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DARLENE CRABTREE

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 PRISCILLA HUNTER, *et al.*,

20 Defendants.
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Case No. CR 06-0565 SI

**DEFENDANT DARLENE
CRABTREE'S REPLY TO
OPPOSITION TO MOTION TO
DISMISS**

[F.R.CRIM.P. 12(B)(3)]

Date: November 9, 2007

Time: 11:00 a.m.

Hon. Susan Illston

1 Defendant Darlene Crabtree hereby replies to the government's Response to her Motion to
2 Dismiss the indictment as follows:

3 **I. INTRODUCTION**

4 Our opening brief showed that the indictment doesn't allege a crime because the government
5 can't point to any law that made the political contributions at issue — two checks for a total of about
6 \$8,800 that Ms. Crabtree co-signed for the Tribe — illegal. Opening Br., p. 2. The government
7 responds by asserting that it was a certain CFR provision that was violated. Response, p. 3. But that
8 CFR provision, as we show below, doesn't help the government. Its plain terms do not prohibit, but
9 rather most likely *allow*, political contributions.

10 We also argued that a prohibition against a Tribe making "charitable gifts" from its Casino
11 account does not put a person on notice that the Tribe may not make a "political contribution" from
12 that account. Opening Br., p. 3. Were the term interpreted that way, it would just not be clear
13 enough to support criminal liability and comply with due process. The government now responds
14 that another phrase in the same Settlement Agreement defines clearly what is prohibited — "other
15 gifts" — and *it* is what put Ms. Crabtree on notice that the Tribe couldn't make political
16 contributions. Response, p. 3. That does not help the government's case either. The word "gift" —
17 whether a "charitable gift" or "other gift" — does not necessarily mean the same thing as a "political
18 contribution." So the prohibition against making some "other gift" still leaves a person of ordinary
19 intelligence guessing about whether she was also prohibited from signing a check for a legitimate
20 political contribution. A conviction for signing that check would violate due process and the
21 indictment should, therefore, be dismissed.

22 **II. FACTUAL BACKGROUND**

23 Ms. Crabtree is charged with willfully misapplying money from her Tribe's Casino account in
24 violation of 18 U.S.C. § 1167(b) and conspiracy in violation of 18 U.S.C. § 371. The alleged
25 misapplication consists in her having co-signed two checks — in her capacity as the Tribe's Secretary
26 — for contributions to legitimate political campaign organizations. Super. Indict., p. 12. She is not
27 charged with diverting money for her personal benefit. What makes the checks for political
28 contributions illegal, the government asserts, is that the Tribe's Settlement Agreement with the

1 National Indian Gaming Commission prohibits the use of money from the Casino account for “gifts.”
2 Response, p. 3.

3 **III. ARGUMENT**

4 The Court should dismiss the indictment because: (1) it doesn’t state a crime against
5 Ms. Crabtree; and (2) the prohibition against “gifts” being made from the Casino account should not
6 be interpreted to include political contributions because such an interpretation would render the term
7 “gift” too vague to support criminal liability consistent with due process.

8 **A. The Indictment Does Not State a Crime**

9 In our opening brief, we argued that the indictment states no crime. Opening Br., p. 2. It
10 doesn’t identify any laws that make the alleged political contributions illegal; there thus can be no
11 “willful misapplication.” The government responds by pointing to 25 C.F.R. §522.4(b), which is
12 mentioned in the indictment, and arguing it is *that* provision which clearly bans any and all political
13 contributions by Indian Tribes. Response, p. 3; Super. Indict., ¶ 5. Well, no.

14 The government’s argument has one big problem. Namely, 25 C.F.R. §522.4(b) does not
15 clearly prohibit the alleged political contributions. Certainly, nothing on the face of the regulation
16 expressly prohibits political contributions; it purports to set forth an exclusive list of permissible uses
17 of gaming revenue. Here’s what the regulation says are the only permissible uses: “(i) To fund tribal
18 government operations or programs; (ii) To provide for the general welfare of the tribe and its
19 members . . . ; (iii) To promote tribal economic development; (iv) To donate to charitable
20 organizations; or (v) To help fund operations of local government agencies.” 25 C.F.R. §522.4(b)(2).

21 A fair reading of the regulation’s language appears to allow legitimate political contributions
22 from gaming revenue. Indeed, at least three of the regulation’s four subsections could be interpreted
23 as allowing political contributions. After all, political contributions to candidates who will support
24 legislation favoring the gaming industry is surely a ‘cost of doing business’ in that highly regulated
25 and competitive industry. Such contributions could thus be considered part of “fund[ing] a tribal
26 operation” — the Casino — under 25 C.F.R. §522.4(b)(2)(i). Similarly, political contributions also
27 “provide for the general welfare of the tribe,” 25 C.F.R. §522.4(b)(2)(ii), to the extent they promote
28 the election of politicians who would support the Tribe’s causes. And in the same vein, political

1 contributions “promote tribal economic development,” 25 C.F.R. §522.4(b)(2)(iii), by enhancing the
2 Casino’s business prospects through promoting friendly legislation.

