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CIRCUIT COURT OF
LEE COUNTY, ALABAMA
MARY B. ROBERSON, CLERK

IN THE THIRTY-SEVENTH JUDICIAL CIRCUIT
LEE COUNTY, ALABAMA

STATE OF ALABAMA,	*	
	*	
	*	
	*	**CC-2014-0565**
v.	*	
	*	
MICHAEL GREGORY HUBBARD,	*	
Defendant.	*	
	*	

State's Response to Defendant's Motion to Revise Sentence

The State of Alabama hereby opposes Defendant Michael Gregory Hubbard's motion to revise his criminal sentence. After four years of criminal appeals, Hubbard remains convicted of six Class B felonies involving four different provisions of the Alabama Ethics Act. This Court's carefully calibrated sentence of a four-year split, among other penalties, properly accounted for the severity of Hubbard's crimes, the position of trust he abused, and the need for serious penalties to deter other wrongdoers. In addition, Hubbard's refusal to admit *any* guilt or express *any* remorse makes him wholly unfit to receive any leniency now that he is finally in jail. In sum, nothing material has changed since Hubbard earned his four-year sentence four years ago. It's simply time for him to serve it. Accordingly, his motion should be denied.

Background

A Lee County special grand jury indicted Hubbard on twenty-three felony charges. Doc. 4. A Lee County jury convicted Hubbard of twelve felonies and acquitted him on eleven. Docs. 753–54. The Court of Criminal Appeals affirmed eleven of Hubbard's

convictions and reversed his conviction on count five. *Hubbard v. State*, ___ So. 3d ___, 2018 WL 4079590 (Ala. Crim. App. 2018). The Alabama Supreme Court granted cert and affirmed Hubbard's convictions on counts 6, 10, 11, 12, 13, and 14. It reversed his convictions on counts 16, 17, 18, 19, and 23. *Ex parte Hubbard*, ___ So. 3d ___, 2020 WL 1814587. The Supreme Court later denied Hubbard's application for rehearing, and he reported to begin serving his prison sentence on September 11, 2020. He is scheduled to be released in September 2024.

Argument

On July 7, 2016—after issuing countless orders in more than a year-and-a-half of pretrial litigation, after presiding over a three-week trial, after hearing the testimony of forty-four trial witnesses, and after hearing the jury return twelve guilty verdicts—this Court held a sentencing hearing for Defendant Michael Gregory Hubbard. On that day, this Court heard still more testimony, including several witnesses who emphasized the good deeds of the defendant and other mitigating evidence. Following that testimony, this Court pronounced its sentence. No person, no attorney, no judge was in a better position to determine an appropriate sentence for Hubbard. And that is exactly what this Court gave Hubbard: an appropriate sentence. For that reason, and because Hubbard brings nothing new to the table, save for the fact that he is now behind bars, this Court should deny his request for a reduced sentence.[1]

[1] The State will confine its response to the "new" issues that Hubbard raises in his motion. To the extent Hubbard generally challenges the length of his sentence, the State adopts and incorporates its brief in support of its sentencing recommendation. Doc. 756.

1. Hubbard is not entitled to a reduced sentence because now he is only a six-time felon.

A reduced or modified sentence would be inappropriate in this case because this Court pronounced individual sentences for each of Hubbard's distinct crimes; it did not issue a single, omnibus sentence based on the totality of Hubbard's wrongs. *See* Sentencing Order, Doc. 765; Trans. 8210–15. In other words—and this point is dispositive—Hubbard is not being punished for his reversed convictions. He is being punished for the crimes of which he remains convicted. That fact makes all the difference because "[i]t is improper, as well as illogical, to think acquittals on some counts somehow ameliorate guilt on convicted counts." *See United States v. Morgan*, 635 F. App'x 423, 449 (10th Cir. 2015). Like the argument in *Morgan*, it would turn justice on its head for Hubbard to receive new sentences for crimes he remains convicted of simply because he is no longer convicted of other crimes. Hubbard attempts to elude this fundamental truth by positing that this Court gave him "unavoidably interconnected sentences running concurrently and some consecutively" as if something needs to be fixed. Motion at ¶ 3. Not so.

