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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
RONALD GILLEY, et. al.	)	
	)	
Defendants.	)	

BRIEF OF RONALD E. GILLEY
IN SUPPORT OF MOTION TO DISMISS COUNTS UNDER 18 U.S.C. § 666 AND 18 U.S.C. §§ 1341, 1343, 1346 & 2 FOR FAILURE TO INFORM THE JURY OF THE ELEMENTS OF THOSE OFFENSES

Comes now Defendant Ronald E. Gilley and submits this brief in support of his motion to dismiss counts under 18 U.S.C. § 666 (hereinafter "Federal Programs Bribery") and 18 U.S.C. §§ 1341, 1343, 1346 & 2 (hereinafter, "Honest Services Bribery") for failure to include the elements of a bribery offense, particularly where campaign contributions are at issue.

The Supreme Court has stated that there are "two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that [it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *U.S. v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). Furthermore, an indictment which sets forth the charge in "the words of the statute itself," is only sufficient "as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling v. U.S.*, 418 U.S. 87, 117-18 (1974) (internal quotations omitted).

As is shown below, where a campaign contribution is at issue, Federal Programs and Honest Services Bribery require an explicit quid pro quo, and neither statute contains the requirement of an explicit quid pro quo in the text of the statute. Thus, where a campaign contribution is at issue, Federal Programs and Honest Services Bribery may not be charged merely in the statutory language, but must include the explicit quid pro quo element. An indictment charging Federal Programs and Honest Services Bribery for a campaign contribution which fails to include the explicit quid pro quo requirement is due to be dismissed for failure to include all the elements of the offense.

In *McCormick v. United States*, 500 U.S. 257 (1991), a Hobbs Act case,[1] the Supreme Court recognized that, where campaign contributions are concerned, drawing a line between the legal and illegal presents a particular challenge. Thus, the Court held that an elected official violates the Hobbs Act by receiving a campaign contribution only "if the payments are made in return for an **explicit** promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991) (emphasis added); *see also, U.S. v. Kincaid-Chauncey*, 556 F.3d 923, 936 (9th Cir. 2009) ("[Under *McCormick*,] when the defendant is charged with color of official right extortion and the unlawfully gained property is in the form of a campaign contribution, the government must prove that there was an explicit quid pro quo."); *see also, United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) ("[P]roof of an express promise is necessary when the payments are made in the form of campaign contributions.").

The indictment does not include this requirement of an explicit quid pro quo for either § Federal Programs or Honest Services Bribery. The indictment merely tracks the language of the

[1] The Hobbs Act prohibits a public official from receiving money "under color of official right." 18 U.S.C. § 1951.

two statutes, neither of which even hint at the requirement of an explicit quid pro quo for campaign contributions. Thus, the indictment is insufficient for failure to include the explicit quid pro quo required for a bribery offense based on a campaign contribution.

I. UNDER *MCCORMICK*, AN ELECTED OFFICIAL CAN BE CONVICTED OF BRIBERY/EXTORTION UNDER THE HOBBS ACT FOR RECEIPT OF A CAMPAIGN CONTRIBUTION ONLY IF THE OFFICIAL ENGAGED IN AN EXPLICIT QUID PRO QUO.

In *McCormick*, the Supreme Court held that an elected official violates the Hobbs Act by receiving a campaign contribution only "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991) (emphasis added). The Supreme Court so held in recognition that candidates for public office constantly solicit contributions and "claim support on the basis of . . . what they intend to do." *McCormick v. United States*, 500 U.S. 257, 273. The Court reasoned that allowing a Hobbs Act conviction without the requirement of an explicit quid pro quo would subject elected officials to criminal prosecution for conduct which is not only "well within the law" but "in a very real sense . . . unavoidable so long as election campaigns are financed by private contributions." *McCormick*, 500 U.S. at 273.

