UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

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

MEMORANDUM OF LAW OF QUINTON T. ROSS, JR., IN SUPPORT OF HIS MOTION TO SEVER

In his motion to sever, Quinton T. Ross, Jr., set forth several grounds upon which he bases his request for (and, we believe, establishes his entitlement to) an order severing for trial the charges alleged against him from those made against the other defendants. Senator Ross respectfully submits this memorandum to expand upon some of those grounds.[1]

As noted in the motion, severance is appropriate (and we believe required) under both Rules 8 and 14 of the Federal Rules of Criminal Procedure. On the face of the indictment, accepting its allegations as true, more than one conspiracy is alleged in, and accordingly misjoined under, a single conspiracy count, in violation of Rule 8. This is primarily because there is no allegation -- and particularly, the facts alleged in the indictment tend to affirmatively disprove – that there was one single, grand, overarching scheme beyond his own actions or circumstances that Senator Ross (a) knew about and (b) agreed to join. *E.g., United States v. Chandler*, 388 F.3d 796, 805-12 (11th Cir. 2004) (on rehearing). Because Senator Ross is misjoined with various other defendants, the

[1] Senator Ross does so without waiving any of the grounds asserted in that motion but not addressed further in this memorandum, and indeed expressly preserves and relies upon all grounds and arguments set forth either in the motion or this supporting memorandum.

charges alleged against him are due to be severed from those of his co-defendants who are not alleged to have participated in the same alleged criminal conduct and conspiracy(ies) apparently alleged against Senator Ross. *E.g.,* Fed. R. Crim. P. 8; *United States v. Castro*, 829 F.2d 1038, 1044-45 (11th Cir. 1987) (ordering new trial as to one defendant in alleged single conspiracy after 6 ½ month jury trial).

And, because (in part due to the multiple conspiracies, but due as well to other factors) Senator Ross would be prejudiced by being forced to go to trial with all (or arguably even any) of his co-defendants, this prejudicial joinder likewise calls for severance of the charges alleged against him for a separate trial. *See, e.g., Chandler*, 388 F.3d at 805-12; *United States v. Pedrick*, 181 F.3d 1264, 1272-73 (11th Cir. 1999); *United States v. Fernandez*, 892 F.2d 967, 989-92 (11th Cir. 1990) (holding trial court would have abused discretion in denying pretrial motion to sever). Both of these main arguments are discussed in further detail below.

The difficulties created by the Government's indictment for Senator Ross' ability to receive a fair trial, particularly if joined with his co-defendants, stem first from the indictment – especially the specific facts asserted in support of each charge against Senator Ross, as opposed to the conclusory allegations of elements in language tracking that of the relevant statutes -- alleging only ***lawful*** conduct on Senator Ross' part: specifically the solicitation and receipt of only ***lawful*** campaign contributions protected by the First Amendment (and cabined as well by due process fair notice and anti-vagueness requirements). Although we have strenuously argued that point at length in the three motions to dismiss filed on Senator Ross' behalf, it is important to address it here as well.

The Legal Framework Regarding Lawful and Unlawful Campaign Contributions

As it applies to Senator Ross, this case is a "pure" campaign contribution case. That is, the only conduct the indictment charges against Senator Ross is requesting and accepting campaign contributions from persons said to have financial or other interests in the outcome of a legislative vote, i.e., the vote on SB380, or other asserted pro-gambling legislation.

There are ***no factual*** allegations accusing Senator Ross, unlike many of his co-defendants, of requesting, being offered, accepting, or agreeing to accept ***anything other than*** "pure" campaign contributions – no fundraising help, no campaign appearances by country music stars, no political polls, no media buys, no offers to pay money to any candidate opposing him to withdraw from the race, no promises of business patronage, no monthly payments, no other "thing of value" or benefit of any kind.

