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.	)	

MILTON McGREGOR'S SUPPLEMENTAL FILING REGARDING *PINKERTON* LIABILITY

Milton McGregor respectfully responds as follows to the Government's change of position as reflected in Doc. 1023 about whether this case involves *Pinkerton*[1] liability and whether the Court should give a *Pinkerton* charge. (Doc. 1023, p. 1: "the government will be seeking the 11th Circuit pattern instruction on *Pinkerton* liability as to all substantive counts as to all defendants.")[2]

Pinkerton is a type of "vicarious liability," *United States v. Arias*, 431 F.3d 1327, 1337 n.7 (11th Cir. 2005), where one defendant is made criminally responsible for another person's substantive offense, by virtue of (among other elements) having entered into a

[1] *Pinkerton v. United States*, 328 U.S. 640 (1946).

[2] *Compare* Transcript of April 25, 2011, Doc. 1022, at p. 12 (Government will not be seeking *Pinkerton* charge); *id.* (counsel, after conferring with co-counsel, reiterates that Government will not be seeking *Pinkerton* charge); p. 14 (Government twice reiterates that it will not be seeking *Pinkerton* charge); p. 15 (Government counsel: "I think the election the Government has made in its prior pleading would prevent a *Pinkerton* charge because I think it would be inconsistent."); p. 22 (after these five statements as recounted above, Government asks for time to reconsider).

conspiracy with the person who then commits the substantive offense.

The Court should not give a *Pinkerton* charge in this case. It would be inconsistent with the way the Indictment is pleaded. It would be inconsistent with the way the Government has explained the charges to the Court and to the defendants, subsequent to the Indictment. It would change the landscape of the case dramatically, shortly before trial. It would confuse and mislead the jury, as it would be incompatible on its face with the Indictment's framing of the substantive charges themselves. For these reasons, as explained further herein, it would create an intolerable prejudice to Mr. McGregor.

1. The indictment is, on its face, not an invitation for imposing *Pinkerton* "vicarious liability." Instead, each substantive charge is brought against *only* the persons who are alleged to have actually participated in the offense in question. Furthermore, subsequent to the Indictment, the Government has confirmed that each defendant is charged in substantive counts on the basis of his or her own alleged participation.

The Government argues for the possibility of *Pinkerton* liability as to "all" substantive counts in the case. But that new position is plainly inconsistent both with the theory of liability embedded in the Indictment itself, and with the way the Government has explained the case since the Indictment. The case, both in the Indictment and subsequently, has been presented as one in which each substantive count targets the defendants whom the Government contends *participated* in that alleged substantive offense, based on that person's own conduct. This is the only reasonable way to read the Indictment.

All defendants are charged, in Count One, with having been part of a single

conspiracy. This would be the starting premise for any *Pinkerton* theory in the case, if there was one: the alleged conspiracy, which allegedly included all defendants.

Then, leaving aside the unique subject of the "honest services" charges (which we will discuss below in section 4), the Indictment contains 27 substantive counts. Not a single one of them is brought against all defendants. Sixteen of them, in fact, are single-defendant counts. This in itself rules out any reasonable *Pinkerton*-based reading of the Indictment. If this case had been indicted by the grand jury as one in which *Pinkerton* liability was sought, that would not be the case. If this were a *Pinkerton* case in the grand jury's eyes, or indeed in the eyes of the prosecutors who wrote the Indictment, surely at least *some* of those substantive counts – maybe all – would have been pleaded against all defendants, with liability being contemplated on a *Pinkerton* theory.

Instead of bringing an Indictment that might be read as *Pinkerton*-based even in part, the grand jury (and the prosecutors who wrote the indictment) plainly were selective about which defendants were named in which counts. Substantive charges were brought *only* against those defendants who are alleged to have been liable as principals in the substantive charge in question (including liability as a principal under 18 U.S.C. § 2[3]) – *not* against everyone who (as an alleged coconspirator in Count 1) might arguably be "vicariously" liable under *Pinkerton*.

