No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

On Appeal from the United States District Court
for the Middle District of Alabama

REPLY BRIEF OF APPELLANT GOVERNOR DON SIEGELMAN, ON REMAND FROM SUPREME COURT OF THE UNITED STATES

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Summary of the Argument

Regarding the scope of "honest services" law after *Skilling*, the prosecutors ignore the vast difference between personal self-enrichment schemes ("bribery" within the meaning of *Skilling*) and contributions to political campaigns. The prosecutors' mere unsupported assertion that campaign contributions are "bribes" cannot match the detailed legal argument in our opening brief, showing that cases based on campaign contributions were not part of the pre-*McNally* core of "honest services" doctrine that now survives after *Skilling*.

The prosecutors also simply ignore the due process aspect of *Skilling*, a portion of *Skilling* that requires reversal on every charge. The prosecutors are comfortable with a system in which the laws do not have to be clear in advance, in which even clearly written laws can be stretched and expanded beyond their text to cover a broader array of conduct, and in which prosecutors are trusted to use their judgment wisely to choose which people should be targeted for prosecution under vague or stretched laws. But as the Supreme Court emphasized in *Skilling*, that is not the way the system of criminal law is to work in our country.

Furthermore, the prosecutors' brief contains a variety of misstatements about procedural aspects of the case. Those misstatements should not distract attention from the core issue, which is that Governor Siegelman did not violate the laws, and must not be incarcerated for doing things that were not illegal.

Argument

1. Campaign contribution cases, and especially issue advocacy or referendum campaign contribution cases, are not "honest services" cases under *Skilling*. Governor Siegelman is entitled to a judgment of acquittal on all "honest services" charges and the conspiracy charge.

As we showed in our opening brief, the charges relating to the C.O.N. Board appointment do not amount to valid "honest services" charges as a matter of law under *Skilling*.[1] The Supreme Court in *Skilling* pared down "honest services" to its pre-*McNally*[2] "solid core"[3] – a solid core that was made up (as the Government itself described the caselaw in its *Skilling* brief) of "self-enrichment schemes" of bribery and kickbacks. The pre-*McNally* solid core of "honest services" did *not* include cases charging campaign contributions – much less issue-advocacy or referendum campaign contributions, as in this case – as bribes. Governor Siegelman took no money for himself. The statute, as interpreted in *Skilling* to be solely a revival of the pre-*McNally* solid core, does not cover this case.[4]

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[1] *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010).

[2] *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987).

[3] *Skilling*, 130 S.Ct. at 2930.

[4] The prosecutors have accepted, and do not seek to overturn, the panel's reversal of Governor Siegelman's convictions on counts 8 and 9. [Government Brief, p. 57]. So, this reply brief will not discuss the portions of the prosecutors' arguments that have to do with those counts.

a. This argument is properly presented and ready for resolution.

The prosecutors say, "Nowhere in their briefs did defendants raise a broader challenge to the constitutionality or scope of the honest services statute; their challenge was limited to the *McCormick* issue. … Thus, defendants have abandoned any claim that they were convicted under a now-invalid theory of honest services fraud." [Government Brief, p. 26].

That contention is both untrue and pointless.

It is untrue because Governor Siegelman did in fact argue, in his first brief on appeal two years ago, that this case is categorically outside the scope of the "honest services" statute (and 18 U.S.C. § 666 as well), because it is a case based on contributions to an issue-advocacy campaign. Our argument was not (as the prosecutors wrongly say) "limited to the *McCormick* issue."[5] As we stated in that May 2008 brief, at page 34, "the law should permit no federal criminal prosecution based on an issue-advocacy or referendum campaign contribution, unless such a prosecution is brought under a statute that actually speaks clearly and specifically to that particular context. Such a holding would be reasonable, as an application of a 'clear statement' rule of statutory interpretation."

