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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

UNITED STATES OF AMERICA, Plaintiff, vs. DONNA YUK LAN LEONG, MAX JOHN SWORD, and ROY KEIJI AMEMIYA, JR., Defendants.	CR No. 21-00142-LEK **DEFENDANT ROY KEIJI AMEMIYA, JR.'S MOTION TO DISMISS; CERTIFICATE OF SERVICE** HEARING Date: Time: Judge: Hon. Leslie E. Kobayashi

DEFENDANT ROY KEIJI AMEMIYA, JR.'S MOTION TO DISMISS

Defendant ROY KEIJI AMEMIYA, JR. ("Amemiya"), by and through his attorneys, Hosoda Law Group, AAL, ALC, and Tamashiro, Sogi, & Bonner, ALC, respectfully moves this Court for an Order Dismissing the Indictment, filed herein on December 16, 2021 [Dkt. 1].

This Motion is brought pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure ("FRCRP"), Rules 7.1 and 12.1 of the Local Rules of Practice for the United States District Court for the District of Hawai'i, the notice requirement in the Sixth Amendment to the United States Constitution, and is based upon the memorandum, as well as the records and files herein.

DATED: Honolulu, Hawai'i, January 31, 2022.

/s/ Lyle S. Hosoda
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. RELEVANT FACTS 3

III. LEGAL STANDARD 7

IV. ARGUMENT 9

A. The Indictment fails to state a cognizable offense against Amemiya and therefore must be dismissed 9

B. Alleging that Amemiya conspired to commit a § 666(a)(1)(A) Offense does not supply the requirement under §371 that there must be a conspiracy to commit any offense against the United States or to defraud the United States or any agency thereof 17

C. The Indictment fails to inform Amemiya of the criminal nature of the alleged conspiracy 23

V. CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Pages**

Dennis v. United States,
384 U.S. 855, 86 S. Ct. 1840, 16 L.Ed.2d 973 (1966) 25

Dixson v. United States,
465 U.S. 482 (1984) 14-15

Givens v. Housewright,
786 F.2d 1378, 1380 (9th Cir. 1986).....7

Hammerschmidt et al. v. United States,
265 U.S. 182 (1924) 16-17

Rewis v. United States,
401 U.S. 808 (1971) 15

Russell v. United States,
369 U.S. 749, 82 S. Ct. 1038, 8 L.Ed.2d 240 (1962) 23-24

Salinas v. United States,
522 U.S. 52 (1997) 21

Tanner, et al. v. United States,
483 U.S. 107 (1987) .....*passim*

United States v. Arch Trading Company,
987 F.2d 1087 (4th Cir. 1993).....9

United States v. Boren,
278 F.3d 911 (9th Cir. 2002)..... 8-9

United States v. Cruikshank,
92 U.S. 542, 23 L.Ed. 588 (1875) 23

United States v. Cogswell,
637 F. Supp. 295 (N.D. Cal. 1985) 25

United States v. Lyle,
742 F.3d 434 (9th Cir. 2014).....8

United States v. McCaleb,
552 F.3d 1053 (9th Cir. 2009)..... 23-24

United States v. Schulman,
817 F.2d 1355 (9th Cir. 1987).....8

CONSTITUTION & STATUTES

U.S. CONST. AMEND. VI .....*passim*

18 U.S.C. § 37 (Section § 37)..... 16, fn. 4

18 U.S.C. § 201(a)..... 14-15

18 U.S.C. § 371 .....*passim*

18 U.S.C. § 641 .....*passim*

18 U.S.C. § 666(a)(1)(A).....*passim*

18 U.S.C. § 666(b).....*passim*

18 U.S.C. § 1343 2-3

RULES & REGULATIONS

FED. R. CRIM. P. 7 (C)(1).....7

FED. R. CRIM. P. 12(B)(3)(B)(V) 7-8

LEGISLATIVE & NON-PERIODIC MATERIAL

S. REP. NO. 225, 98TH CONG. 1ST SESS. 369, REPRINTED IN 1984 USCCAN 351 20

DANIEL N. ROSENSTEIN, SECTION 666: THE BEAST IN THE FEDERAL CRIMINAL ARSENAL, 39 CATH. U.L. REV. 673, 701-702 (1990) 22

ELECTRONIC MEDIA AND ONLINE SOURCES

CRIMINAL RESOURCE MANUAL 1002: THEFT AND BRIBERY IN FEDERALLY FUNDED PROGRAMS (JAN. 21, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-1002-theft-and-bribery-federally-funded-programs. 19-20