Our reading of the Indictment – that each defendant charged in each count is being

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[3] Under the plain terms of 18 U.S.C. § 2, "aiding and abetting" is (or gives rise to) a type of "principal" liability. "Vicarious liability" under *Pinkerton* is something quite different, and is not a variant or type of § 2 liability. *United States v. Gallo-Chamorro*, 48 F.3d 502, 507 (11th Cir. 1995).

charged with his or her *own* participation, rather than on the basis of any "vicarious" liability – is confirmed by the Government's own representations to the Court, subsequent to the Indictment. This is most clearly apparent in Doc. 609, which was the Government's response to the motions by Mr. Coker and Mr. McGregor raising the "duplicitousness" problem. The problem, as identified in those motions, was that Counts Five and Ten seemed to charge each defendant with two separate offenses, which is improper under the Eleventh Circuit's law of "duplicitousness." Each count seemed to raise the possibility that Mr. McGregor might be convicted for acts that he allegedly performed, *or* for somehow being complicit in acts that Mr. Gilley and his colleagues allegedly performed. (Coker Motion, Doc. 426; McGregor Motion, Doc. 451).

In response, the Government did not say that we had read the Indictment correctly and that it would cure the "duplicitousness" issue through an election. The Government's response was very different: it was, first and foremost, that Mr. McGregor's counsel and Mr. Coker's counsel had mis-read the Indictment. The Government's position was that we had missed the fact that the Indictment plainly charged each person only with liability on account of his *own* acts. "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." (Doc. 609, p. 3). "[T]he pending charges relate specifically to the defendants' individual conduct." (*Id.*, p. 5)

The entirety of page 4 of Doc. 609 is the Government's insistence on this point. In

detail, the Government emphasized, Mr. Gilley and his alleged colleagues were being charged with *their* offers and/or promises; and, the Government emphasized, Mr. McGregor was being charged with *his* alleged offers and/or promises. The Government insisted that the Indictment as written was not charging Mr. McGregor with liability on account of what Mr. Gilley and his colleagues had done. The Government insisted that a reader of the Indictment would understand this, by virtue of the incorporation of factual allegations from earlier portions of the indictment, recounting what each defendant individually had allegedly done. (Doc. 609, p. 4).

Thus having read the Indictment (which is precise and limited as to which alleged co-conspirators are charged in the substantive counts, charging only those who are alleged to have participated) and then having read the Government's position as stated in Doc. 609, no reasonable person could believe that this case is one involving *Pinkerton* liability, either in the eyes of the grand jury or in the eyes of the prosecutors.

Mr. McGregor recognizes that there is caselaw stating that *Pinkerton* liability does not have to be pleaded in the indictment. (In candor, for instance, we note the recent *United States v. Vazquez-Castro*, 2011 U.S. App. LEXIS 7123 (1st Cir. 2011).) Mr. McGregor respectfully disagrees with that caselaw even on its own terms, but notes that this Court does not have to go so far as to hold that *Pinkerton* liability always has to be pleaded in the indictment. This case can be resolved on its own particular facts, and the Court can make such orders as are appropriate to avoid jury confusion and potential prejudice. In this case, it is not just that the Government waited until late in the case

(after repeated inquiry from the Court) before mentioning *Pinkerton* liability. Far worse than that, it is that *Pinkerton* liability in this case would be affirmatively inconsistent with the way the Indictment was written. It would also be affirmatively inconsistent with the Government's representations to this Court and to the defendants about what the Indictment means.

With this recognition about the particular facts of this case, in addition to the further points below, it will be clear that there should be no *Pinkerton* instruction here.

2. The Government surely does not literally mean that there should be a *Pinkerton* instruction "as to all substantive counts as to all defendants." That would be patently wrong.

In addressing the particular unfair impact of the Government's change in position on the charges against Mr. McGregor, we can begin with this fact: on most counts in the Indictment, Mr. McGregor is not a defendant. The Counts in which Mr. McGregor is not a defendant include Counts Two (§ 666 charge against Gilley, Massey and Smith); Count Six (§ 666 charge against Means); Count Seven (§ 666 charge against Means); Count Nine (§ 666 charge against Preuitt); Count Eleven (§ 666 charge against Ross); Count Twelve (§ 666 charge against Ross); Count Thirteen (§ 666 charge against Gilley); Count Fourteen (§ 666 charge against Smith); Count Sixteen (§ 666 charge against Crosby); Count Seventeen (§ 1951 charge against Ross); Count Eighteen (§ 1951 charge against Ross); Count Nineteen (§ 1951 charge against Means); Count Twenty (§ 1951 charge against Means); Count Twenty-One (§ 1951 charge against Smith); Count Twenty-Two (§ 1951 charge against Preuitt); Count Thirty-Four (§ 1956 charge against Gilley and

Smith); Count Thirty-Five (same); Count Thirty-Six (same); Count Thirty-Seven (same); Count Thirty-Eight (§ 1001 charge against Preuitt); Count Thirty-Nine (§ 1512 charge against Geddie).