3 At the very least, someone trying to figure out whether a political contribution was a
4 permissible use would be left guessing as to whether it was. Because political contributions seem to
5 be allowed, rather than prohibited, by a fair reading of the CFR provision — and because the
6 government points to no other regulation or statute expressly prohibiting the expenditure — the
7 indictment should be dismissed.

8 **B. Due Process Does Not Permit Conviction Under an Unduly Vague Criminal Law**

9 The government doesn’t disagree that a criminal law must not leave a person of ordinary
10 intelligence “guessing” about what the law prohibits. After all, one convicted of a crime under that
11 law can lose her liberty, her reputation, her right to vote. But yet the vagueness of the law allegedly
12 violated is exactly the problem here.

13 **1. A Person of Ordinary Intelligence Would Not Know Political** 14 **Contributions From the Casino Account Were Illegal**

15 In our opening brief, we showed that it violates Due Process to criminalize behavior a “person
16 of ordinary intelligence” would not know was prohibited from reading the words used in the law.
17 *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). Opening Br., p. 3. We then argued that a
18 prohibition against “charitable gifts” (Super. Indict., ¶ 25) does not necessarily warn “a person of
19 ordinary intelligence” that political contributions are criminally prohibited. Opening Br., p. 4.

20 The government responds that a conviction would not violate due process. It points out that
21 the Settlement Agreement says that “[n]o charitable gifts *or other gifts* shall be made by the casino”
22 Settlement Agreement, p. 5 (*emphasis added*). And it argues that the phrase “other gifts” is actually
23 what puts a person of ordinary intelligence on notice that political contributions cannot be made from
24 the Casino account. Response, p. 3.

25 The government’s argument is not persuasive. Resort to the phrase “other gifts” would help
26 the government only if the word “gifts” necessarily meant “legitimate political contributions” to a
27 person of ordinary intelligence. But it’s just not the ordinary understanding of those terms. Put
28 simply: in common parlance, the sentences “I gave Senator Smith a gift” and “I gave Senator Smith

a political contribution” do not necessarily mean the same thing.¹ Since the terms are not interchangeable, the term “gifts” should have been expressly defined in the Settlement Agreement to include political contributions. It wasn’t. Or, even easier, the Settlement Agreement should have said in plain English “no political contributions” if that’s what was really intended to be proscribed. Because it didn’t, and because it would be wrong to convict someone for violating a “gift” prohibition because she signed checks for political contributions, the indictment should be dismissed.

2. Well-Settled Principles of Statutory Construction Do Not Allow an Interpretation That Makes These Political Contributions Illegal

a. The Rule of Lenity Prevents Conviction

We also showed that, without a plain and unmistakable proscription of behavior, courts will not impose criminal punishment for that behavior. *Dunn v. U.S.*, 442 U.S. 100, 113 (1979). Opening Br., 4. The government accepts that standard for applying the so-called rule of lenity, but argues — rather, asserts without explanation — that the making of political contributions *was* plainly and unmistakably proscribed. Response, p. 4. As we’ve shown, there is no such clear proscription anywhere in the law or the Settlement Agreement. The rule of lenity should be applied.

b. Criminal Laws Must Be Interpreted in Ways that Avoid, Not Invite, Constitutional Difficulties

Citing *Boos v. Berry*, 485 U.S. 312, 351 (1988), our opening brief showed that federal courts construe laws, where fairly possible, to avoid constitutional difficulties, not create them. Opening Br., p. 5. The government’s Response does not address our argument. The point is that “fairly possible” alternative constructions exist that would avoid the thorny questions that might arise under Due Process² and the First Amendment³ from construing the settlement agreement as prohibiting political contributions. The court should avoid such a construction and hold that a conviction for signing checks making “political contributions” should not be countenanced here.

¹ This distinction is reflected in our laws. For instance, a “political contribution” is subject to limits and reporting requirements in ways that “gifts” are simply not.

² The statute would be void for vagueness as applied here.

³ Political contributions are a form of protected speech. *Buckley v. Valeo*, 424 U.S. 1, 23 (1976).

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should dismiss the three counts in the indictment
3 charging Darlene Crabtree of misapplication of funds and conspiracy to misapply funds.
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5 Dated: October 26, 2007

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