and the unrebutted record evidence, Defendant Finch further argued that the evidence conclusively shows that the ***funding*** associated with the 17th Street ***ditch*** was approved by the City commission well ***before*** Michael White was even hired as Lynn Haven City Manager. ECF No. 542 at 11.[2]

Thus, because of the irrebuttable inconsistencies within Michael White's testimony regarding the ***funding and approval*** for the 17th Street ***ditch***, it is apparent that the government elicited perjured testimony in that it was factually impossible for the conversation described by Michael White to have taken place. *Schuchmann*, 84 F.3d at 756; *see also United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991) ("[T]estimony generally should not be declared incredible as a matter of law unless

[2] Michael White admitted "the original contracts were all done before" he was hired as City Manager. Trial Tr. vol. 2, 280:5-6. On cross, Michael White also admitted that the documents, the records, and the contracts would be the best evidence of timing related to funding the 17th Street ditch. *Id.* at 280:17-21.

it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature.").

In response, the government argues that "financing on the 17th Street *project* did come back before the Commission on September 12, 2018." ECF No. 548 at 7 (emphasis added). But this argument makes several misstatements about Michael White's testimony and the evidence. Details and facts matter.

First, the government conveniently ignores and fails to address that Michael White testified that the alleged conversation with Mr. Finch was specifically about financing the ***ditch***. *See* ECF No. 542 at 10-14. Second, the government's reliance on the September 12, 2018, vote is misguided and misstates the evidence. The record is clear. The September 12, 2018, Commission voted to approve an addendum to include work involving stormwater improvements—not work related to the ***ditch***. *See* Def.'s Ex. 54 at 102–03 (detailing that the addendum was to work on Mississippi, Colorado, and Texas streets). The government also conveniently cuts off the portion of the September 12, 2018, Commission minutes that shows the motion and unanimous vote were for a "separate contract." *Id.* at 103.

The government would have this Court and a reasonable juror simply ignore Michael White's testimony and accept the government's new argument that is unsupported by the evidence. The Court should reject the government's unsupported argument and grant Defendant Finch's Renewed Motion for Judgment of Acquittal.

III. The government failed to present sufficient evidence of federal programs' structure, operation, and purpose.

Defendant Finch argued in his Renewed Motion for a Judgment of Acquittal that the government did not present sufficient evidence of FEMA's, NOAA's, or the DOJ's structure, operation, and purpose related to federal funding to fulfill 18 U.S.C. § 666's jurisdictional requirements under *Fischer v. United States*, 529 U.S. 667, 682 (2000). *See* ECF No. 542 at 19-24.

Defendant Finch maintains his position that the testimony from only state-level witnesses that the City of Lynn Haven received federal funds is insufficient because "an organization is not a beneficiary of a federal program merely because the organization receives federal funds." *Fischer v. United States*, 529 U.S. 667, 682 (2000) (emphasis added).

In response, the government claims that the defense has overlooked multiple items of important documentary evidence that undermine the defense's argument, citing six government exhibits—2a2, 2a3, 2a4, 2a6, 2b1, and 2c. ECF No. 548 at 10-11.

The government's exhibits, however, are still insufficient evidence of the various entities' structure, operation, and purpose. Courts "must evaluate a federal program's 'structure, operation, and purpose' to determine if the federal receipts qualify as benefits. Failure to conduct this necessary investigation violates *Fischer*'s admonition that § 666 is not a boundless statute that applies to virtually every state

bribery or fraud case." *United States v. McLean*, 802 F.3d 1228, 1240 (11th Cir. 2015).

Like the testimony from the state-level witnesses, the government's exhibits contain generic language about the grant programs, but not sufficient evidence for the Court or jury to evaluate the federal program's structure, operation, and purpose as required by *McLean* and *United States v. Edgar*, 304 F.3d 1320, 1325 (11th Cir. 2002) ("After *Fischer*, it is clear that the term 'benefits' encompasses only federal funds expended under sufficiently comprehensive programs. Application of this standard is to be guided by reference to a program's 'structure, operation, and purpose,' as well as the conditions under which recipient entities receive funds.").

There is a distinction between a federal program's purpose (determined by Congress and/or the federal agency), and a federal program's grant purpose (determined by the agency's operators). This distinction is consistent with requiring the government to provide sufficient evidence of the federal program's purpose, but also of its structure and operation. Each is required, and any gaps in the evidence warrant acquittal.

Here, there is insufficient evidence of NOAA's structure, operation, and purpose for a reasonable juror to determine if the federal receipt qualifies as a benefit for Count 2. Furthermore, there is insufficient evidence of the DOJ's, FEMA's, ***and***

NOAA's structure, operation, and purpose for a reasonable juror to determine if the federal receipt qualifies as a benefit for Count 1.

III. Conclusion

The government's opposition to Defendant Finch's Renewed Motion for Judgment of Acquittal is riddled with misstatements of the record, evidence, and testimony. It further makes broad-stroke arguments that have no bearing here, and often lack citation or reference to the record evidence.

The evidence in the record is "so scant that the jury could only speculate as to defendant's guilt." *United States v. Herberman*, 583 F.2d 222, 231 (5th Cir. 1978). Even viewing all the evidence in a light most favorable to the prosecution, a ***reasonably*** minded jury must have had a reasonable doubt as to the existence of any of the essential elements of the alleged crime of conspiracy and bribery. Upon further review of all the evidence, including the unrebutted evidence from the defense, which should give "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,"[3] an entry of a Judgment of Acquittal is warranted. The Renewed Motion for Judgment of Acquittal should be granted.

[3] *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2023, the foregoing document was filed with the Clerk of the Court using CM/ECF and that a true and correct copy of the foregoing has been served electronically via the CM/ECF System on all counsel of record.

/s/ Guy A. Lewis
GUY A. LEWIS