CRIMINAL RESOURCE MANUAL 1003: LEGISLATIVE HISTORY – 18. U.S.C. § 666 (JAN. 21, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-1002-theft-and-bribery-federally-funded-programs. 20-21

JUSTICE MANUAL, 9-46.000 – PROGRAM FRAUD AND BRIBERY (JAN. 2020), https://www.justice.gov/jm/jm-9-46000-program-fraud-and-bribery#9-46.100#9-46.100. 20-21

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

UNITED STATES OF AMERICA, Plaintiff, vs. DONNA YUK LAN LEONG, MAX JOHN SWORD, and ROY KEIJI AMEMIYA, JR., Defendants.	CR No. 21-00142-LEK **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Defendant Roy Keiji Amemiya, Jr. (“Amemiya”) respectfully requests, pursuant to the Sixth Amendment’s notice requirement[1] and Federal Rules of Criminal Procedure (“FRCRP”) Rule 12(b)(3), that the Indictment filed herein on December 16, 2021 (“Indictment”) by the United States of America (“United States”) [Dkt. 1] be dismissed for failure to state an offense against him, as required by FRCRP Rule 7(c)(1).

[1] Pursuant to the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]

The Indictment charges Amemiya with a single count of Conspiracy pursuant to 18 U.S.C. § 371 ("Section 371" or "§ 371"). Section 371 is entitled "Conspiracy to commit offense or to defraud United States" and provides that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (emphasis added). The plain language of the foregoing statute requires that a conspiracy be aimed at committing an offense against the United States or intended to defraud the United States or any agency thereof. In other words, the target of a § 371 conspiracy offense must be the United States or an agency thereof.

The Indictment alleged that the offenses against the United States that Amemiya conspired to commit were as follows: (1) to embezzle, steal, obtain by fraud and otherwise without authority knowingly convert over $5,000 or more from a program receiving federal funding (collectively, "Theft"), in violation of 18 U.S.C. § 666(a)(1)(A) ("Section 666(a)(1)(A)" or "§ 666(a)(1)(A)"); and (b) to devise and intend to devise, with the intent to defraud, a material scheme and artifice to defraud and to obtain money and property from persons by materially false and fraudulent pretenses, representations, promises, and omissions of material facts ("Wire Fraud"), in violation of 18 U.S.C. §1343 ("Section 1343" or

"§1343")(emphasis added).

There are absolutely no allegations in the Indictment that Amemiya conspired to commit an offense against the United States or to defraud the United States or any agency thereof. The Indictment, by alleging that Amemiya conspired to commit the offense of Theft against a program receiving federal funds, in violation of §661(a)(1)(A), acknowledged that the victim of the alleged conspiracy was a program receiving federal funding, i.e. the City, and not the United States or an agency thereof. Therefore, the Indictment must be dismissed for failure to state an offense against Amemiya.

II. RELEVANT FACTS

The overt acts alleged in the Indictment arise out of and relate to the City and County of Honolulu ("the City") Police Commission's ("HPC") decision to approve a negotiated Separation Agreement which, among other terms and conditions, allowed the City's former Honolulu Police Department ("HPD") Chief, Louis Kealoha ("Chief Kealoha") to retire and receive severance pay in the amount of $250,000 ("Separation Agreement") from salary funds allocated in HPD's budget.

The following are the relevant facts alleged in the Indictment:

> Amemiya and two co-defendants, Donna Yuk Lan Leong ("Leong") and Max John Sword ("Sword") were indicted on December 16, 2021. Within the Indictment it is generally alleged that Leong served as Corporation Counsel for the City, Sword served as a member and

Chairperson of the HPC[2], and Amemiya served as Managing Director[3] of the City. (Indictment ¶¶1-3).

Chief Kealoha served as Chief of HPD from 2009 until December of 2016, when he was placed on administrative leave after being identified as a target of a federal criminal investigation that ultimately led to his indictment and conviction. (Indictment ¶¶15-16).

In or about January 2017, Leong, Sword, and Amemiya, in their respective official capacities, arranged for Kealoha to retire with a payout. (Indictment ¶17).

A $250,000 payout was approved by the HPC on January 18, 2017. (Indictment ¶18). The payment was premised upon a waiver and release by Chief Kealoha of any claims he may have against the City, HPD, HPC, and their agents resulting from his employment or retirement and was memorialized in a written agreement signed by Sword, Kealoha, and Kealoha's attorney after having been approved as to form and legality by the City's corporate legal department. (Indictment ¶18).

That payment was "coded" as three separate payments amounting to less than $100,000 each. (Indictment ¶19). Any payment of greater than $100,000 would have to be approved by the City Council by resolution pursuant to ROH Chapter 2, Article 17, Section 2-17.2(c)(1). (Indictment ¶13).