The Supreme Court granted certiorari in *McCormick* to resolve a circuit split on the issue of what the government must show to convict an elected official of extortion under the Hobbs Act for the receipt of a campaign contribution. *Id.* at 267. The jury instruction challenged in *McCormick* had actually acknowledged that "[i]t would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from foreign doctors who would benefit from this legislation." *Id.* at 261 n.4. But the Supreme Court rejected the jury instruction because it also stated that McCormick could be convicted of extortion if the campaign

contributions were "made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation." *Id.* at 274. The Court found this part of the instruction unacceptable because it would have allowed the jury to convict McCormick for a contribution based on the mere expectation of benefit. *Id.*

The Supreme Court also rejected the Fourth Circuit's holding that receipt of a campaign contribution by an elected official followed by a vote by the official could not be considered by the jury as a factor indicating that the campaign contribution was a bribe. *Id.* at 272.

The Supreme Court explained that conduct by elected officials which might raise ethical concerns or even inferences of bribery in other contexts cannot do so on the basis of campaign contributions because it is legal, commonplace, and unavoidable that campaign contributions will be given and received to some degree "in exchange" for influence:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, **who run on platforms and who claim support on the basis of their views and what they intend to do or have done.** Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

Id. at 272-73 (emphasis added).

Thus, because it is both legal and inevitable that candidates will solicit and receive campaign contributions on the basis of their position on the issues and "what they intend to do or have done," the Supreme Court held that an elected official may be convicted for extortion/bribery under the Hobbs Act "only if the payments are made in return for an **explicit** promise or undertaking by the official to perform or not to perform and official act [because] [i]n such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* at 273.

The "downside" of our representative form of government is that "[f]avoritism and influence are [un]avoidable." *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.) *overruled on other grounds, Citizens United v. FEC,*130 S.Ct. 876 (2010). This is because, as Justice Kennedy explained in *McConnell*, "Democracy is premised on responsiveness." *Id.* "It is in the nature of an elected representative to . . . favor the voters and contributors who support [certain] policies. *It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.*" *Id.*

In summary, under *McCormick,* an elected official cannot be convicted under the Hobbs Act for receipt of a campaign contribution merely because he knows the contribution is made with anticipation of favorable future action, but only where the official has made an explicit promise to take certain official action in exchange for the contribution. *McCormick,* 500 U.S. at 273-74. The Supreme Court reasoned that any less a showing would render criminal conduct which is and will be standard procedure "so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* at 272-73.

II. THE HOLDING AND REASONING OF *MCCORMICK* APPLY WITH EQUAL FORCE TO FEDERAL PROGRAMS AND HONEST SERVICES BRIBERY WHERE CAMPAIGN CONTRIBUTIONS ARE AT ISSUE.

When an elected official is accused of bribery for receiving a campaign contribution in return for his vote, the Supreme Court's reasoning in *McCormick* applies, regardless of under which bribery statute the defendant has been charged. This is because the core concern of *McCormick* is that the only way to separate legal from illegal conduct where campaign contributions are concerned is to require an explicit quid pro quo. Otherwise any campaign contribution might constitute a federal crime. This reasoning applies with equal force to prosecution for bribery under Federal programs and Honest Services Bribery.[2] A bribe under whatever statute is still a bribe.

McCormick stands for the proposition that there is nothing illegal when an elected official solicits contributions on the basis of his support for legislation. Such conduct crosses from legal to illegal only when "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* at 273. By the same token, regardless of whether bribery is charged under the Hobbs Act, Federal Programs Bribery, or Honest Services Bribery, where a campaign contribution is at issue, without the requirement of an explicit quid pro quo, any campaign contribution could be prosecuted as a bribe.

[2] In *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (*vacated by Siegelman v. United States*, 130 S. Ct. 3542 (2010) and *Scrushy v. United States*, 130 S. Ct. 3541 (2010)), the Eleventh Circuit reasoned that the explicit quid pro quo requirement of *McCormick* should be applied to federal funds bribery and honest services. However, as a vacated opinion, *Siegelman* has no precedential value. The Supreme Court vacated the Eleventh Circuit's opinion and remanded the case to the Eleventh Circuit with instructions to reconsider the case in light of the Supreme Court's opinion in *Skilling v. United States*, 130 S.Ct. 2896 (2010).