The following point should go without saying, but it needs to be nailed down in light of the Government's change in position. When the Government says (Doc. 1023 p. 1) that it "will be seeking the 11th Circuit pattern instruction on Pinkerton liability as to all substantive counts as to all defendants," surely this does not mean that the Government contends that Mr. McGregor could be facing *Pinkerton* liability on any substantive count in which he is not charged. If the Government is seeking to hold Mr. McGregor criminally responsible under a *Pinkerton* theory on counts for which he is not named, it would be an outrageous deprivation of due process, and a violation of the Fifth Amendment's "indictment" clause.

So the Court will certainly not be in a position to (as the Government says) give "the 11th Circuit pattern instruction on Pinkerton liability as to all substantive counts as to all defendants." (emphasis supplied). If the Court decided to give any *Pinkerton* instructions at all, the Court would have to tailor such instructions carefully in such a way that the jury unmistakably knew that *Pinkerton* liability on each count could apply, if at all, *only* to the defendants charged in each such particular count. In the course of trying to frame these careful instructions, the unfairness of the Government's change in position would become even more clear: the jury would have to understand that it was being asked to consider holding *some* defendants liable for crimes in which they did not participate,

even while other defendants were not facing that same prospect on those same charges, and even while the jury was given no reason to justify that difference in treatment. How the jury would be supposed to process this concept, and to apply it fairly, is impossible to figure.

3. There is no basis for a *Pinkerton* charge as to the substantive § 666 counts against Mr. McGregor.

Since Mr. McGregor cannot be *Pinkerton*-liable on any substantive count in which he is not charged (as shown above in Section 2), we turn next to the substantive counts that do include him. The first of these are the § 666 counts: Count Three, Count Four, Count Five, Count Eight, Count Ten, and Count Fifteen. Consideration of these counts shows further ways in which *Pinkerton* liability makes no sense in this case, and also shows further ways in which any attempt to frame limited *Pinkerton* instructions would wind up confusing the jury.

Take Count Fifteen first. Mr. McGregor is the only defendant in that Count. This is the count that charges him with having made payments to Mr. Crosby. No other person is identified as being allegedly responsible, as a principal, for this alleged offense. (Mr. Crosby faces a related charge in Count Sixteen, but he is not charged under Count Fifteen.) There is no alleged co-conspirator who could conceivably have the principal liability for Count Fifteen, in which Mr. McGregor might then "vicariously" share under a *Pinkerton* theory. In short, the possibility of a *Pinkerton* charge on this single-defendant count is incomprehensible. If the grand jury had had any notion that anyone

else had principal liability and that Mr. McGregor could have vicarious liability, then surely at least someone else would be charged in this Count. No one was. The Government has confirmed in a subsequent filing what is obvious on the face of the Indictment: the charges, as to payments to Mr. Crosby, are premised on the allegation that Mr. McGregor was responsible for the payments. (Doc. 582, p. 3). Yet we are now told by the Government that a *Pinkerton* instruction should be given as to "all" substantive counts, which includes Count Fifteen. The Government's position makes no sense in the context of the case. It would be impossible for any jury to understand.

Take, next, Counts Five and Ten. As mentioned above, these are the ones with the "duplicitousness" problem. The Government denied that either of these counts sought to hold Mr. McGregor liable for the acts of Mr. Gilley and his colleagues. His liability, if any, was to be for his own conduct. Yet the Government still seeks a *Pinkerton* instruction as to these counts. As with Count Fifteen, this presents an impossible puzzle. It is impossible to understand what the *Pinkerton* instruction would be supposed to mean, in the context of these charges. It would certainly be impossible for the jury to understand the message that it *couldn't* hold Mr. McGregor responsible under these charges for what Mr. Gilley and his colleagues did, but that it *could* hold him *Pinkerton*-liable. The jury would have no way of applying that cryptic instruction.

The problem is especially puzzling as to Count Five. The only defendants in that Count were Mr. McGregor, Gilley and Massey. Because of the "duplicitousness" issue, we are now told that Mr. McGregor is not to be held responsible for any promises or

offers that Gilley, Massey, and Lobbyist A made. Mr. McGregor is the only remaining defendant other than them on this Count. He is, also, the only person alleged to have participated in the acts for which the Government says it is prosecuting him under Count Five. So where would the *Pinkerton* liability come from? Whose offense would Mr. McGregor be vicariously *Pinkerton*-liable for? It is a complete mystery. Yet the Government says the Court should give a *Pinkerton* instruction on "all" counts. A *Pinkerton* instruction on Count Five would leave the jury baffled, and would risk a verdict having nothing to do with the Indictment, the law or the evidence.