Despite having been coded as three separate payments, only a single check was generated and it was provided to Chief Kealoha's attorney on January 27, 2017. (Indictment ¶¶19, 20).

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[2] The Indictment alleges that the HPC is a seven-member volunteer board that is responsible for appointing/removing the police chief, reviewing rules and regulations applicable to HPD, reviewing HPD's annual budget, and considering/investigating any charges brought by the public against members of HPD. (Indictment ¶7).

[3] The Indictment alleges that the Managing Director serves within the Mayor's office under the Mayor as the principal management aide and is next in line to assume Mayoral duties if the Mayor was unavailable. (Indictment ¶9).

> That check was deposited into Chief Kealoha's account and cleared the City's account over February 8 and 9, 2017. (Indictment ¶¶21, 22).
>
> The Indictment alleges that the manner and means of the conspiracy involved an "attempt to materially omit and conceal and cause others to materially omit and conceal the details of the Kealoha payout from the City Council and the public." (Indictment ¶26).

The essence of the allegations is that the three defendants conspired to: materially omit and conceal the details of the Separation Agreement from the City Council and the public; induce HPD to pay for Chief Kealoha's severance from salary funds allocated in the HPD's budget in order to circumvent City Council approval; attempt to have HPD make false and material omissions to the City Council in order to obtain the reallocation of funds budgeted from a later period to cover the funds spent by HPD for the Separation Agreement in an earlier period; and induce and attempt to induce HPD to part with more than $250,000 in public funds belonging to the City for the purpose of funding Chief Kealoha's payout, rather than submitting the Separation Agreement to the City Council for approval and funding or using the City Corporation Counsel's Judgments and Settlements Budget to pay for the costs of the Settlement Agreement.

There are no allegations that any of the defendants received any money or other personal benefit from the alleged conspiracy. The defendants were not charged with the offenses they are alleged to have conspired to commit. There are no allegations detailing that the defendants conspired to commit an offense against the

United States, or to defraud the United States or any agency thereof. Rather, the allegations describe an agreement to fashion a means through which a City employee could receive a severance payment from funds already allocated to HPD for salaries.

As to Amemiya, the Indictment contains a generalized allegation that Amemiya engaged in a conspiracy to commit offenses against the USA:

> Beginning on a date unknown, but no later than December 1, 2016, and continuing until in or about July 2020, within the District of Hawaii and elsewhere, defendants DONNA YUK LAN LEONG, MAX JOHN SWORD, and ROY KEIJI AMEMIYA, JR., did knowingly and willfully combine, conspire, and agree together, with each other and with others to commit the following offenses against the United States:
>
> a. To embezzle, steal, obtain by fraud and otherwise without authority knowingly convert over $5,000 or more from a program receiving federal funding, in violation of Title 18 United States Code, Section 666(a)(1)(A); and,
>
> b. To devise and intend to devise, with the intent to defraud, a material scheme and artifice to defraud and to obtain money and property from persons by materially false and fraudulent pretenses, representations, promises, and omissions of material facts, in violation of Title 18, United States Code, Section 1343.

(Indictment ¶25). The Indictment contains only three specific and limited allegations regarding Amemiya's participation (overt acts) in the alleged conspiracy:

> On or about January 19, 2017, the Acting HPD Chief sent a letter to HPD opposing the use of HPD money to fund Kealoha's payout.
>
> On or about January 24, 2017, the Acting HPD Chief's above-referenced letter appeared in a media report. On the same date, SWORD asked the Acting HPD Chief to call the media to clarify his statement, but the Acting HPD Chief declined. *AMEMIYA then told Acting HPD Chief that he was "burning bridges" by publicly objecting to Kealoha's*

payout coming from HPD's budget.

> On or about May 23, 2017, AMEMIYA called the acting HPD Chief to confirm that HPD would not raise the Kealoha payout at the City Council budget hearing. *AMEMIYA said he "wanted to make sure" that the Kealoha payout "did not become a story.*" After AMEMIYA'S call, an HPD Deputy Chief revised his planned statement and removed comments that the salary shortfall included the $250,000 that was improperly paid from HPD's salary budget for Kealoha's payout.

(Indictment ¶¶33(k) (l), (y))(italics added). None of these actions were in furtherance of any offense against the United States or any agency thereof, and all occurred *after* the information that the USA asserts was being concealed had become public.

III. LEGAL STANDARD

The Sixth Amendment guarantees a criminal defendant the fundamental right "to be informed of the nature and the cause of the accusation." U.S. Const. Amend. 6. Under the Sixth Amendment, the charging document is required to "state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against." Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986)(reversing denial of habeas relief as to conviction for first-degree murder due to violation of Sixth Amendment notice requirement); See also Fed. R. Crim. P. Rule 7 (c)(1)("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged[.]")