For example, in *U.S. v. Donna*, 366 Fed. Appx. 441, 444, 2010 WL 653251 (3d Cir. 2010), a mail fraud and extortion case, the government apparently conceded that an explicit quid pro quo is required for bribery charges based on campaign contributions:

> The government . . . acknowledges that campaign contributions cannot satisfy a quid pro quo requirement for a criminal conviction arising from the payment and receipt of the contributions unless the agreement was explicit. *See McCormick v. United States*, 500 U.S. 257, 273, 111 S.Ct. 1807, 1816, 114 L.Ed.2d 307 (1991).

U.S. v. Donna, 366 Fed. Appx. 441, 444, 2010 WL 653251, 1 n.3 (3d Cir. 2010). See also, *U.S. v. Kincaid-Chauncey*, 556 F.3d 923, 937 n.16 (9th Cir. 2009) (noting that the district court gave an explicit quid pro quo instruction "[f]or the campaign contributions alleged as acts in furtherance of the honest services fraud scheme").

A. The § 666 counts of the Indictment fail to set forth the requirement of an explicit quid pro quo because the words of the indictment merely track the statutory text, which does not even include a requirement of a quid pro quo.

The text of § 666 does not even require a quid pro quo, much less an explicit one. 18 U.S.C. § 666 (a)(2). The text of 18 U.S.C. § 666 (a)(2), in relevant part, provides that a person who "corruptly" offers a gift "**with intent to influence or reward** an agent of . . . a State . . . government . . . in connection with any business, transaction, or series of transactions of such . . . government" is guilty of bribery.[3] 18 U.S.C. § 666 (a)(2) (emphasis added).

The statutory language of § 666 makes it a federal offense to intend to "influence" a public official; but obviously, it is not improper for a constituent such as Mr. Gilley to attempt to influence state legislators. That is what citizens generally intend to do with their campaign

[3] But see n. 6, *infra.*

contributions – influence politicians. *See McCormick v. U.S.*, 500 U.S. 257, 272-73; *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.).

Thus, the statutory text alone indicates that if Gilley made a campaign contribution to an elected official "with intent to influence or reward" the official in his or her voting on the electronic bingo legislation, then Mr. Gilley is guilty of bribery. But this is precisely the level of intent that, in *McCormick*, the Supreme Court held insufficient to show a bribe under the Hobbs Act where a campaign contribution was concerned. *McCormick*, 500 U.S. at 272-73. The Supreme Court's reasoning is framed from the perspective of the elected official because the defendant in *McCormick* was an elected official. But the converse of the statement is obviously applicable: that constituents constantly offer campaign contributions to candidates on the basis of which issues and or legislation the candidates support and what they intend to do or have done.

Thus, the words of § 666 alone, even if they were adequate to convey the specific intent required for a conviction where no campaign contribution is at issue,[4] cannot possibly be sufficient to inform the jury of what it must find to indict Gilley for a campaign contribution because the words of the statute describe conduct which the Supreme Court has said is legal and unavoidable.

B. The Honest Services Counts fail to set forth the explicit quid pro quo requirement.

The indictment charges that Gilley

> knowingly devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama, the Legislature, the Legislative Reference Service, and the citizens of Alabama of their right to the honest services of elected members and employees of the Legislature through bribery and concealment of material information.

[4] As argued *infra*, Gilley does not concede that the statutory text of § 666 is adequate where no campaign contribution is at issue.

Doc. 3, Indictment ¶ 234. Thus, the Honest Services Bribery charge is an improvement over the Federal Programs Bribery charge because it at least uses the word "bribery."[5] However, the Honest Services charge does not include the explicit quid pro quo element.

III. AN INDICTMENT WHICH FAILS TO SET FORTH ALL OF THE ESSENTIAL ELEMENTS OF THE OFFENSE IS INSUFFICIENT, EVEN THE WORDS OF THE INDICTMENT TRACK THE STATUTORY TEXT.

In *Hamling v. U.S.*, the Supreme Court noted that, to be sufficient, "an indictment [must] first, **contain[] the elements of the offense charged**." *Hamling v. U.S.*, 418 U.S. 87, 117-18 (citing *Hagner v. United States*, 285 U.S. 427 (1932); *United States v. Debrow*, 346 U.S. 374 (1953)); *U.S. v. Britton*, 2 S.Ct. 512 (U.S. 1883). See also, *U.S. v. Walker*, 490 F.3d 1282, 1296 (11th Cir. 2007). There are "two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *U.S. v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).