The problem is also puzzling for similar reasons as to Count Ten, which involves both Mr. McGregor and Mr. Coker. Perhaps the Government's answer here would be that either Mr. McGregor or Mr. Coker could be *Pinkerton*-liable as to the other. But if the Court tried to explain that to the jury, in a way that was carefully tailored to make sure the jury understood that it could not range farther afield than that, the Court's task would be far too difficult to be worthwhile. The Indictment, and the Government's post-indictment explanation, have made clear that Mr. McGregor and Mr. Coker are charged in this Count based on the factual allegations of paragraphs 129 and 131 of the Indictment. (Doc. 609, p. 4).[4] Looking at those paragraphs of the Indictment, as the Government's

[4] "[A] review of the overt acts delineated in Count One identifies that conduct for which the respective defendants have been charged … The same holds true for Count Ten of the Indictment. Count One of the Indictment lists numerous overt acts, which are incorporated by reference into Count Ten. A review of paragraphs 119, 120, 125 and 127 detail the conduct of defendants Gilley, Massey and Lobbyist A with regard to promises of specific amounts of money to defendant Ross. Additionally, paragraphs 129 and 131 of the Indictment describe telephone conversations between defendant McGregor and Ross, and defendants McGregor and Coker in March 2010, in which defendants McGregor and Coker discuss their promises of financial support to defendant Ross in unspecified amounts related to the then pending pro-

stated basis for Count Ten against Mr. McGregor, it is clear that these charges are based on the premise that Mr. McGregor was involved as a principal in this alleged offense, based on his own alleged conduct. This affirmative representation by the Government leaves no room for a new theory that Mr. McGregor could now be held *Pinkerton*-liable on the basis of something that Mr. Coker did on his own. Again, this is not just a matter of the Government not having mentioned *Pinkerton* until late in the case; it is a matter of inconsistency with the Government's affirmative representations about what the charges were based on. Thus giving a *Pinkerton* instruction, as to this Count, would be unfair to Mr. McGregor, as well as being impossible to frame with enough clarity to guide the jury appropriately.

Count Three is similar, in that it involves Mr. McGregor and one other defendant, Mr. Geddie. Consistent with the Government's position as stated in Doc. 609, one can look to the earlier factual allegations of the Indictment to see why those persons, out of all the alleged co-conspirators, were chosen to be the only defendants in this Count. Count Three has to do with $5000 in campaign contributions allegedly given to Legislator 3 on February 15, 2010. (Indictment, Doc. 3, ¶ 194 pp. 41-42). Paragraphs 67-71 tell us who was allegedly involved in this: the two people who are charged, Mr. McGregor and Mr. Geddie. The allegation is that Mr. McGregor told Mr. Geddie to make the contribution. That is why these two and no others are charged, obviously, because the Government convinced the grand jury that they were the ones involved. It is clearly not a matter of

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gambling legislation. Again, there is no ambiguity as to which defendants are being charged with this conduct—defendants McGregor and Coker."

Pinkerton liability, because *Pinkerton* liability could have been charged as to other alleged co-conspirators as well. So what would a *Pinkerton* charge add, to the jury's understanding, on Count Three? Nothing but confusion. There is no one else who is conceivably the alleged principal, with principal liability for Count Three, in whose liability Mr. McGregor could vicariously share under *Pinkerton*.

To avoid repetition, the Court can note briefly that Counts Four and Eight are similar in this regard. In each of them, the grand jury (guided by the prosecutors) affirmatively chose to name as defendants only those persons who were allegedly involved in the actual conduct, according to the factual allegations that are incorporated into these counts. Not every alleged member of the alleged single "conspiracy" in Count 1 is named as a defendant on these substantive counts, as one would expect if this were truly a potential matter of *Pinkerton* liability. Mr. McGregor was charged in these counts because the Government (wrongly) asserts that he was involved. It's just like the Government said as to other counts, in Doc. 609 p. 5: "[T]he pending charges relate specifically to the defendants' individual conduct." Again, a *Pinkerton* charge would add nothing to the jury's understanding, and would confuse the jury because it is so plainly inconsistent with the way the Indictment is drawn up in this regard.