Beyond being false, the prosecutors' suggestion of waiver is also pointless, because in a footnote, these prosecutors are forced to concede that the Government

[5] *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991)

of the United States "is not asserting forfeiture or procedural default against any colorable claim that a defendant is actually innocent of honest services mail or wire fraud, as those offenses are now defined by *Skilling*." [Government Brief p. 26, n.4]. One might hope that that would be so obvious that it would go without saying: if Governor Siegelman's conduct was outside the scope of the "honest services" offense as construed in *Skilling*, he must not go to prison for it, and the Government of the United States will not place procedural hurdles in the way of that fundamental principle of justice. But it is good that this has been made explicit in the prosecutors' brief: if Governor Siegelman did not violate the law, he should not be imprisoned, and any procedural "waiver"-type hurdles are waived.

And that, of course, is the nature of the contention that we are addressing here: that Governor Siegelman was in fact innocent of honest services fraud as defined in *Skilling*. The issue is properly before the Court.

b. Contributions to campaigns, and specifically issue-advocacy campaigns, are not bribes as the term was used in *Skilling* to describe the pre-*McNally* solid core.

In arguing that this case is within the pre-*McNally* solid core, the prosecutors simply say that this is a case about bribery, as though there were no difference between money in an official's pocket and contributions to an issue advocacy campaign. The prosecutors therefore ignore all the things we discussed in the pertinent section of our opening brief. They ignore the vital First Amendment

interests involved in the campaign contribution context, as contrasted with the lack of such interests in true bribery cases. They ignore the fact that the Government itself, in its brief to the Supreme Court in *Skilling*, described pre-*McNally* caselaw as having been based almost entirely and perhaps literally without exception on "self-enrichment schemes." They ignore the fact that the Supreme Court, in allowing "honest services" to survive at all, relied on the Government's brief and its catalog of dozens of those self-enrichment cases. They ignore the fact that none of those dozens of cases – and indeed no pre-*McNally* "honest services" case at all, so far as we have been able to find – charged a campaign contribution as a bribe.

The words "bribe" and "bribery" do not, as a matter of ordinary usage, necessarily include campaign contributions, not even in situations where those campaign contributions are said to be made in exchange for official action. That is, "bribe" and "bribery" are often used specifically to refer to personal payments *as distinct from* campaign contributions. Even just within the last three months, two federal Courts of Appeals have used the words in just this way: as describing personal enrichment as contrasted with and distinct from campaign contributions (again, even when the contributions were said to have been in exchange for official action). *Green Party of Conn. v. Garfield*, ___ F.3d ___, 2010 U.S. App. LEXIS 14248, *24 (2nd Cir. 2010) ("the Connecticut General Assembly enacted the CFRA's ban on contractor contributions in response to a series of scandals in which

contractors illegally offered bribes, 'kick-backs,' and campaign contributions to state officials in exchange for contracts with the state."); *McComish v. Bennett*, ___ F.3d ___, 2010 U.S. App. LEXIS 13863, *5 (9th Cir. 2010) ("A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation.")

The question is not whether the word "bribery" can ever be, or whether it sometimes is, used in a way that encompasses some campaign contributions. Prosecutors could not win by showing that the word is sometimes used in that way. The question is whether cases involving campaign contributions – and specifically issue-advocacy contributions – were within the pre-*McNally* "solid core" of "honest services" bribery. As we have shown, they were not. Against all this, the prosecutors want to use language loosely, and to rely on instances where others may have used language loosely, in support of a broad interpretation of the word "bribery" so that it does now include campaign contributions. But such loose use of language is particularly inappropriate in dealing with the meaning of *Skilling*, which was a case all about the dangers and unfairness of loose language in the criminal law. "Bribery," within the holding of *Skilling*, refers to those types of cases that made up common fact patterns that were accepted by consensus as applications of "honest services" law before *McNally*. It does not encompass everything that other people, living in the post-*McNally* and post-§ 1346 era of

expanding prosecutorial aggressiveness, might try to characterize as bribery.

So, it is pointless to debate the prosecutors (as they try to do, extensively, in their brief) about whether lawyers in this case referred to the "honest services" charges in this case as being "bribery"-type charges. Any such references during argument at earlier stages in this case do not answer the questions of what the Supreme Court meant in *Skilling*, and of what the scope of § 1346 is after *Skilling*.