FRCRP Rule 12 governs motions to dismiss an indictment. FRCRP Rule 12(b)(3)(B)(v) provides:

> **(3) Motions That Must Be Made Before Trial**. The following defenses, objections and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without trial on the merits:
>
> * * *
>
> **(B)** a defect in the indictment or information, including:
>
> …
>
> **(v)** failure to state an offense[.]

Fed. R. Crim. P. 12(b)(3)(B)(v). A motion to dismiss an indictment pursuant to FRCRP Rule 12(b)(v) "is appropriately granted when it is based on questions of law rather than fact." United States v. Schulman, 817 F.2d 1355, 1358 (9th Cir. 1987). "In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, [we are] bound by the four corners of the indictment. We must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." United States v. Lyle, 742 F.3d 434, 436 (9th Cir. 2014) (citations and quotation marks omitted).

In United States v. Boren, 278 F.3d 911 (9th Cir. 2002), the 9th Circuit Court of Appeals said:

> In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment. On a motion to dismiss an indictment for failure to state an offense, the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged. The indictment either states an offense or it doesn't. There is no reason to conduct an evidentiary hearing. A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence.

> This is unlike pre-trial motions to dismiss premised on other grounds, such as that the indictment violates the defendant's right against double jeopardy, on which a court may take evidence and make factual determinations. . . . A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence . . . The Court should not consider evidence not appearing on the face of the indictment.

Id. at 914.

IV. ARGUMENT

A. The Indictment fails to state a cognizable offense against Amemiya and therefore must be dismissed.

The sole count against Amemiya is that he committed Conspiracy pursuant to 18 U.S.C. §371. 18 U.S.C. § 371, which is entitled, "Conspiracy to commit offense or to defraud United States," provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.A. § 371 (emphases added). Section 371 "criminalizes conspiracies of two sorts: conspiracies to commit an offense against the United States and conspiracies to defraud the United States." United States of America v. Arch Trading Company, 987 F.2d 1087 (4th Cir. 1993). The operative language of the foregoing statute requires that the target of both types of conspiracies be the United States or any agency thereof.

In Tanner et al. v. United States, 483 U.S. 107 (1987), the United States

Supreme Court was called upon to determine whether a conspiracy to defraud Seminole Electric Cooperative, Inc. ("Seminole"), a private corporation, constitutes a conspiracy to defraud the United States under 18 U.S.C. § 371. Seminole, which was owned and operated by 11 rural electric distribution cooperatives, generated and transmitted electrical energy to these cooperatives. Seminole borrowed over $1.1 billion from the Federal Financing Bank for a power plant construction project that included an access road. The loan was guaranteed by the Rural Electrification Administration ("REA"), a credit agency of the United States Department of Agriculture that assists rural electric organizations by providing and guaranteeing loans and approving other security agreements that enabled borrowers to obtain financing. Under the loan agreement, the REA had the right to supervise the construction and equipment of the electric system and inspect, examine, and test all work and materials related to the construction project. REA bulletins and memoranda required Seminole to obtain REA approval before letting out certain contracts, including the construction agreement for the access road, and required certain bidding procedures to be used.

Construction of the power plant began in September 1979. To provide access to an area where a transmission line would be run, plans called for construction of a 51-mile patrol road. The road required materials that would support heavy trucks and resist flooding, and at a meeting in March 1981, William Conover ("Conover"),

Seminole's procurement manager, was informed that the contractor was having difficulty obtaining enough suitable fill material for the road. The contractor indicated that it had not attempted to locate alternate fill materials and that the contract price would have to be increased substantially for the road to be completed. The contract was subsequently terminated.

Following the March meeting, Conover called Anthony Tanner ("Tanner"), who owned a limerock mine, to discuss whether limerock and limerock overburden could be used as an alternative fill material. Conover and Tanner were friends and had previously engaged in several business deals together. At Conover's request, a Seminole engineer examined the material at Tanner's mine and determined that it would be suitable for the road. Seminole acquired limerock overburden from Tanner on an interim basis so that road construction could continue while bids were solicited for the remainder of the project. Seminole called for bids on a contract for provision of fill materials and a contract for building the road. The final bid specifications were favorable to Tanner's company in several respects, and Tanner was awarded both contracts on May 14, 1981.