The indictment likewise is devoid of any ***factual*** allegations showing or supporting a conclusion that Senator Ross enriched himself, or had any purpose to enrich himself (¶30), through any such campaign contribution – or that any such contribution was treated, by either the asserted donor or Senator Ross, as ***anything but*** a campaign contribution. (*See, e.g.,* ¶¶ 118-123, 125-127, 131) (all referring to "campaign contribution" or "campaign contributions"). Indeed, as best as can be determined from the language of the indictment[2], every contribution credited to Senator Ross is treated as what it was – a campaign contribution. Likewise, nowhere does the indictment state any

[2] And as can be confirmed from Senator Ross' campaign filings under the Alabama Fair Campaign Practices Act. *See* http://arc-sos.state.al.us/cgi/elcdetail.mbr/detail?&elcpass=34856, last accessed Feb. 1, 2011.

facts to show or suggest that Senator Ross benefited personally or in any way from any campaign contribution, other than (inferably) by increasing his campaign fund.

And, not only does the indictment allege ***only*** that Senator Ross asked for, received, or was offered ***campaign contributions only***, with ***no*** hint of any personal benefit attached. The indictment's non-conclusory ***factual*** allegations likewise fail to show that any contribution was supported by an explicit *quid pro quo*, i.e., a specific promise or agreement by Senator Ross in response to perform or not perform an official act, specifically an explicit promise or undertaking by Senator Ross to vote for or support SB380 or even "pro-gambling legislation" in return for the campaign contribution.[3] (*See* ¶¶119, 128-129, 131).

The Supreme Court and the Eleventh Circuit have made clear that, to convict a public official of ***any*** charge of extortion "under color of official right" under the Hobbs Act, 18 U.S.C. §1951, the Government must prove a *quid pro quo*, i.e., the public official received payment in exchange for the official's promise to perform or not to perform a

[3] The indictment alleges Senator Ross "demanded" contributions (¶119; *see* ¶35), or "solicited and … pressured" potential contributors "under the color of official right" to provide contributions. (¶¶222, 224). It further alleges in conclusory form that Senator Ross accepted the contributions "intending to be influenced and rewarded in connection with" the vote on SB380 specifically or pro-gambling legislation generally (¶¶28, 210, 212; *see* ¶¶30, 208), or "corruptly" (¶¶28, 31, 208, 210, 212) or "to enrich [him]sel[f]" (¶30); that the contributions were "not due to Ross" (¶¶222, 224); and that Senator Ross and the other defendants "knowingly devised and intended to devise a scheme and artifice to defraud and deprive" the State of Alabama and its citizens "of their right to the honest services of elected members … of the Legislature." (¶234). But, the indictment is woefully lacking in factual allegations that show or even support these conclusory assertions regarding Senator Ross' purported *malum* intent.

Senator Ross denies that he "demanded" contributions (and probably also that he "pressured" contributors, hesitating only because of the ambiguity of the Government's chosen word "pressured"). And, he ***vehemently*** denies requesting or accepting contributions with any of the alleged prohibited intents or states-of-mind, or in return for his vote or support for SB380 or any other "pro-gambling legislation," or in any way other than as a legitimate, lawful campaign contribution.

specific official act. *Evans v. United States*, 504 U.S. 255, 268 (1992); *McCormick v. United States*, 500 U.S. 257, 273-74 (1991); *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) (on petition for rehearing); *United States v. Martinez*, 14 F.3d 543, 553-54 (11th Cir. 1994).

More important for present purposes, reversing a conviction under that Act, the Supreme Court has stressed that where an elected official, such as Senator Ross (Indictment, ¶13), receives a campaign contribution or campaign contributions (*see, e.g., id.*, ¶¶118, 120-123), conviction of the same charge requires proof that the quid pro quo is ***explicit***. That is, the Government must show that "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick*, 500 U.S. at 273. As we argued in support of Senator Ross' motions to dismiss the charges brought under the other two statutory schemes at issue (federal programs bribery, and "honest services" fraud), certainly conduct not prohibited by one statute may nonetheless be criminalized under another. But, given the clearly-implied First Amendment and explicit Due Process concerns on which that ruling was founded, *id.*, at 272-73, the *McCormick* Court's line-drawing between lawful and unlawful contributions – which was based little, if at all, on interpretation of the Act's statutory language, much less the Act's (unmentioned) legislative history – applies equally to prosecutions under other federal criminal statutes for giving and receiving campaign contributions, including the conspiracy, federal programs bribery, and "honest services" fraud laws invoked here.[4]

