

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 C**

INTRODUCTORY NOTE TO PROPOSED INSTRUCTIONS #C1 to C-7

This set of jury instructions pertains to the “honest services” charges. It begins with an edited version of the pattern instruction – edited in order to fit the allegations of the Indictment, as well as to keep “honest services” within its post-*Skilling* boundaries.

As with § 666, this set of proposed instructions is not sufficient in itself; it is designed to be used in conjunction with proposed instructions #A1 *et seq.* As with § 666, proposal of these jury instructions does not constitute a waiver of Mr. McGregor’s arguments that the “honest services” doctrine is inapplicable under the circumstances of this case.

PROPOSED JURY INSTRUCTION #C-1  
PORTIONS OF PATTERN INSTRUCTION ADAPTED IN LIGHT OF INDICTMENT  
AND *SKILLING*

It's a Federal crime to use the United States mail, or to use interstate wire, radio, or television communications, to carry out a scheme to fraudulently deprive the public of a right to honest services.<sup>1</sup>

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

- (1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the intangible right of honest services;
- (2) the Defendant did so with an intent to defraud; and
- (3) the Defendant used the United States Postal Service by mailing or by causing to be mailed, some matter or thing to carry out the scheme to defraud; or that the Defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.<sup>2</sup>

A "scheme" includes any plan or course of action intended to deceive or cheat someone.<sup>3</sup>

To act with "intent to defraud" means to act knowingly and with the specific intent to

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<sup>1</sup> Combined from first paragraph of pattern instructions 50.2 and 51, and tailored specifically to public-sector "honest services" (i.e., depriving *the public*).

<sup>2</sup> Combined from second paragraph of pattern instructions 50.2 and 51.

<sup>3</sup> Pattern instruction 50.2

deceive someone, usually for personal financial gain or to cause financial loss to someone else.<sup>4</sup>

To "deprive someone else of the intangible right of honest services" is to violate, or to cause a public official or employee to violate, a duty to provide honest services to the public.<sup>5</sup>

More particularly, the duty to provide honest services is violated only by bribery. I [have explained]/[will explain] to you, more particularly, various aspects of what "bribery" means, in the law applicable to this case.<sup>6</sup>

The Government must prove that the Defendant intended to breach that duty and foresaw, or should have foreseen, that the State would suffer a loss as a result of the breach.<sup>7</sup>

The Government must prove beyond a reasonable doubt that the Defendant specifically intended to defraud. "To defraud" means to perpetrate a fraud. This includes the requirement that it must be proven beyond a reasonable doubt that the Defendant intended that there would be a fraudulent statement or representation.<sup>8</sup>

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<sup>4</sup> Pattern instruction 50.2.

<sup>5</sup> Lightly edited from Pattern instruction 50.2.

<sup>6</sup> Necessary in light of *Skilling* (and in recognition that while *Skilling* narrowed "honest services" to bribes and kickbacks, this case involves charges of bribery and not of kickbacks).

<sup>7</sup> From Pattern Instruction 50.2 (substituting "the State" for "the employer").

<sup>8</sup> This introduces the requirement of *fraud* and of *materiality*, which is incorrectly omitted from Pattern Instruction 50.2. "Honest services" fraud is still a form of fraud, and thus requires the

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.<sup>9</sup>

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.<sup>10</sup>

To "cause" the mail to be used is to do an act knowing that the use of the mail will follow in the ordinary course of business or where that use can reasonably be expected to follow.<sup>11</sup> To "use" interstate wire communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.<sup>12</sup>

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element of materiality. *See, e.g., United States v. DeVegter*, 198 F.3d 1324, 1328 n.4 (11<sup>th</sup> Cir. 1999). "Honest services," in other words, simply substitutes for the "money or property" element in traditional fraud; it is the *object*, or the *thing deprived*. It does not displace the other elements of the offense, including fraud and materiality.

<sup>9</sup> From 50.1.

<sup>10</sup> From 50.1.

<sup>11</sup> From 50.2.

<sup>12</sup> From 51.

Argument and Explanation: This instruction is adapted from Eleventh Circuit Pattern Instruction 50.1, 50.2, and 51. Pattern instruction 50.2, which is designed specifically for “honest services,” cannot be used by itself. The pattern instruction, for instance, incorrectly omits “materiality” as an element in “honest services” fraud, and it was written to cover the pre-*Skilling* broader definition of “honest services.” This proposed instruction corrects those problems. Additional instructions, below, are further necessary to elucidate other points not adequately covered in the pattern instruction, even as edited herein.

PROPOSED JURY INSTRUCTION #C-2  
NON-DISCLOSURE REQUIRES DUTY

As I have explained, a “scheme to defraud” requires fraud. In this case, the Government’s burden is to prove a type of fraud based on concealment of material information. The Government must prove beyond a reasonable doubt that the Defendant intentionally did not disclose material information, that the Defendant thereby intended to create a false and fraudulent representation, and that the Defendant had a duty, explicit or implicit, to disclose the material information.