Several problems developed after Tanner began working on the road. A dispute arose as to whether Seminole or Tanner was required to maintain access roads leading to the patrol road. Conover advised Seminole that the contract was ambiguous, and that Seminole should pay for the maintenance of the access road,

which Seminole did. Later, the REA complained that the bond provided by Tanner was not from a company approved by the Treasury Department. In two letters to another bonding company in July 1981, Conover represented that the construction on the patrol road was considerably more advanced than it was at that time. It was also discovered that limerock, which weakens when wet, could not be used in areas subject to flooding. In those areas, Tanner provided and spread sand, at a higher price than sand provided and spread by the first contractor. The patrol road was completed in October 1981.

In June 1981, before the patrol road was finished, representatives of one of the members of the Seminole cooperative requested that Seminole end all business relations with Tanner. Seminole initiated an internal investigation, after which it suspended and later demoted Conover for violation of its conflict-of-interest policies. Federal authorities also conducted an investigation, and in June 1983, indicted Conover and Tanner. After a 6-week trial resulted in a hung jury and mistrial declaration, the two were re-indicted. Count 1 alleged conspiracy to defraud the United States in violation of 18 U.S.C §371, and Counts 2-5 alleged separate instances of mail fraud in violation of 18 U.S.C. §1341. Conover was convicted on all counts, Tanner was convicted on all but Count 3, and both appealed. The Court of Appeals affirmed their convictions, holding that their actions constituted a conspiracy to defraud the United States under §371, which was sufficient to establish

a §1341 violation. The court did not reach the question of whether the evidence established the use of the mails for purpose of defrauding Seminole.

The Supreme Court granted certiorari, partly to consider whether Tanner and Conover's ("Petitioners") actions constituted a conspiracy to defraud the United States within the meaning of 18 U.S.C. § 371. The Supreme Court observed that:

> Section 371 is the descendant of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867. See Act of Mar. 2, 1867, ch. 169, §30, 14 Stat. 484 (prohibiting conspiracy to "defraud the United States in any manner whatever"). Neither the original 1867 provision nor its subsequent reincarnations were accompanied by any particularly illuminating legislative history. This case has been preceded, however, by decisions of this Court interpreting the scope of the phrase "to defraud . . . in any manner or for any purpose." In those cases we have stated repeatedly that the fraud covered by the statute "reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" We do not reconsider that aspect of the scope of §371 in this case. Therefore, if petitioners' actions constituted a conspiracy to impair the functioning of the REA, no other form of injury to the Federal Government need be established for the conspiracy to fall under §371.

Id. at 128 (citations omitted). Petitioners argued that if the evidence adduced at trial established a conspiracy to defraud, then the target of that conspiracy was Seminole and a conspiracy to defraud a private corporation receiving financial assistance from the Federal Government does not constitute a conspiracy to defraud the United States. Id. at 129. The Government raised two arguments in response: (1) a conspiracy to defraud the United States may be effected by the use of third parties, and; (2) Seminole, as the recipient of federal financial assistance and the subject of

federal supervision by the REA, may itself be treated as the United States for purposes of § 371. The Supreme Court agreed with the Government's first argument:

> The Government observes, correctly, that under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud. The Government also correctly observes that the broad language of § 371, covering conspiracies to defraud "in any manner for any purpose," puts no limits based on the method used to defraud the United States. A method that makes uses of innocent individuals or businesses to reach and defraud the United States is not for that reason beyond the scope of § 371. In two cases interpreting the False Claims Act, which reaches "[e]very person who makes or causes to be made, or presents or causes to be presented" a false claim against the United States, Rev. Stat. § 5438, we recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act.

Id. at 129 (citations omitted). In rejecting the Government's second argument, the Supreme Court said:

> The conspiracies criminalized by §371 are defined not only by the nature of the injury intended by the conspiracy, and the method used to effectuate the conspiracy, but also – and most importantly – by the *target* of the conspiracy. Section 371 covers conspiracies to defraud "the United States or any agency thereof," a phrase that the Government concedes fails to describe Seminole Electric. . . . The Government suggests, however, that Seminole served as an intermediary performing official functions on behalf of the Federal Government, and on this basis a conspiracy to defraud Seminole may constitute a conspiracy to defraud the United States under §371.
>
> The Government suggests that this position is supported by the Court's reasoning in *Dixson v. United States*, 465 U.S. 482 (1984), a decision involving the scope of the federal bribery statute, 18 U.S.C. §201(a). Far from supporting the Government's position in this case, the reasoning of the Court in *Dixson* illustrates why the argument is untenable. For the purpose of §101's provisions pertaining to bribery

of public officials and witnesses, §201(a) defined "public official" to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government." The question presented in *Dixson* was whether officers of a private, nonprofit corporation administering block grants were "public officials" under §201(a). Although the "on behalf of" language in §201(a) was open to an interpretation that covered the defendants in that case, it was not unambiguously so. Therefore, the Court found §201(a) applicable to the defendants only after it concluded that such an interpretation was supported by the section's legislative history.