[4] In reviewing the convictions of former Alabama Governor Don Siegelman and HealthSouth founder and former CEO Richard Scrushy on federal funds bribery (§ 666(a)(1)(B)) and "honest services" fraud (18 U.S.C. §§ 1341, 1346) charges, the

Recognizing this case as a "pure" campaign contribution case as to Senator Ross is important, because that triggers the heightened requirement on the Government to allege and prove an **explicit** *quid pro quo* – as necessary to prevent the criminalizing of legitimate campaign fundraising activity and routine political service to constituents "that ha[ve] long been thought to be well within the law." *McCormick*, 500 U.S. at 272.

And, recognizing that the ***facts*** alleged in the indictment show ***only*** conduct by Senator Ross within the legitimate sphere of political activity -- and ***not*** the exchange of his "explicit promise or undertaking" to vote for SB380 specifically, or even vote for or otherwise support "pro-gambling legislation" generally, in return for the payments -- is critical. That is the difference between alleging conduct that is criminal, and alleging conduct (as this indictment does as to Senator Ross) that is ***not.***

Summary of the Allegations Against Senator Ross

Each of the substantive counts (Counts 11 and 12, federal programs bribery; Counts 17 and 18, extortion under color of official right; and Counts 23 through 33, "honest services" fraud) asserted against Senator Ross is alleged in language that largely tracks the language of the charging statutes at issue. Each count acquires its factual meat by incorporating the allegations contained in 178 earlier paragraphs (paragraphs 1 through 26 and 39 through 190) of the Indictment, most of which do not mention and have nothing to do with Senator Ross. (¶¶221, 223).

Eleventh Circuit cited approvingly the application of the *McCormick* explicit *quid pro quo* standard to campaign contributions prosecuted under the conspiracy, federal funds bribery, and honest services mail fraud statutes. *United States v. Siegelman*, 561 F.3d 1215, 1225 (11th Cir. 2009). The Eleventh Circuit's affirmance of defendants' convictions was vacated and remanded by the Supreme Court for further consideration in light of the Court's decision in *Skilling*. ___ U.S. ___, 130 S.Ct. 3542 (2010).

Other than one paragraph identifying him as an elected senator, the handful of paragraphs with factual allegations that do mention Senator Ross[5] focuses on an abbreviated history of his actions regarding "gambling legislation," an abbreviated history of his solicitation of campaign contributions from certain co-defendants, and an abbreviated history of his receipt of campaign contributions from certain co-defendants. Notably absent: any factual allegations showing any intent on Senator Ross' part to exchange his vote (or other support) on SB380 specifically or "pro-gambling legislation" generally for any such contribution, much less any **explicit** *quid pro quo*.

With respect to Senator Ross, the paragraphs incorporated in Counts Seventeen and Eighteen allege the following: Senator Ross "was serving his second term in the Alabama Senate" and "was a candidate for reelection in the 2010 Senate election cycle." (¶13).

As to certain actions he took regarding "gambling legislation," the incorporated paragraphs allege that in March 2009, Senator Ross introduced a bill in the Senate, Senate Bill 471 ("SB471"), "which proposed amendments to the Alabama Constitution authorizing the operation of electronic bingo at only specified locations in Alabama, including Macon County, home of Victoryland, and Houston County, home of Country Crossing, which was then under construction." (¶20). The bill, and a virtually identical bill introduced in the Alabama House of Representatives, were supported by the "Sweet Home Alabama Coalition," formed to "promote the passage of pro-gambling legislation

[5] Only 17 of the 178 incorporated paragraphs mention Senator Ross. (*See* ¶¶13, 20, 118-132) (mentioning Ross by name). All but 2 of them are listed as "Overt Acts" alleged in support of the conspiracy count, Count One. (¶¶118-132). The only statute the indictment alleges defendants conspired to violate is the federal program bribery statute,18 U.S.C. §§666(a)(1)(B) and 666(a)(2). (¶28).

that would be favorable to the business interests of individuals operating electronic bingo facilities, including [co-defendants] McGregor and Gilley." (¶¶19-20). Neither bill was put to a vote in either house of the Legislature in 2009. (¶20).

