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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

RESPONSE OF MILTON McGREGOR TO DOC. 980, ROSS'S "MOTION TO STRIKE AND TO PRECLUDE GOVERNMENT FROM ARGUING THAT 18 U.S.C. § 666 DOES NOT REQUIRE A QUID PRO QUO"

Milton McGregor responds as follows to Senator Ross's motion (Doc. 980) to strike and preclude. The motion concerns Senator Ross's request that the Government be barred from arguing against a *quid pro quo* element under 18 U.S.C. § 666. Senator Ross adopted and incorporated Mr. Gilley's motion to the same effect, Doc. 956.

1. As Mr. Gilley pointed out in his motion, the Government has conceded to the Supreme Court in another case that § 666 does include a *quid pro quo* element. The Government made that concession in its Brief in Opposition in the *McNair* case. The Government told the Supreme Court that the Eleventh Circuit's decision was consistent with those of other Circuits that do recognize a "*quid pro quo*" element under § 666. *See* Doc. 956-2, pp. 21-22 (pages 17-18 of Government's Brief in Opposition in *McNair*). The Government described the governing law as involving proof of an "exchange," or "*quid pro quo*," and equated that with the statute's "intent" element. *Id.*, page 15 of the Government's Brief in Opposition. The Government argued that the Eleventh Circuit had

only rejected a requirement of identification of a specific "*quo*." *Id.*, pp. 17-18 & n.5 of the Government's Brief in Opposition. Yet the Government tries to deny, in this case, that there is any "*quid pro quo*" requirement at all under *McNair*.[1]

2. In this case, the debate over whether the Government must identify a specific "*quo*," or not – that is, whether *McNair* was correctly decided, once it is understood as the Government understood it in *McNair* itself – is largely academic. In each of the § 666 counts against Mr. McGregor pertaining to interactions with legislators, the Indictment does commit the Government to proving a specific, identified, "*quo*." The Indictment alleges that there was an intent to influence or reward "in connection with an upcoming vote on pro-gambling legislation." (Indictment, Doc. 3, ¶¶ 194, 196, 198, 204, 208). As to the § 666 count pertaining to Mr. Crosby, too, the Government identifies an alleged "*quo*": "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." So, the Government certainly should not be heard to argue that it can convict on some looser, and less specified, theory in this case in particular. Regardless of whether a "*quid pro quo*" has to be "specific" in every case, it will have to be "specific" in this case, by virtue of the Government's own Indictment.

3. Mr. McGregor further respectfully submits that this Court should take into account the point that Senator Ross and Mr. Gilley have demonstrated (i.e., the mismatch between the Government's argument in this case, and its argument in *McNair*), when this

[1] One thing that should always be remembered, when discussing *McNair*, is that it was not a case about campaign contributions. So, arguments about the *McCormick* "explicit *quid pro quo*" standard for campaign-contribution cases are certainly not answered by *McNair*. *See McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991)

Court interprets and applies § 666 in this case. More broadly, the Court should recognize that this is an example of a larger pattern, a pattern of the Government arguing whatever seems most conducive to a "win" in each case without regard to whether it is the same thing that the Government has argued in other cases. Mr. McGregor has previously pointed out an example of the same phenomenon. *See* Doc. 246, pp. 7-8 (pointing out that while the Government has found it strategically advantageous in this case to admit that the *McCormick* "explicit *quid pro quo*" standard applies to campaign-contribution cases under the "honest services" law, the Government has found it strategically advantageous to refuse to admit that in another pending case, *United States v. Siegelman*).

The point, here, is not to ask the Court to criticize particular brief-writers.[2] The point is that the law of so-called "public integrity" or "political corruption," under "honest

[2] Some criticism, though, would be deserved. As this document was being finished, the Government filed Doc. 1004, seeking leave to file a supplemental filing that takes a new position on the *McCormick* "explicit *quid pro quo*" issue, which is contrary to the position that the Government took earlier in this very case. The Government's new position in this case is that the *McCormick* standard doesn't apply outside of the Hobbs Act. The Government is just a tiny bit unstraightforward about saying this, but that does seem to be the Government's position now. Doc. 1004-2, pp. 6-7. Back in November, the Government was quite clear that it conceded – even that it *contended* affirmatively, for strategic purposes – that the *McCormick* "explicit *quid pro quo*" standard applies to "honest services" law. *See* Doc. 236, p. 10 n.6 ("That *Skilling* incorporated this heightened showing for campaign contribution bribe payments blunts defendant McGregor's claim that applying § 1346 in this context somehow impermissibly would implicate First Amendment concerns.") And if it applies to "honest services," as the Government conceded it does, there is no reason why it wouldn't apply to § 666 as well.

Mr. McGregor will, at an appropriate juncture (either in trial briefing or at some other point if the Court so requests) explain other ways in which Doc. 1004-2 is wrong on the law. The point remains, for now, that the Government is assembling the law of "public integrity" on the fly, on a case-by-case basis. This is precisely how criminal law is not supposed to work. In criminal law, the law is supposed to be clear *ex ante*.

services" and § 666, is still a confusing work-in-progress. The whole area of law is fluid, and subject to debate, and uncertain in its contours. That is the huge and recurring problem, which Mr. McGregor has pointed out in his own motions to dismiss.

The best answer to the problem, as Mr. McGregor has pointed out, is to hold that these statutes simply do not cover State legislative activity, or campaign contributions. If Congress wants to have a criminal law covering these matters, the Congress should write a law that does that with some clarity. *Cf. Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2933 & n.44 (2010) (recognizing that if Congress wants a broader honest-services law, the Congress should do that, but pointing out some difficult wrinkles and issues that Congress would have to try to figure out precisely how to handle). The second-best answer to the problem, as Mr. McGregor has also pointed out, would be to hold that if these statutes may cover the allegations in this case, still doubts about the statutes' elements should be resolved against the Government under the "rule of lenity" and the Due Process "fair warning" standard that mirrors the highly-protective "qualified immunity" standard. *See Hope v. Pelzer*, 536 U.S. 730, 739-40 & n.10, 122 S.Ct. 2508, 2515 & n.10 (2002) (connecting the qualified immunity "clearly established law" standard to the criminal-law "fair warning" standard). The Government cannot even agree with itself, from one case to the next, about what the law is; it would therefore be unfair and unconstitutional to resolve any disputed questions in favor of the Government.

For these reasons, whether the Court grants Mr. Ross's motion or denies it, the Court should take his point as additional support for granting the pending motions to

dismiss, and/or for resolving disputed issues about the law of § 666 and "honest services" in favor of the defense at future points in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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