Unlike the interpretation of the federal bribery statute adopted by the Court in *Dixson*, the interpretation of §371 proposed by the Government in this case has not even an arguable basis in the plain language of §371. . . . Rather than seeking a particular interpretation of ambiguous statutory language, the Government, in arguing that §371 covers conspiracies to defraud those acting on behalf of the United States, asks this Court to expand the reach of a criminal provision by reading new language into it. This we cannot do.

Moreover, even if the Government's interpretation of §371 could be pegged to some language in that section, the Government has presented us with nothing to overcome our rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States, supra*, at 812. The Government has wrested no aid from §371's stingy legislative history. Neither has the Government suggested much to commend its interpretation in terms of clarity of application. Petitioners assert that the Government's logic would require any conspiracy to defraud someone who receives federal assistance to fall within §371. The Government replies that "there must be substantial ongoing federal supervision of the defrauded intermediary or delegation of a distinctly federal function to that intermediary to render a fraud upon the intermediary a fraud upon the "United States.'" . . . Yet the facts of this case demonstrate the difficulty of ascertaining how much federal supervision should be considered "substantial." The Government emphasizes the supervisory powers granted the REA in the loan agreement; petitioners argue that the restrictions placed by the REA on Seminole were comparable to those "that a bank places on any borrower in connection with a secured transaction.". . . Given the immense variety of ways the Federal

> Government provides financial assistance, and the fact that such assistance is always accompanied by restrictions on its use, the inability of the "substantial supervision" test to provide any real guidance is apparent. "A criminal statute, after if not before it is judicially construed, should have a discernible meaning."

483 U.S. at 130-132 (citations omitted)(emphasis added). The Court then concluded: "[T]he Government's sweeping interpretation of §371 – which would have, in effect, substituted 'anyone receiving federal financial assistance and supervision' for the phrase 'the United States or any agency thereof' in § 371 – must fail." Id. at 132. The Court also held that if the evidence at trial was sufficient to establish that Petitioners conspired to manipulate Seminole to make misrepresentations to REA, their convictions may stand.

In Hammerschmidt et al. v. United States, 265 U.S. 182 (1924), the Supreme Court reviewed the conviction of thirteen persons charged in one indictment with the crime of violation § 37 of the Penal Code[4]. The essence of the charge was that the petitioners, by printing, publishing, and circulating material intended and designed to counsel, advise and procure persons required to register for the Selective Service Act to refuse to obey the Act, willfully and unlawfully conspired to the defraud the United States by impairing, obstructing and defeating a lawful function

[4] Section 37 of the Penal Code, which is very similar to 18 U.S.C. § 371, stated:

> If two or more persons conspire . . . to defraud the United States in any manner or for any purpose, and one or more of such parties do an act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable[.]"

of its government. The Supreme Court explained that:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

Id. at 188. The Court held that "a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" cannot be included within the legal definition of a conspiracy to defraud the United States and the indictment should have been quashed.

In this case, the Indictment contains no allegation that Amemiya conspired to commit an offense against the United States or to defraud the United States or any agency thereof. There are no allegations, for example, that federal funds were used for the Kealoha payout, or that the payout impaired, obstructed, or defeated a lawful function of the United States or an agency thereof. The Indictment must be dismissed as there is no cognizable offense alleged against Amemiya, pursuant to Tanner.

B. Alleging that Amemiya conspired to commit a § 666(a)(1)(A) Offense does not supply the requirement under §371 that there must be a conspiracy to commit any offense against the United States or to defraud the United States or any agency thereof.

The Indictment on its face alleges that the target of the offense that Amemiya is alleged to have conspired to commit is the City and not the United States. Count

1 of the Indictment alleges that Amemiya, Leong, and Sword did knowingly and willfully combine, conspire, and agree together, with each other and with others to commit the following offenses against the United States:

> To embezzle, steal, obtain by fraud and otherwise without authority knowingly convert over $5,000 or more from a program receiving federal funding, in violation of Title 18, United States Code, Section 666(a)(1)(A)

(Indictment ¶25(a))(emphasis added). Per the Indictment, as part of the conspiracy, Amemiya, Leong, and Sword "did attempt to materially omit and conceal and cause others to materially omit and conceal the details of the Kealoha payment from the City Council and the public"; "did induce HPD to pay for Kealoha's payout from salary funds allocated in HPD's budget in order to circumvent City Council approval"; "did attempt to have HPD make materially false and misleading representations and omissions to the City Council in order to obtain the reallocation of funds from a later period to cover the funds spent by HPD for Kealoha's payout"; and "did attempt to persuade HPD not to disclose to the City Council that the reason HPD sought additional funding in the fourth quarter was related to the salary shortfall caused by HPD's payment of the Kealoha payout in the third quarter."