Senate Bill 380 ("SB380") was introduced in the Alabama Senate on February 4, 2010. (Senator Ross did not introduce it, and the indictment does not allege otherwise.) SB380 "proposed an amendment to the Alabama Constitution permitting the operation and taxation of electronic bingo in Alabama," and was supported by "McGregor, Gilley, and other operators of similar gambling enterprises." (¶22). On March 9, 2010, Senator Ross "introduced in the Senate a competing pro-gambling bill," which is not otherwise identified. (¶124). On March 30, 2010, "a revised SB380 passed in the Alabama Senate, receiving 21 votes, the minimum required to pass a constitutional amendment."[6] (¶24). Senator Ross "voted in favor of SB380." (¶130).

As to his soliciting and receiving contributions, the incorporated paragraphs note various contributions made to Senator Ross between September 17, 2009 and April 20, 2010 by a few of the co-defendants, one of which they made directly (¶120) and the others of which are attributed to them (particularly McGregor) as coming from political action committees (PACs) to which they (and often, if not always, others) contributed money.[7] (¶¶118, 121-123).

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[6] SB380 did not "pass a constitutional amendment," but rather proposed a constitutional amendment, and approved (at least with respect to the Senate) submitting the proposed amendment, to the "qualified electors" of the State of Alabama; if also approved by the House for submission to the electorate, the proposed amendment would become valid only "when approved by a majority of the qualified electors voting thereon." Senate Bill 380, § 1 (Reg. Sess. 2010). *see* Constitution of Alabama §284 (1901).

[7] The indictment charged as part of the conspiracy alleged in Count One that McGregor, Gilley, and lobbyists working for them "disguise[d] payments made to legislators from whom they sought support by concealing illicit payment through [PACs] and using

Those incorporated paragraphs also allege one conversation (cursorily) between Senator Ross and "Lobbyist A" (¶119), one conversation (very cursorily) between Senator Ross and co-defendant Jarrod Massey (¶125), and two conversations between Senator Ross and Mr. McGregor (¶¶128-129) in which Senator Ross solicited campaign contributions; as well as three conversations between co-defendants (not Senator Ross) in which those co-defendants discussed either having been solicited by Senator Ross for campaign contributions (¶¶126-127, 131) or making "additional campaign contributions (¶131).

More specifically, as to the conversations in which Senator Ross participated, the incorporated paragraphs allege that in late December 2009 or early January 2010, Ross called Lobbyist A and "demanded" "a campaign contribution from Massey and Gilley" of "approximately $5,000 or $10,000." (¶119). The indictment alleges Ross "stated that he believed that he deserved the campaign contribution" because of an act already taken in the past, i.e., "he had sponsored the pro-gambling legislation in the 2009 legislative session and that he was no longer 'feeling the love.'" (*Id.*) Further, "[I]n or about the middle of March 2010, one or two weeks prior to the vote on SB380, Ross called Massey to ask for an additional $25,000 in campaign contributions." (¶125)

The most extensive conversations in which Senator Ross participated as set out in the incorporated paragraphs occurred on March 29, 2010, "the day before the anticipated vote" on SB380, and March 30, "the day of the vote" on SB380. (¶¶128, 129).

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conduit contributors" (¶36), which the indictment nowhere defined. But, at all times material to the indictment, the practices of making individual and corporate contributions to PACs, and PACs accepting contributions from and making contributions to other PACs, were expressly permitted by Alabama's campaign finance laws, which governed all the contributions at issue in this case. *See* Code of Alabama §§17-5-2(a)(8) and (10), 17-5-7, 17-5-8, 17-5-14.

