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.	)	

THIRD MOTION TO DISMISS

Milton McGregor respectfully submits this third motion to dismiss. Mr. McGregor's other motions to dismiss, Docs. 206 and 208, have already been briefed. This motion adds three points.

1. As to the counts against Mr. McGregor based on 18 U.S.C. § 666, including Count 1 (charging a conspiracy to violate § 666), Mr. McGregor submits that § 666 does not cover campaign contributions or other campaign support. Thus the Court should dismiss Count 1 and all other § 666 counts that are premised, to any degree, on campaign contributions or other campaign support. This would include, at least, Counts 1, 3, 4, 5, 8, and 10. This argument has been touched upon in Mr. McGregor's brief (Doc. 207) in support of an earlier motion to dismiss the § 666 charges, but is made here explicitly so that there is no question about its presentation.

The premises for this argument are simple. (1) Criminal laws must be written clearly, so as to clearly define what is lawful and what is criminal. *See, e.g., Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2927-28 (2010). (2) It is Congress, not the

Courts, that is supposed to define the federal criminal laws. *See, e.g., United States v. Santos*, 553 U.S. 507, 523, 128 S.Ct. 2020, 2030 (2008). (3) If the Executive thinks that there should be a law to cover something, the Executive has plenty of strength to press Congress to enact such a law; so it is not appropriate or necessary for the Courts to read existing laws to cover things that the Executive believes should be covered. *See, e.g., Santos*, 553 U.S. at 514, 128 S.Ct. at 2025. (4) The Courts will not presume that the Congress has meant to do something of monumental importance, or something that touches deeply on core constitutional concerns, unless the Congress does it explicitly. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 25, 121 S.Ct. 365, 373 (2000) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.")

The legislative history of § 666, recounted in Doc. 207, shows that the statute was not designed to cover campaign contributions. And the text of the statute is hopelessly vague about what legal standard would separate a lawful campaign contribution from an unlawful one, if the statute were read to cover campaign contributions at all. After all, one could say that vast numbers of campaign contributions are made in order to "influence" (*see* § 666) incumbent officials in, or to "reward" (*id.*) them for, their decisionmaking about official acts.[1] The word "corruptly" in the statute would therefore do all the work, in dividing lawful campaign contributions from unlawful ones, if the statute were read to cover campaign contributions. And the word "corruptly" is too

[1] For instance, every time that a person gives a contribution to an incumbent's reelection campaign because of actions the incumbent has taken while in office, there is an intent to "reward" in some sense.

vague to bear all that weight, in a context that is so rich with First Amendment implications. If Congress had ever wished to write a statute explaining where the dividing line lies between routine campaign-finance practices and crimes, the Congress could have and should have done that. Since Congress has not written such a law, the Courts should not struggle to find a standard in a law, like § 666, that was not written for that purpose.

Mr. McGregor recognizes that, in a case that did not involve campaign contributions (but instead involved a cash payoff to a corrections officer in exchange for increased pretrial-release privileges), the Eleventh Circuit recently emphasized the breadth of the phrase "any thing of value" in § 666. *See United States v. Townsend*, ___ F.3d ___, 2011 U.S. App. LEXIS 655 (11th Cir. 2011). There are sentences in that opinion that could be cited to support the Government's opposition to this argument; the Government will emphasize that campaign contributions are a thing of value, and that the statute covers "any" such thing. *Id.*, *14-17. But in *Townsend* the Eleventh Circuit was not presented with, and therefore did not decide anything about, the unique and constitutionally significant matter of campaign contributions. Accordingly, *Townsend* does not contain any holding, and does not even actually contain any *dicta*, answering the specific question about § 666 raised in this motion.[2]

[2] Similarly, and despite the Government's recent filing (Doc. 413), *Townsend* does not answer Mr. McGregor's prior motion to dismiss the counts under § 666 (Doc. 206 (motion); Doc. 207 (brief)). The questions in *Townsend* were whether freedom was a thing of value that could meet the statute's $5000 valuation element, or whether only tangibles were things of value, *id.*, *13-17; and whether the amount of a bribe could be used as a proxy for valuation of an intangible, *id.*, *17-20. *Townsend* does not address

2. As to the mail and wire fraud charges (Counts 23 through 33), Mr. McGregor moves to dismiss because the indictment does not adequately allege the nature of the alleged scheme. It does not identify whose "honest services" were the alleged thing of which the State and the public were to be defrauded; it alleges a scheme to bribe (¶ 234), but does not identify who was allegedly to be bribed, or in what way. Therefore there is no identification, by the grand jury, of what the actual "object" of the alleged scheme was. Moreover, the indictment alleges concealment of material information in summary fashion (¶ 234), but does not identify what information was material or how it was to be concealed. This omission is important, because even an "honest services" fraud scheme is still a fraud scheme, and thus proof of material misstatement or omission is required. *See, e.g., United States v. Jockisch*, 159 Fed. Appx. 145, 2005 U.S. App. LEXIS 27988 (11th Cir. 2005) (unpublished) (recognizing that the requirement of materiality, under *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827 (1999), applies in "honest services" fraud cases as well as in traditional money or property fraud cases). Whatever is the "object" of an alleged fraud scheme – whether it is money or property under a traditional