Because the City is clearly not the United States and a critical element of a conspiracy offense under 18 U.S.C. § 371 is that the target of the conspiracy be the United States or an agency thereof, the Indictment seeks to supply this element by alleging that Amemiya conspired to commit the §666(a)(1)(A) offense against "a

program receiving federal funding". Pursuant to 18 U.S.C. § 666(b), "[t]he circumstance referred to in subsection (A) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

Prior to 1984, embezzlements, thefts, and unauthorized conversions of funds or property from the United States government were generally prosecuted pursuant to the general theft statute, 18 U.S.C. § 641.[5] However:

> Use of the general theft statute was often precluded because either title to the property stolen had passed from the federal government before it was stolen, or the funds were so commingled that their federal character could not be shown.

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[5] 18 U.S.C. § 641 provided:

> **§ 641. Public money, property or records.** Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both. The word ''value'' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Criminal Resource Manual 1002: Theft and Bribery in Federally Funded Programs, (updated January 21, 2020) https://www.justice.gov/archives/jm/criminal-resource-manual-1002-theft-and-bribery-federally-funded-programs. In 1984, Congress reformed the federal criminal law and enacted § 666:

> The legislative history of 18 U.S.C. § 666 is sparse. Nevertheless, the limited legislative history of 18 U.S.C. § 666 indicates that Congress intended it to be construed broadly, consistent with its purpose of protecting the vast sums of money distributed through Federal programs from theft and fraud. The Senate Report states that 18 U.S.C. § 666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or state and local governments pursuant to a Federal program."
>
> S. Rep. No. 225, 98th Cong. 1st Sess. 369, *reprinted in* 1984 USCCAN 351.
>
> The Congress also clearly intended to vitiate the problems of title transfer and commingled funds encountered under 18 U.S.C. § 641. In many cases, such [Sec. 641] prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that state and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved. *Id.* at 369.

Criminal Resource Manual 1003: Legislative History – 18 U.S.C. § 666, updated January 20, 2021, https://www.justice.gov/archives/jm/criminal-resource-manual-

1002-theft-and-bribery-federally-funded-programs (citing in JM 9-46.100)

The scope of Section 666 is quite broad, and in Salinas v. United States, 522 U.S. 52 (1997), the United States Supreme Court held, with respect to a bribery charge brought pursuant to Section 666(a)(1)(B)[6], that:

> [t]he enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate §666(a)(1)(B). Subject to the $5,000 threshold for the business or transaction in question, the statute forbids acceptance of a bribe by a covered official who intends "to be influenced or rewarded in connection with any business, transaction, or series of transactions of [the defined] organization, government or agency." §666(a)(1)(B). The prohibition is not confined to a business or transaction which affects federal funds. The word "any" which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.
>
> Furthermore, the broad definition of the "circumstances to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition. The statute applies to all cases in which an

[6] 18 U.S.C.§ 666(a)(1)(B) states in relevant part:

> (a) Whoever, if the circumstances described in subsection (b) of this section exists –
>
> (1) being an agent of an organization or of a State, local, or Indian tribal government, or agency thereof –
>
> . . .
>
> (B) corruptly . . . accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or
>
> . . .
>
> Shall be fined under this title, imprisoned not more than 10 years, or both.

> "organization, government, or agency" receives the statutory amount of benefits under a federal program. § 666(b).

Id. at 57. As one commentator has noted:

> Because the focus of section 666 is on the relationship between the Federal Government and the entity benefiting from federal monies, the statute does not require that either the stolen property or the bribe have any direct link to the federal program. Based upon the statutory language of section 666, any employee of an entity receiving federal benefits exceeding $10,000 in a single year, who commits theft or accepts a bribe, is subject to federal prosecution, regardless of whether the employee personally administers the funds, or in any way participates in or knows of the federal program or its benefits. If this is indeed the scope of the new statute, it is not reflected in the legislative history. Furthermore, with such a result, the possibility of federal ingress into the activities of employees of state, local, and private entities becomes virtually boundless.
>
> Section 666 of title 18 is a valuable statute—a statute necessary to protect federal interests in the state and private sector. However, the courts should not forget that Congress enacted the statute for a specific purpose, the prevention of corruption in federally funded programs by nonfederal employees. This goal will be undermined if the statute is subject to indiscriminate use by overzealous prosecutors seeking to impose federal jurisdiction where none exists. To prevent this misuse, Congress must define more precisely the activities subject to prosecution under section 666, thereby narrowing the statute's scope. However, until such a redrafting occurs, the federal courts must recognize their responsibility in ensuring that the application of section conforms with its congressional purpose.