On March 29, 2010, Senator Ross called Mr. McGregor; asked McGregor whether "'You feel like you got the twenty-one [votes] in the Senate?,'" to which "McGregor responded that he was 'cautiously optimistic"; and Ross "later in the call … thanked McGregor for recent campaign contributions" and said he "actually [was] calling to see if I can get some more help.'" McGregor was at best non-committal ("'I don't even know where we are'") and at worst dismissive ("'I did my thing in December and [co-defendant Robert] Geddie's been doing his thing and other people since'") toward Senator Ross' request. [8] (¶128)

Then, on March 30, 2010, "the day of the vote … McGregor called Ross and told Ross that he could 'call on some folks' that he had 'relationships with to help' Ross. McGregor stated further that 'money is tight'" and "told Ross he would work with Geddie to secure additional contributions for Ross." Senator Ross told McGregor he "definitely appreciate[d] … whatever you can do and … what you've already done." Ross noted "'we're just getting down to the wire'" and "'you don't know until you ask, and so … you just make your calls.'" Senator Ross also stated, "we know the window is

[8] Paragraph 128 alleged in its entirety: "On or about March 29, 2010, the day before the anticipated vote on the pro-gambling bill, SB380, Ross called McGregor and asked, "You feel like you got the twenty-one [votes] in the Senate?" McGregor responded that he was 'cautiously optimistic.' Later in the call, Ross thanked McGregor for recent campaign contributions and said, 'I'm actually, uh, calling to see if I can get some more help.' In response, McGregor claimed: 'I don't even know where we are. I've, I've been so wrapped up and, uh, Geddie … he's been keeping up with everything.' After Ross continued to press the issue, claiming that campaign support 'would help [Ross] out tremendously,' McGregor stated, 'I did my thing in December and Geddie's been doing his thing and other people since.'"

closing on us fast and so I'm just trying to do everything I can to … make sure I can raise [funds] …,' to which "McGregor promised to help however he could."[9] (¶129).

As to the conversations between others to which Senator Ross was not a party, the incorporated paragraphs set out two conversations, "in about March 2010" and on March 14, 2010, in which others reported or complained that Senator Ross had asked for additional contributions after that party already had given him campaign contributions. (¶¶127-128). Then, on March 31, 2010, "following the successful vote on SB380," co-defendants Coker and McGregor "discussed additional campaign contributions for Ross." McGregor suggested Coker "say [some]thing to any other clients about helping Quinton [Ross]," to which Coker responded, "… I'm gonna give him … a good .. check from the .. medical association and from the soft drink folks." (¶131).

Conspicuously absent from either the conversations in which Senator Ross participated or the conversations other had regarding Senator Ross, is ***any*** discussion of a) Senator Ross' vote or even position on SB380 or other "pro-gambling legislation," b) any future official action by Senator Ross, c) any request that Senator Ross take any action, specific or otherwise, or d) Senator Ross' intentions regarding SB380 or other "pro-gambling legislation," much less e) even the whiff of any exchange (especially the

[9] The indictment asserts that "[a]t all relevant times, Ross ran unopposed in his reelection bid." (¶132). But, the deadline for candidates to qualify with political parties to participate in the primary election was just a few days after this reported conversation, on April 2, 1010. FCPA Filing Calendar – 2010 Election Cycle, http://www.sos.state.al.us/downloads/election/2010/2010-FCPA-Filing-Calendar.pdf , last accessed Feb. 2, 1011. Moreover, Alabama law contemplates and permits even candidates running unopposed raising campaign contributions. *See, e.g.,* Code of Alabama §17-5-8(a)(1) (reporting requirements apply to candidates running unopposed).

required explicit *quid pro quo*) of campaign (or other) contributions in return for his vote or other official action.[10]

Rather than merely tangential to the severance issues, the two areas discussed above bear on both the misjoinder and prejudicial joinder of Senator Ross and thus the basis for his entitlement to a separate trial.

