

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

MILTON E. McGREGOR, )

Defendant. )

CR. NO. 2:10cr186-MHT

**PROPOSED JURY INSTRUCTIONS OF MILTON McGREGOR**

**Exhibit B**

## INTRODUCTORY NOTE TO PROPOSED JURY INSTRUCTIONS #B1 to B7

This set of instructions concerns the charges under 18 U.S.C. § 666(a)(2). It begins with an edited version of Eleventh Circuit Pattern Jury Instruction 24.2 (from the “Offense” instructions in the pattern instruction set). The pattern instruction is written regarding a charge against an “official” rather than a private citizen, i.e., a charge under § 666(a)(1)(B). This proposed instruction is revised to fit § 666(a)(2), and contains other changes designed to lead in to additional proposed instructions concerning the elements. The proposed instruction is also tailored specifically to the charges in the Indictment – for instance in the Indictment’s allegation of what entity the alleged agents were agents of, and the 12-month period in which receipt of federal assistance is calculated. This set of proposed instructions then contains further proposed instructions suited to this case.

Mr. McGregor does not contend or admit that these instructions are sufficient to cover the elements of § 666. They are not sufficient in themselves. In order to be sufficient, they must be given along with proposed instructions #A-1 *et seq.* Those instructions further elucidate the concept of the *quid pro quo*, the agreement, the explicitness and specificity, the definition of “corruptly,” and related issues.

Proposal of these jury instructions, of course, does not constitute a waiver of Mr. McGregor’s arguments that the statute is inapplicable under the circumstances of this case.

PROPOSED JURY INSTRUCTION #B-1  
EDITED PATTERN INSTRUCTION FOR § 666

It's a Federal crime, under some circumstances, for anyone to corruptly give, offer, or agree to give anything of value to a person who is an agent of a State government receiving significant benefits under a Federal assistance program, when the person intends to influence or reward the government agent in connection with certain transactions of the government, or agency.

This definition that I have just given to you cannot be taken on its own. It has to be applied according to further instructions I am about to give you, and also according to other instructions I [have given you]/[will give you] about the definition of what constitutes an illegal bribe in this respect. You must apply those instructions as well as the ones I am about to give right now.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the person to whom the Defendant corruptly gave, offered, or agreed to give things of value was an agent of the State of Alabama;
- (2) During the one-year period from May 1, 2009, to April 30, 2010, the State of Alabama received benefits greater than \$10,000 under a Federal program involving some form of Federal assistance;
- (3) The defendant intended to influence the person in connection with business, a transaction, or a series of transactions of the State of Alabama involving something worth \$5,000 or more. Again I remind you that I [have given]/[will give] further instructions explaining to you what this element means, as applied to this case; and
- (4) the Defendant acted corruptly.

To act "corruptly" means to act voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent" is any employee, officer, or director of the State of Alabama, subject to the further explanation of that term that I will give you.

Explanation: edited version of pattern instruction, as explained above.

PROPOSED JURY INSTRUCTIONS #B-2  
AGENT OF THE ENTITY CHARGED, NOT SOME OTHER ENTITY

For each count, you must consider the person to whom things were allegedly offered or given, and consider whether that person was an “agent” of the State of Alabama. A person might be an agent of some *other* entity, including an entity that is part of the State government but is not the State itself; but that itself would not make the person an agent of the State itself. The Government must prove beyond a reasonable doubt, as to each count, that the person involved was an agent of the State. This means that the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State itself.

Argument and Explanation: This instruction is supported by the fact that the Indictment explicitly and solely charges each person as an agent of the State, and by *United States v. Langston*, 590 F.3d 1226, 1233-35 (11<sup>th</sup> Cir. 2009) (reversing convictions on this basis). *E.g., id.* at 1233 (“These cases reach the common-sense conclusion that an employee of an agency entity cannot be an agent of the principal entity unless the legal construct establishes such a relationship.”); *id.* at 1234 (“We must necessarily scrutinize that which purports to create the employment relationship with the agency to determine if the employee is authorized to act on the principal entity's behalf.”).

PROPOSED JURY INSTRUCTION #B-3  
AGENT: CONTROL OVER FUNDS

In order to show that the person in question was an “agent” of the State of Alabama, the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State of Alabama with respect to its funds.

The Government must prove, further, that the acts that are at issue in this case involved the person’s role as an agent of the State in that sense.