Daniel N. Rosenstein, "Section 666: The Beast in the Federal Criminal Arsenal," 39 Cath. U. L. Rev. 673, 701-702 (1990). In this case, Amemiya was not charged with committing an offense under Section 666(a)(1)(A). Therefore, that Section cannot be the basis to allege federal jurisdiction over a conspiracy offense under Section 371. Since the Indictment on its face, does not allege that Amemiya

conspired to commit any offense against the United States or to defraud the United States or any agency thereof, no cognizable offense under 18 U.S.C. §371 has been alleged against Amemiya and the Indictment should be dismissed.

C. The Indictment fails to inform Amemiya of the criminal nature of the alleged conspiracy.

"To prove a conspiracy, the government must show (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." United States v. McCaleb, 552 F.3d 1053, 1058 (9th Cir. 2009). The Indictment includes generic language at paragraph 25 that tracks the language of all three of the relevant statutes in this case and implicates all three defendants, including Amemiya. However, because this allegation does not "descend to particulars," alone it is not sufficient and does not provide Amemiya with adequate notice of the crimes for which he has been indicted. See Russell v. United States, 369 U.S. 749, 765, 82 S. Ct. 1038, 1048, 8 L.Ed.2d 240, 252 (1962)(quoting United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588, 593 (1875)).

The additional allegations that the USA may argue provide these necessary "particulars" relative to Amemiya are: (1) the allegation that all three co-defendants arranged for Chief Kealoha to retire with a payout during January of 2017 (Indictment ¶17); (2) the allegation that Amemiya told the Acting HPD Chief he was "burning bridges" on January 24, 2017 (Indictment ¶33(l)); and (3) the

allegation that Amemiya called the Acting Police Chief to confirm he would not address the payout at a City Council budget hearing on May 23, 2017 (Indictment ¶33(y)). However, as detailed below, these allegations do not connect Amemiya to a criminal conspiracy, and therefore the Indictment fails.

The USA necessarily needs to allege that Amemiya entered into an agreement with co-conspirators to engage in criminal conduct. See McCaleb, 552 F.3d at 1058. The agreement allegation must contain a level of particularity that would permit Amemiya to know what agreement the Government is referring to and show "with accuracy to what extent he may plead a former acquittal or conviction." Russell, 369 U.S. at 764. Here, the allegation is that "[i]n or about January 2017, Leong, Sword, and Amemiya, in their respective capacities, arranged for Kealoha to retire with a payout." (Indictment ¶17). However, the agreement described at paragraph 17 is not an agreement to engage in criminal activity. There is nothing criminal about discussing and agreeing to pay severance to a soon-to-be former employee.

The Indictment describes the coding of the severance payments in such a way so as to avoid detection by the City Council. It does not allege that the co-defendants made that decision, or whether the coding was part of an agreement among all three of them. The coding occurred later in time than the agreement to make a payout to Chief Kealoha and that is the earliest potential introduction of criminal intent into

the transaction. If the coding of the payments in smaller increments was an aspect of the agreement to make a payout to Chief Kealoha, described at paragraph 17, then it needs to have been alleged as part of that agreement otherwise the Indictment lacks any specific allegation of a criminal agreement. "[I]t is the court's duty to carefully scrutinize indictments under the broad language of the conspiracy statute 'because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty."' United States v. Cogswell, 637 F. Supp. 295, 299 (N.D. Cal. 1985)(quoting Dennis v. United States, 384 U.S. 855, 860, 86 S. Ct. 1840, 1843, 16 L.Ed.2d 973, 978 (1966)). There is no law here prohibiting severance payments, only laws about when City Council approval of expenditures is needed. The Indictment needs to allege, with particulars, that Amemiya entered into an agreement to make a payout to Chief Kealoha *and* violate the law to do it.

V. CONCLUSION

Based upon the foregoing, Defendant Amemiya respectfully requests that this Honorable Court dismiss the Indictment against him.

DATED: Honolulu, Hawai`i, January 31, 2022.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

UNITED STATES OF AMERICA, Plaintiff, vs. DONNA YUK LAN LEONG, MAX JOHN SWORD, and ROY KEIJI AMEMIYA, JR., Defendants.	CR No. 21-00142-LEK **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date noted below, a copy of the foregoing document was duly served via electronic transmission (CM/ECF), on the following parties:

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