Hubbard may have had an argument if he could fairly trace his custodial sentence to his reversed counts, but he cannot do so. The Court's sentencing order demonstrates that the Court carefully crafted its sentences to account for the egregiousness of each crime. For example, the Court ordered a ten-year sentence split to serve two years for Count 6, Hubbard's violation of § 36-25-5.1 for taking money from APCI. But for Count 10—a second violation of section 5.1 for taking money from Edgenuity—the Court ordered only a six-year sentence split to serve 18 months. Continuing with the theme of measured

justice, the Court ordered sentences of five years split to serve 18 months for Counts 16–19 and Count 23. Because those convictions were reversed, however, Hubbard will not serve them. Lastly, this Court made the deliberate choice to run certain convictions consecutively and certain convictions concurrently. Doc. 765, p. 4 (noting that Counts 5, 6, and 10 run consecutively to Counts 11 through 14). This decision again reflects the Court's proper consideration of each individual conviction and its relation, if any, to the others. Had Hubbard seen a different set of convictions overturned on appeal then he may have had a different sentence. But the simple fact that appellate courts reversed some convictions and not others is an improper basis to reconsider the remaining sentences.

Moreover, reconsidering the remaining sentences is particularly unwarranted in this case. It defies reason for Hubbard to receive a new sentence for taking $60,000 per year from APCI (Count 6) simply because an appellate court reversed Count 5 on the ground that when Hubbard voted to give APCI a lucrative monopoly that could have devastated Medicaid, he was acting more as a consultant than as an employee. *Hubbard*, 2018 WL 4079590 at *20-23. Similarly, Hubbard deserves no leniency for illegally lobbying the Executive Branch and using his office and his staff for his own personal gain (Counts 11–14) on the ground that he is no longer guilty of soliciting various individuals with interests in government for $150,000 (Counts 16–19). At bottom, Hubbard's reversed counts have no bearing on his affirmed counts and their underlying sentences. Hubbard implicitly concedes as much by failing to cite a single case that supports his argument. This failure is telling. Hubbard's unsupported motion should be denied.

2. The principles of sentencing support a significant custodial sentence for Hubbard.

Hubbard's next argument centers on the principles that every judge considers at sentencing, but oddly, Hubbard makes no specific argument that this Court failed to undertake that analysis or that it erred in applying these factors to Hubbard. Motion at ¶¶ 6–7. Instead, Hubbard merely nods to the generalized idea that each case calls for the "least restrictive sanction that is consistent with the protection of the public and the gravity of the crime" and that consideration should be paid to whether he is a danger to society. Motion at ¶ 6 (quoting Ala. R. Crim. P. 26.8).

It may be that Hubbard makes only passing reference to these factors because he recognizes the mountain of precedent that details the significant cost public corruption like his inflicts on society. For example, it has been said that "[p]ublic corruption . . . harms society as a whole." *United States v. McNair*, 605 F.3d 1152, 1216 (11th Cir. 2010). As for Hubbard's suggestion that he is less dangerous than a common criminal, that notion too has been rejected: "A dishonest public official who profanes his official trust may do more harm to our society than common criminals, and be much more difficult to investigate and convict." *Baucom v.Martin*, 677 F.2d 1346, 1351 (11th Cir. 1982). Had Hubbard offered a specific argument, he also would need to contend with equally germane caselaw holding that "[d]efendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime therefore can be affected and reduced with serious punishment." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006). Hubbard, of course, was uniquely positioned to weigh his potential financial gains against his risk of prosecution given that he passed many of the ethics laws for which he was later prosecuted.

Regardless of Hubbard's reasons for only briefly passing upon the principles of sentencing, the conclusion remains clear: This Court had before it ample evidence and ample authority to justify a significant custodial sentence. Indeed, that Hubbard is only serving a total of four years in split sentences for six Class B felony convictions that are each punishable by no less than two years and up to twenty years demonstrates the Court's measured judgment. *See* R. Crim. P. 26.8, Committee Comments (advising courts to use alternatives like split sentences to find a "middle ground" in sentencing).[2] It is no surprise that Hubbard may disagree with the Court's conclusion, but that is not a persuasive point. Hubbard also may truly believe that he is not a danger to society, but he is wrong. He caused great harm to the State, its citizens' confidence in its government, and its government's reputation across the country. Were this malicious conduct left unchecked, it would grow like a cancer. Thus, this Court rightly recognized four years ago that Hubbard deserved a custodial sentence. It need not review these same questions again. By doing so this Court would put at risk the very confidence in government it instilled by holding that even a powerful man like Hubbard must account for his crimes.

3. Hubbard's contention that he has been adequately punished is factually flawed and wholly unpersuasive.

Having ignored the costs of his crimes, Hubbard focuses his attention on the suffering he truly cares about—his own. On this score, Hubbard gets the facts wrong, but even when he is right, he is unpersuasive. First, Hubbard incorrectly claims that he has lost

[2] Given the overwhelming evidence at trial detailing Hubbard's misuse of State resources, it is fair to suggest that Hubbard's newfound concern for scarce State resources is disingenuous and self-serving.

his right to vote. Motion at ¶ 9. Yet despite his six felony convictions—each of which arises from him illegally profiting from his elected position—Hubbard retains the right to vote. This is because the Alabama Legislature declined to include any violation of the Alabama Ethics Act as a crime of moral turpitude that causes a removal of voting rights. Ala. Code § 17-3-30.1(c) (including, by contrast, theft of lost property, forgery, and illegally selling securities as crimes of moral turpitude).