An indictment which sets forth the charge in "the words of the statute itself," is "generally sufficient," **but only "as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'"** *Hamling*, 418 U.S. at 117-18 (internal quotations omitted) (emphasis added). Furthermore, the Supreme Court has explained that "the fact that the statute in question, read in the light of the common law, and of other statutes on the

[5] Apparently, the addition of the word "bribery" acknowledges the Supreme Court's holding in *Skilling*, in which the Supreme Court held that Honest Services was unconstitutionally vague. "To preserve the statute without transgressing constitutional limitations," the Supreme Court read it narrowly so that the statute did not reach any and all deprivations of the amorphous concept of "honest services," but only bribes and kickbacks. *Skilling*, 130 S.Ct. 2896, 2931.

like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *U.S. v. Carll*, 105 U.S. 611, 612-13 (1881).

In this case, where the a holding of the Supreme Court clearly indicates that a bribery conviction for a campaign contribution requires an explicit quid pro quo, but no such requirement is indicated in the statute's text, an indictment which merely quotes the statute obviously fails to convey all the elements of the crime, and is thus insufficient.

IV. EVEN FOR THE COUNTS WHICH ARE NOT BASED ON CAMPAIGN CONTRIBUTIONS, THE INDICTMENT IS DUE TO BE DISMISSED FOR FAILURE TO INCLUDE ALL THE ELEMENTS OF BRIBERY UNDER § 666.[6]

As noted above, the statutory language of § 666 does not include any mention of a quid pro quo, nor does the statute use the term "bribe." Thus, in *United States v*. McNair, 605 F. 3d 1152 (11th Cir. 2010), the Eleventh Circuit recently held that §666 does not require proof a quid pro quo.[7] However, *McNair* creates a new, judge-made hybrid form of bribery which is a cross between bribery and an illegal gratuity. Unlike bribery, "almost bribery" under § 666 does not require a quid pro quo; but unlike an illegal gratuity, "almost bribery" under § 666, according to the Eleventh Circuit, also does not require that the gift be connected to any particular official act. Thus, in addition to violating the separation of powers doctrine, *Boulware v. United States*, 552

[6] Gilley acknowledges that this argument is currently foreclosed by the Eleventh Circuit's recent holding in *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010). However, there is a circuit split on the specific intent required to be proven for a conviction under § 666 and the Eleventh Circuit's opinion in *McNair* is the subject of a petition for certiorari before the Supreme Court. Thus, in an abundance of caution, to preserve the issue for review, Gilley includes the argument in this section.

[7] The Eleventh Circuit stated that by its holding it joined the Sixth and Seventh Circuits in adopting "a *no*-quid pro quo requirement." *United States v. McNair*, 605 F.3d 1152, 1203 (emphasis added). However, the opinion could arguably be read to hold instead that a conviction under § 666 does not require proof of a *specific* quid pro quo. The Eleventh Circuit also stated that its holding was that "[Section] 666 does not require a *specific* quid pro quo." *United States v. McNair*, 605 F.3d 1152, 1203 (emphasis added). Gilley contends that a "no quid pro quo" requirement is the better reading of the opinion as a whole.

U.S. 421, 434 (2008), by creating a new crime, the Eleventh Circuit's expansive reading of § 666 also violates due process by unforeseeably broadening the reach of a criminal statute. *See Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964) (holding that unforeseeably broad state-court construction of a criminal statute would "deprive [defendant] of due process of law by denying him fair warning that his contemplated conduct constitutes a crime."); *United States v. Lanier*, 520 U.S. 259, 267 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.").

V. RULE OF LENITY

Where campaign contributions are concerned, *McCormick* indicates that charges under Federal Programs and Honest Services Bribery require a limiting construction requiring an explicit quid pro quo. Allowing Federal Programs and Honest Services Bribery to be charged without including the explicit quid pro quo creates due process issues in the indictment and would violate the rule recently reiterated by the Supreme Court in *Skilling*. The Court explained, "'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Skilling*, 130 S. Ct. at 2905 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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I hereby certify that I have on this the 4th day of February, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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