Likewise, as we noted in our opening brief, the prosecutors cannot now expand § 1346 to cover campaign or issue-advocacy contributions cases by pointing to some prosecutions of such cases (whether before or after *McNally*) under other statutes. In *Skilling*, the Supreme Court held that when Congress enacted § 1346 in 1987, it intended to revive the core of "honest services" doctrine as it had existed before *McNally*. The Supreme Court did not find or ratify any Congressional intention to *expand* "honest services" beyond that pre-*McNally* core, in order to cover other things – such as campaign contributions – that might have been prosecuted under other statutes.

While the Supreme Court mentioned other statutes in *Skilling*, it did not suggest that those other statutes offer a basis for expanding the reach of "honest services" beyond the pre-*McNally* consensus. Instead, having already confined "honest services" to those patterns of cases that were established by common consensus and repeated application in pre-*McNally* law, the Supreme Court then

mentioned other statutes to bolster the idea that *as to those common patterns of cases*, potential defendants are well on notice that such things are unlawful. *Skilling*, 130 S.Ct. at 2933-34. This is a far cry from using other statutes to justify expanding "honest services" to cover new patterns of cases (like this one, involving contributions to an issue-advocacy campaign rather than personal self-enrichment) that had not been prosecuted as "honest services" violations before *McNally*. If the prosecutors in this case relied on other statutes as justification for expanding "honest services" to cover cases involving campaign contributions, they would not be taking seriously the legislative-intent reasoning of *Skilling*.

c. Governor Siegelman's status as guarantor of a campaign loan – a status he entered long *after* the alleged *quid pro quo* supposedly came to exist as an implied state of mind - is irrelevant both as a matter of law and as a matter of fact.

At points in their brief, the prosecutors describe the campaign contributions as "payments … to Siegelman" or as being money "paid [to] Siegelman." [Government Brief, pp. 30-31]. Again, prosecutors have resorted to the use of loose language. These were not payments to Governor Siegelman. They were contributions to a campaign regarding a referendum. This is undisputed, and it is inappropriate to use loose language that diverts attention from this fact.

The prosecutors have also, as we anticipated in our opening brief, tried to gain some mileage from the fact that Governor Siegelman became a guarantor on a campaign loan that was retired with the help of these contributions. [Government

was actually innocent of violating the law. [Government Brief, p. 26 n.4]. That is, in fact, the situation with regard to § 1512(b)(3) as well as the other charges in this case: Governor Siegelman did not violate the law. We hope that the same guidance that led to that footnote in the opening brief will keep the prosecutors from creating any new "waiver" or "forfeiture" arguments for their reply brief on the § 1512(b)(3) charge. If such new arguments do appear in the prosecutors' reply brief, the Court should reject them.

Governor Siegelman indisputably did not violate § 1512(b)(3). He is entitled to a judgment of acquittal.

Conclusion

In concluding, we will quote the passage with which Governor Siegelman closed his reply brief to the Supreme Court in support of his petition. It was the last filing in the case, before the Justices vacated and remanded for further consideration in light of *Skilling*. It is about the due process concerns that ended up animating the Supreme Court's decision in *Skilling*. And it remains true in this case, as an explanation of why this Court should reverse under *Skilling*:

> A common thread linking the two issues here is that there are prosecutors who, even if only rarely, sometimes ask the federal criminal code to conform itself to their intuitions. A case can start with prosecutorial disapproval of a person or situation, and the laws are then treated as a malleable set of words that can be pressed as necessary to match the intuition and to permit a conviction. Whether it takes the form of expanding discretion under ambiguous statutory

> language as in the first question [regarding "honest services" and § 666], or ignoring the boundaries set by clear statutory language as in the second [regarding § 1512(b)(3)], such an approach to the law is dangerous to liberty whenever it appears. In prosecutions of elected officials and cases implicating First Amendment interests, like this one, it is also dangerous to our system of democracy. This Court should grant review on both questions.

This Court, having received the case for reconsideration, should reverse Governor Siegelman's conviction, and should render a judgment of acquittal on all counts.

Respectfully submitted,

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I certify that copies of the foregoing have been served by U.S. Mail on the following this 20th day of September, 2010, that on the same day the brief has been uploaded electronically to the Court, and that an original and six copies have been sent by U.S. Mail to the Clerk for filing.

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