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the meaning of the word "business" in § 666 (in particular, whether drafting and voting on legislation is "business"), does not address the meaning of the word "agent" in § 666, does not address the sovereignty concerns that are implicated in a case about State legislative activity, and does not address the legislative history of § 666 (history which demonstrates that the statute was not meant to cover a case such as this). Even if *Townsend* had addressed the legal issue of whether enforcing conditions of pretrial release was "business" within the meaning of § 666, that would not give an answer to the question whether writing and voting on legislation is "business" too. Enforcing conditions of pretrial release is much closer to the sort of service function that can be covered by § 666's term "business," than to the purely regulatory/sovereign function of creating legislation. *Townsend* was a victory for the Government, but it was a victory only on the questions presented in that case, not on the questions presented in this case.

charge, or "honest services" in a § 1346 charge, there has to be fraud in the sense of material omission or misstatement. The indictment does not identify what the fraud was.

In response to Mr. McGregor's motion for a bill of particulars on these charges (Doc. 359), the Government emphasized its view that the statement of these charges is sufficient because Paragraph 233 of the Indictment incorporates Paragraphs 1-26, and 29-190, in which the Indictment alleges "overt acts" allegedly in furtherance of a conspiracy. (Doc. 386). Mr. McGregor submits that this is insufficient, and that Counts 23 through 33 should be dismissed on the authority of *United States v. Bobo*, 344 F.3d 1076, 1084-85 (11th Cir. 2003), and *United States v. Adkinson*, 135 F.3d 1363, 1377 (11th Cir. 1998). In *Bobo*, the Eleventh Circuit reversed the denial of the defendant's motion to dismiss the indictment, because the fraud scheme had not been adequately alleged. There, as here, the indictment's statement of the fraud count had incorporated the allegations about "overt acts" from a conspiracy count that preceded it in the indictment. *Id.* at 1084. The Court held that this was not sufficient, and that the motion to dismiss should have been granted despite this statement of incorporation.

> Because the government incorporated the paragraphs from Count I of the indictment in Count II, the jury may have believed that the overt acts alleged to support the conspiracy charge were sufficient to describe the alleged scheme or artifice to defraud. However, we have held that the overt acts are to support the charge of conspiracy, "not to describe an alleged scheme to defraud." *United States v. Adkinson*, 135 F.3d 1363, 1377 (11th Cir. 1998).

Id. at 1085. As recognized in this quotation from *Bobo*, the Eleventh Circuit decision in *Adkinson* was to the same effect: adoption of allegations about "overt acts" in support of a conspiracy is no substitute for clarity in an indictment about the nature of an alleged

scheme to defraud.

> Government counsel now argues that the missing scheme to defraud the banks can be located among the 227 overt acts remaining in Count I. The overt acts, however, are there to support the allegations of a conspiracy, not to describe an alleged scheme to defraud. United States v. Mercer, 133 F. Supp. 288, 290-91 (N.D.Cal.1955) (indictment charging defendant with wire fraud supported only by overt acts and no particulars of the scheme insufficient).

Adkinson, 135 F.3d at 1377.

Mr. McGregor is aware that yesterday, the Court denied his motion for bill of particulars, including a rejection of his reliance on *Bobo*. (Doc. 429). Mr. McGregor respects the Court's ruling in that regard. However, Mr. McGregor respectfully submits that the question presented herein is different. Even if the "overt acts" may be relied upon to give some sort of notice such that a bill of particulars is not required (though Mr. McGregor respectfully disagrees with the Court on that), still this motion to dismiss is not based merely on notice concerns. It is based on also on the concern that the indictment, as written by prosecutors, did not actually have the grand jury making a proper determination as to whether, and if so how, the elements of the alleged crimes were present. In other words, a vague indictment is in derogation of the role of the grand jury, as well as being troubling for "notice" purposes. *See United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (en banc) (requirement that indictment must allege all elements of the crime serves two purposes: (1) notice, and (2) protecting the constitutional role of the grand jury).

3. As Mr. McGregor has pointed out in his motion for bill of particulars (Doc. 359, p. 9), the Government has avoided clarity on the question of exactly what it agrees

that it must prove, in terms of any "explicit *quid pro quo*" connection between campaign contributions (or other political support) and official action. The Indictment itself plainly does not allege that there was an "explicit *quid pro quo*" agreement or promise, as an element of any of the offenses that the Government has charged against Mr. McGregor. If any of the statutes at issue do cover campaign contributions, then a truly "explicit *quid pro quo*" is an element of each crime, for reasons explained in *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991). Failure to allege that element in this case renders the Indictment fatally defective, since an indictment must allege all elements of the offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 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 all counsel of record.

/s/ Joe Espy, III
Of Counsel