Argument and Explanation: This instruction is supported by, *e.g.*, *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (“In *United States v. Phillips*, we held that for an individual to be an ‘agent’ for the purposes of section 666, he must be ‘authorized to act on behalf of [the agency] with respect to its funds.’ 219 F.3d 404, 411 (5th Cir. 2000).”); *id.* at 345-46 (reversing convictions under § 666 because even if the defendants were agents of the entity alleged, their challenged and allegedly corrupt conduct did not pertain to their role as agent of that entity).

PROPOSED JURY INSTRUCTION #B-4  
BUSINESS, TRANSACTION OR SERIES/PUBLIC FUNDS

As I have mentioned, the Government must prove beyond a reasonable doubt that the Defendant offered or gave something in order to influence an agent of the State in connection with some business, transaction, or series of transactions of the State. These words include the requirement that the decision, in which the agent was to be influenced, concerned an aspect of how the State would spend or apply public funds.

The Government must prove beyond a reasonable doubt that the Defendant converted public spending into unearned private gain.

Argument and Explanation: This proposed instruction makes sense of the words “business, transaction, or series of transactions,” in light of the fact that § 666 was spending-clause legislation.

The second paragraph is based on the Supreme Court’s explanation: “Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain,” *Sabri v. United States*, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947 (2004) (emphasis supplied).

If the Court will not give both paragraphs, Mr. McGregor requests each paragraph.

PROPOSED JURY INSTRUCTION #B-5  
18 U.S.C. § 666(c)

The law does not prohibit the offering, giving, or agreeing to give *bona fide* salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

It would not be a violation of this law, for a person to pay an agent for doing things other than his official duties as an agent of the State.

Authority and Explanation: 18 U.S.C. § 666(c). Just as the Congress found it necessary and appropriate to make this explicit in the statute, it should be explicit in the instructions.

The second paragraph particularizes and explains the first. *Cf. Collier v. State*, 55 Ala. 125 (1877) (not criminal for prosecutor to receive fee for giving legal advice outside his official duties), cited in *Evans v. United States*, 504 U.S. 255, 268 n.20, 112 S.Ct. 1881, 1889 n.20 (1992) If the Court will not give both paragraphs, Mr. McGregor requests that the Court give at least the first paragraph.

PROPOSED JURY INSTRUCTION #B-6  
FOCUS ON WHAT "INFLUENCE" MUST BE

It is not a crime to influence how legislation is written, nor is it a crime to influence how legislators vote on legislation. There are types of influence that are legal, because it is legitimate and lawful for people to try to influence legislation. That is part of the legitimate functioning of democracy. You must focus on whether the Government has proven, beyond a reasonable doubt, the particular type of influence that the law covers, as I have explained it to you: corrupt influence consisting of bribery, as I [have explained]/[will explain] the rules of what constitutes unlawful bribery.

Argument and Explanation: This instruction is necessary and appropriate in order to help ensure that the jury does not convict any defendant based on constitutionally-protected "lobbying" or advocacy-type conduct, and that the jury focuses on the narrower definition of the offense.



PROPOSED JURY INSTRUCTION #B-7  
INDIVIDUAL'S OWN CONDUCT (INCLUDING AVOIDANCE OF PROBLEM OF  
"DUPLICITOUS" CHARGES)

In considering the charges [against Mr. McGregor] under this statute, you must understand that the pending charges relate specifically to each defendant's individual conduct.

No defendant is charged, or can be convicted, based on promises allegedly made by other defendants, or by other persons including any who pleaded guilty to similar charges.

No defendant is charged with responsibility for any other person's conduct; each person's responsibility, if any, is only for conduct that he is proven beyond a reasonable doubt to have engaged in.

Argument and Explanation: In its opposition to the motions to dismiss some counts based on duplicitousness (Doc. 609), the Government recognized (p. 5) the propriety of a jury instruction designed to get at this point. The first paragraph, above, adapts language from the Government's filing (Doc. 609, p. 5): "the United States has confirmed on the record, here and in Count One of the Indictment, that the pending charges relate specifically to the defendants' individual conduct." As to the second paragraph, see Doc. 609, p. 3 (Government: "Both defendants McGregor and Coker claim that, as currently pled, they are in jeopardy of being tried under Counts Five and Ten for promises allegedly made by other defendants. This is simply not the case.") The third paragraph is suggested in order to make the same point clear.