Next, Hubbard is correct that he has lost his elected position, as far as that gets him. If Hubbard takes the position that elected officials who commit multiple felonies should not serve jail time because they have already lost elected office, then he should say so. Failing that, the State submits that it is wholly unpersuasive for Hubbard to lament his loss of a position that belongs to the people of Alabama because he used that position to enrich himself and ignore the needs of his constituents.

Hubbard next asks this Court to focus on the "divestment of his business interests," but that point does little for Hubbard. After all, Hubbard broke the law by intertwining his business interests with his public office. *See, e.g.*, Trans. 6004–05 (Will Brooke, responding to whether he noticed that Hubbard always mixed official legislative business with his personal financial needs: "It's [Hubbard's] way of selling me to try and help with [his] job situation"). The State fails to understand how Hubbard's business losses merit sympathy when Hubbard used his public office to illegally benefit those very businesses. The State also cannot help but observe that it was Hubbard's initial loss of income from IMG that sparked his monetization of the Speakership. Hubbard was not entitled to profit

from his public position then, and he cannot now use the loss of income in the vehicles he used to facilitate his corruption as a bulwark against punishment.

Lastly, and perhaps most flagrantly, Hubbard uses a law review article focused on the collateral consequences of convictions for indigent defendants to bolster his argument that he deserves sympathy. *See Holistic is not a bad word: A criminal defense attorney's guide to using invisible punishments as an advocacy strategy*, McGregor Smyth, 36 U. Tol. L. Rev. 479 (discussing bars to subsidized housing and other sanctions that disproportionately harm racial and economic minorities). Suffice it to say, it is a bad advocacy strategy for Hubbard to mourn his loss of an income stream worth millions, which he financed on the backs of hard-working Alabamians who expected an honest elected official. That Hubbard has lost some of these ill-gotten gains in no way suggests that Hubbard has paid back his debt to society.

4. Hubbard contradicts himself by asking for a rehabilitative sentence.

Finally, Hubbard's claim that a revised sentence would "better serve the State's interest in rehabilitation" is perplexing, given that Hubbard has refused to admit he did anything wrong.[3] Motion at ¶ 10. A probationary sentence serves "to ameliorate the harshness of the law's judgment and give[s] the convict a chance to show that he or she is a fit subject and *may be rehabilitated and become an acceptable citizen*." *Johnson v. State*,

[3] As recently as the day Hubbard reported to jail, his attorney released the following statement: "Mike Hubbard is a strong Christian man and has accepted the current situation but firmly believes in his innocence and looks forward to exploring other options to clear his name." *available at* https://www.wsfa.com/2020/09/11/former-ala-house-speaker-mike-hubbard-turns-himself-prison-sentence/ (last visited Sept. 21, 2020).

16 So. 3d 1229, 1230 (Ala. Crim. App. 2012) (emphasis added). In other words, probation is appropriate for defendants who admit guilt and seek to do better. But by all appearances—save for Hubbard's counsel's single reference to rehabilitation—Hubbard has not admitted guilt and thus sees no need to do better. Thus, either his counsel is not on the same page as Hubbard or they are simply throwing out whatever argument they can muster. Either way, this argument does not stick. Other factors aside, rehabilitation is for the repentant convict, not the recalcitrant.

Conclusion

This final contradiction is a fitting summary to Hubbard's motion. He offers no legitimate basis for his filing, not a single precedent to support his request, and not even a guiding principle of fairness as to why he deserves sympathy. Instead, his motion rests on a simple maxim: in the case of prison time for Mike Hubbard, less really is more. Yet Hubbard sits in a jail cell precisely because a jury of his peers learned that he practiced just the opposite approach when he held public office. For too long Alabama's citizens got shortchanged by Hubbard's greed in office. Now, after a jury and this Court held him accountable for his crimes, Hubbard asks for leniency. But leniency must be earned. And for Hubbard, a six-time felon who still feels he did nothing wrong, he does not deserve leniency. He deserves every day of his four-year sentence. The State respectfully asks this Court to deny Hubbard's motion.

Respectfully submitted this 21st day of September, 2020.

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CERTIFICATE OF SERVICE

I certify that on September 21, 2020, I electronically filed the foregoing using the AlaFile system, which will send notification of such filing to the following registered persons, and that any person not registered with the AlaFile system was served a copy of the foregoing by U. S. mail:

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