UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
QUINTON T. ROSS, JR.	)	

QUINTON T. ROSS, JR.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND TO PRECLUDE GOVERNMENT FROM ARGUING THAT 18 U.S.C. § 666 DOES NOT REQUIRE A QUID PRO QUO

In its opposition (doc. no. 613) to Senator Ross' motion to dismiss the federal program bribery and related conspiracy charges against him, the Government asserts that the Eleventh Circuit does not require a *quid pro quo* for a conviction under 18 U.S.C. § 666. *See* United States' Opposition (doc. no. 613), at 22-23, 25. Senator Ross' motion to strike (doc. no. 980) seeks an order striking that legal argument from the Government's opposition, and barring the Government from making such an argument before the jury or otherwise before the Court in this action. Motion to Strike (doc. no. 980), at 1, 2.

The requested relief of striking that argument and barring its assertion is warranted by application of judicial estoppel, which "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." 18 Moore's Federal Practice §134.30 (2011); *see, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (similar); *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2007) (similar). Judicial estoppel applies to "a party's legal as well as factual assertions." *Whaley*, 520 F.3d at 1002. Because the doctrine's "purpose is to protect the integrity of the judicial process," *New Hampshire v. Maine*, 532 U.S. at 749, the party seeking to invoke judicial estoppel is not required to show individual prejudice

resulting from the inconsistent positions. *E.g., Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) (applying estoppel to bar debtor's claim for damages, but not injunctive relief).

"[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire v. Maine*, 532 U.S. at 750 (quotations omitted). Among the factors typically to be considered: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51 (estopping New Hampshire from asserting later inconsistent position); *Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006) (no abuse of discretion in refusing to apply estoppel). These factors are neither "inflexible prerequisites" nor "an exhaustive formula for determining the applicability of judicial estoppel," *New Hampshire v. Maine*, 532 U.S. at 751; these and additional factors may be considered by a trial court in deciding whether to exercise its equitable discretion to invoke the doctrine. *Id.* at 750-51.

In opposing the petition for writ of certiorari in *United States v. McNair*, no. 10-533, the Solicitor General explicitly argued before the Supreme Court that the Eleventh Circuit opinion in *McNair does* require a *quid pro quo* for a conviction under §666. *See* Brief for the United States in Opposition, Attachment 2 to Gilley Motion to Strike (doc.

no. 956-2), at 21 ("McNair contends … that, 'although ostensibly holding only that no *specific* quid pro quo need be found for a conviction under §666, the Eleventh Circuit actually held that *no* quid pro quo need be shown for a conviction under §666.' That is incorrect.") (emphasis in original). That position conflicts with the Government's reading of Eleventh Circuit law here, also based on the panel opinion in *McNair*, "that proving a violation of §666 does *not* require a quid pro quo." Opposition to Motion to Dismiss Federal Program Bribery Charges (doc. no. 613), at 22 (emphasis added).

In its response to Ross' motion to strike[1], the Government acknowledges it is bound here by the Solicitor General's position before the Supreme Court in *McNair*. Government Response to Motion to Strike (doc. no. 1018), at 1. Although the Government offers a "more precise characterization" of *McNair*, see Response (doc. no. 1018), at 1-2, its concession necessarily, if tacitly, admits that its "no *quid pro quo* is required under §666" position in this case cannot stand.

And, contrary to the Government's assertion, *see id.* at 2, even if one accepts for sake of argument the "more precise characterization" of *McNair* (i.e., that "a §666 prosecution does not require a link between a specific thing of value and a specific official act"), *id.*, an order striking the "no *quid pro quo* is required under §666" argument from the Government's filings and barring its assertion before the jury or the Court would in fact benefit defendants here. Among other things, such an order would eliminate an incorrect and thus misleading argument; it would reduce the risk of jury

[1] By Order entered yesterday (doc. no. 996), consistent with a similar Order relating to defendant Ronald Gilley's motion to strike entered last Thursday, April 21 (doc. no. 962), all briefs regarding Senator Ross' motion to strike are due today. The Government filed its response electronically at approximately 2:55 p.m. The need to address the Government's response has pushed the completion of this supplemental memorandum past 5:00 p.m. In the event dispensation is required, Ross respectfully requests leave to file this supplemental memorandum after 5:00 p.m.

confusion; and even if the Government ends up agreeing – as it implies, *see id.* at 2 -- that *McNair* (or at least the Government's reading of *McNair*) does not apply to campaign contributions but instead only to non-campaign-contribution benefits, any defendant alleged to have received a benefit other than a "pure" campaign contribution would proceed under a more stringent standard of proof as to the federal program bribery charges than "no *quid pro quo* is required."[2]

In sum, the Government's concession, the conflict between the Government's former and later positions, and the detriment that defendants would suffer if the later "no *quid pro quo*" position is not barred, all support granting the relief Ross requests here. This is true whether such relief is based on a theory of judicial admission (that the Government here is bound by the Solicitor General's position before the Supreme Court in *McNair*), the doctrine of judicial estoppel, or another form of estoppel or other equitable doctrine.

As noted from the start, Mr. Ross in this motion seeks the elimination and barring of the "no *quid pro quo* is required under §666" argument ***only***. The Government's

[2] The Government's assertion that the Solicitor General's reading of McNair did not "prevail" before the Supreme Court, *see* Response (doc. no. 1018), at 2 n. 2, even if deemed true, does not defeat the requested relief. The Solicitor General's reading of *McNair* – specifically including the Government's disagreement with petitioner McNair's argument that the Eleventh Circuit had in fact erroneously adopted a "no quid pro quo is required' reading of §666, thus creating or widening a serious conflict among Circuits on the issue – was the linchpin of its opposition that petitioner had misread the panel opinion in McNair, the "true" reading of McNair showed the Circuit to be consistent with the other Circuits, and thus there was ***no*** inter-Circuit conflict warranting Supreme Court review. Although not the only argument against review, the "lack of any significant conflict" argument occupied the most space, and the proper interpretation of the *McNair* panel opinion clearly was the dominant issue. Even with just a summary denial of cert, arguably the Supreme Court at least implicitly accepted the Solicitor General's position on the interpretation of McNair, including its rejection of the "no quid quo pro is required under §666" argument the Government advanced in our case. Regardless, as noted above, a finding that the Government formally "prevailed" on its reading of McNair is ***not*** a prerequisite to invocation of judicial estoppel, *New Hampshire v. Maine*, 532 U.S. at 750-51; and the integrity of the judicial system is best promoted by enforcing consistency in this Court with the position taken by the United States' ranking lawyer on the same issue before the highest court in the nation.

arguments regarding the effect (or lack of effect) of *McNair* on Ross' position that a federal programs bribery conviction based on campaign contributions – if ever permissible at all – requires ***at least*** an explicit *quid pro quo* between the contributions and specific official action, or that the Indictment satisfactorily alleges even an explicit *quid pro quo*, Response (doc. no. 1018), at 2-3, are irrelevant to the narrow issue raised by this motion to strike.[3] Mr. Ross has demonstrated his entitlement to the relief he seeks, and respectfully requests entry of an order 1) striking from the Government's Opposition (doc. no 613) the argument that the Eleventh Circuit does not require a *quid pro quo* for a conviction under 18 U.S.C. §666, and 2) barring the Government from making such an argument to the jury or otherwise in this action.

Respectfully submitted,

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[3] Ross obviously has addressed at length the facial ***in***validity of the indictment as to him in his three motions to dismiss and the objections to the Magistrate Judge's recommendations concerning those motions, all of which are set for oral argument next week.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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