Authority and Explanation: The fact that this case is charged by the Government based on concealment of material information is directly shown by paragraph 234 of the Indictment (Doc. 3, p. 58).

The definition is taken from *United States v. Browne*, 505 F.3d 1229, 1265 (11th Cir. 2007) (“a defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation may constitute a violation of the mail fraud statute where the defendant had a duty, explicit or implicit, to disclose material information.”)

This instruction naturally raises the question of where the Government will claim to have identified the source of a duty to disclose. The Government has not done so, to date. (The Government finally identified, this month, the alleged concealment of material information, which provides the Government’s basis for this aspect of the “fraud” charges,” in oral argument on May 5. *See* Doc. 1089, Transcript of May 5, p. 118 lines 12-21. The Government must not be allowed to change its theory on that, as the case proceeds further). It will likely be appropriate, in the end, for the Court to grant judgment of acquittal on the “honest services” counts for this reason. If the Government ever identifies its view as to the source of a duty to disclose the information allegedly concealed, Mr. McGregor would like the opportunity to address that.

PROPOSED JURY INSTRUCTION #C-3  
GOOD FAITH

“Good faith” is a complete defense to a charge that requires intent to defraud. A defendant isn’t required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can’t establish fraudulent intent.

A failure to disclose material information cannot be fraudulent intent if the Defendant honestly, even if mistakenly, believed that no disclosure was required or that any required disclosures would be made.

Authority: The first two paragraphs are from Eleventh Circuit Pattern Instruction Special Instruction #17 (excerpted to include pertinent part). The third paragraph speaks in the same terms, specifically as to non-disclosure (which is, as noted above, the type of fraud alleged by the Government in this case). Mr. McGregor requests all paragraphs above, and requests them separately if the Court will not use all of them.



PROPOSED JURY INSTRUCTION #C-4  
PERSONAL KNOWLEDGE/INVOLVEMENT

No Defendant can be held criminally liable because of another person's conduct, under these mail- and wire-related charges, unless he was a knowing party to a scheme that included that other person's conduct.

Authority and Explanation: See *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, \*33 ("Siegelman may be held criminally liable for Scrushy's conduct on the Board only if he was a knowing party to a scheme that included that conduct. *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979).")

PROPOSED JURY INSTRUCTION #C-5  
UNANIMITY

You cannot convict any defendant on any of the mail or wire-based fraud charges, unless you unanimously agree on certain particulars as to such a charge.

You may not convict any defendant for any particular mailing or wiring unless you are all in unanimous agreement not only that the mailing or wiring was in furtherance of a scheme to defraud the public of honest services, but also unless if you are in unanimous agreement as to which official's honest services were at stake, if any, such that the mailing or wiring was in furtherance of the deprivation of that person's honest services.

Also, you may not convict any defendant for any mailing or wiring unless you are in unanimous agreement as to what material information, if any, was fraudulently concealed.

Authority and Explanation: See *United States v. Atkinson*, 135 F.3d 1363, 1377-78 (11<sup>th</sup> Cir. 1998) (explaining requirement of jury unanimity on the acts constituting the scheme to defraud). If the Court finds any particular problem with the phrasing of this requested instruction, Mr. McGregor requests the opportunity to discuss and propose an alternative phrasing that adequately conveys the unanimity requirement.

PROPOSED JURY INSTRUCTION #C-6  
SCHEME SUBSTANTIALLY AS CHARGED IN THE INDICTMENT

The Government must prove beyond a reasonable doubt that there was a scheme that is substantially the same as the one charged in the Indictment. This includes the requirement that the Government must prove that the participants in the scheme were substantially the same as charged in the Indictment. If the Government has not met this requirement, you may not convict any defendant on any of Counts 23 through 33.

Authority and Explanation: See First Circuit Pattern Instruction # 4.18.1341 (“First, that there was a scheme, substantially as charged in the indictment, ...”); “But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.”); Fifth Circuit Pattern Instruction 2.59 (“... a scheme to defraud that was substantially the same as the one alleged in the indictment ...”)

The second sentence of the proposed instruction (regarding substantial identity of participants) is a logical consequence of the basic principle. If the Court declines to include the second sentence, Mr. McGregor requests the remainder.

PROPOSED JURY INSTRUCTION #C-7  
WILLFUL PARTICIPATION

The Government must prove beyond a reasonable doubt that the Defendant willfully participated in the scheme.

An act or failure to act is “willful” if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if a defendant acted in good faith, he cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Explanation and Authority: Taken from (and, in the first paragraph, slightly adapted from) First Circuit Pattern Instruction 4.18.1341.