4. There is no room, and certainly no reasonable need, for a *Pinkerton* charge on the "honest services" charges.

Finally, the charges against Mr. McGregor also include the eleven "honest services" mail- and wire-fraud counts. The Court should not give a *Pinkerton* instruction

as to these, either. The Court should not give such an instruction because it would be confusing, unnecessary, and inconsistent with what the Government has said thus far in the case.

As with the § 666 charges described above, it is useful to look back at what the Government has said about these charges. Mr. McGregor moved (Doc. 359) for a bill of particulars on these charges. One of the things Mr. McGregor discussed in that motion, as something he needed to know more about in order to defend himself, was why Mr. McGregor was allegedly liable for things in which he was not personally involved. He mentioned, specifically, the indictment's allegations about Mr. Gilley and Senator Smith. (Doc. 359, pp. 7-8). In the § 666 charges about their interaction, Mr. McGregor is not charged, because (even according to the Indictment) he was not involved in the relevant conduct. Yet the same set of allegations is at the core of two of the "honest services" charges (Counts 26 and 33), where (in contrast to the analogous § 666 charges) Mr. McGregor is charged. Mr. McGregor asked for an explanation as to what the Government said, about how he could be liable on those counts for things in which he was (even according to the Indictment itself) not involved. *See* also Doc. 359, p. 10 (returning to this topic with specific question).

If *Pinkerton* had anything to do with the "honest services" charges in this case, that would have been the time for the Government to say it. Instead, the Government affirmatively represented something different. The Government responded that it planned to prove Mr. McGregor culpable on those counts because of the *different* "co-schemer"

liability doctrine applicable to mail- and wire-fraud. (Doc. 386, pp. 6-7). The Government concluded that discussion by saying (*id.*, p. 7), "The United States has provided defendant McGregor with the evidence supporting each mailing and wiring, and if he wishes to argue at trial that he is not liable for particular counts, he is more than capable of doing so." If the Government had wished to say that Mr. McGregor was liable for all counts whether he knew anything about them or not, by virtue of *Pinkerton* liability, the Government was more than capable of making that argument. It did not.

The Government's decision not to make any *Pinkerton* argument about the "honest services" charges made perfect sense then, and it still makes perfect sense today. It makes perfect sense precisely because (as the Government argued) mail- and wire-fraud have their own specific doctrine of shared liability, with its own parameters that are different from the parameters of *Pinkerton*. Trying to pile *Pinkerton* on top of that doctrine would be like trying to use stilts on a trampoline; it would be an accident waiting to happen. It would confuse even the most attentive jury.

Moreover, the Government has told us that the alleged "scheme to defraud" that underlies the mail- and wire-fraud charges is based on the same facts as the conspiracy count (*see* Doc 386, p. 3 ("The allegations incorporated by reference as part of the honest services bribery scheme make clear that the factual contours of the alleged scheme are co-extensive with the charged conspiracy.") (footnote omitted)). So what is to be gained, in substance, by adding the possibility of *Pinkerton* liability to the "honest services" charges? Literally nothing but confusion.

Mr. McGregor recognizes that there are cases allowing a *Pinkerton* instruction where there is a charge of conspiracy *to commit mail- or wire-fraud*, followed by substantive counts of mail- or wire-fraud. Here, though, the Government would be relying on an odder construct than that: a conspiracy *to violate § 666*, as the *Pinkerton* premise for vicarious liability on mail- or wire-fraud charges. The oddness of the construct is another reason why the Court should decline to confuse the jury with a *Pinkerton* charge. Adding a *Pinkerton* possibility to the "honest services" charges would also create a sort of cross-contamination of possible reversible error, that would infect all the counts. Mr. McGregor has offered substantial arguments in favor of the view that, as a matter of law, § 666 does not cover the acts alleged in this case. If those arguments are correct, then they mean that the conspiracy-to-violate § 666 charge also fails to state an offense. Allowing *Pinkerton* liability on the "honest services" charges would also infect the "honest services" counts with this very same potential error. This is another reason why it would be unwise to give a *Pinkerton* charge.

Conclusion

As shown herein, the Court should not confuse the jury with any *Pinkerton* instructions in this case. *Pinkerton* liability is inconsistent with the grand jury's framing of the Indictment, as well as being inconsistent with the Government's representations. Furthermore, *Pinkerton* instructions would confuse the jury while adding nothing legitimate to the case.

Respectfully submitted,

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