The Indictment Alleges Multiple Conspiracies, Not Just One

First, some preliminary observations. Contrary to what the Government may claim (as it has in response to other motions filed by Senator Ross), Senator Ross' severance argument does ***not*** consist of a pretrial challenge to the sufficiency of the Government's anticipated evidence at trial. Senator Ross' severance arguments do rely on the specific facts (as opposed to the conclusory statements parroting statutory language) as alleged in the indictment as to Senator Ross and the other defendants.

And, certain general principles are undisputed: Charges and defendants joined in an indictment generally will be tried together; there is a preference for joint trial, especially in conspiracy cases; and a defendant does not have to know of "each phase of a conspiracy, all of its details, all of the conspirators, or the participants in each event" in order to be part of, and held criminally liable for conspiracy. *E.g., Pedrick*, 181 F.3d at 1272. Moreover, the ordinary justifications for joint trials are efficiency and judicial economy.

But, those principles do not decide and end the matter here. Both as to misjoinder and prejudicial joinder, the facts (or allegations) must be examined on a case-by-case,

[10] Senator Ross is not asserting a mere failure to allege "an explicit *quid pro quo*" in those words (although the indictment nowhere uses that non-statutory phrase), but instead that the ***facts*** alleged do not show or amount to the explicit *quid pro quo* required to push Senator Ross' conduct across the (ill-defined) line from lawful to unlawful.

individual defendant basis. *See, e.g., Castro*, 829 F.3d at 1044-45 (misjoinder); *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (prejudicial joinder) ("The risk of prejudice will vary with the facts in each case"). And, in this case both "efficiency" and fairness point in the same direction, because "efficiency" cannot be divorced from practicality. As the Fifth Circuit has said, "we are keenly aware that the claimed 'efficiency' of a joint trial can be a surrogate for the reality that a joint trial of multiple defendants is simply to the advantage of the government." *United States.v. Simmons*, 374 F.2d 313, 318 (5th Cir. 2004).

The indictment in this case charges, in a single count (Count 1), a sole, massive, overarching conspiracy to corrupt the Alabama ***Legislature***. *See, e.g.,*, Indictment at ¶29 ("It was a purpose of the conspiracy for McGregor and Gilley to corruptly provide and offer to provide payments and campaign contributions, among other things of value, to members and staff of the Alabama Legislature[.]")

The substance of Count 1 tells a different story. Instead of a single, massive conspiracy in which all alleged conspirators, named and unnamed, conspired together to corrupt the Alabama ***Legislature***, there are multiple, distinct conspiracies in which certain groupings of co-conspirators are alleged to have conspired together to corrupt certain individual Alabama ***Legislators*** and staff. To see this, the Court need look no further than the groupings, by individual defendant and the three cooperating witness legislators, of the overt acts in furtherance of the alleged conspiracy in Count 1. As these groupings evidence – particularly the lack of overlap or interrelationship among the acts, or especially many of the individual defendants – the alleged conduct charged actually consists of separate conspiracies.

If the indictment even arguably alleges an overall scheme, the best bet would be an agreement between co-defendants Milton McGregor and Ronald Gilley, in grossly oversimplified terms, to buy sufficient votes to pass what the indictment refers to as "pro-gambling legislation" in both houses of the Legislature (or at least the Senate, although the legislation – which actually would simply have put the issue of the regulation and taxation of electronic bingo, in the form of a constitutional amendment, to the Alabama electorate for a vote – would not even be put to a popular vote without the concurrence of three-fifths of both houses). The indictment further lumps all nine other defendants into -- and thus as knowingly joining and sharing -- that same, single, broad agreement.

As applied to Senator Ross, though, the indictment's facts show no interrelationship (no corrupt dealings, much less an agreement to pursue an unlawful objective) between Senator Ross and at least five of his alleged defendant co-conspirators (Larry Means, James Preuitt, Harri Anne Smith, Joseph Crosby, and Jarrell Walker). The facts reflect no joint dealing by Senator Ross with McGregor and Gilley together, nor any direct dealing by Senator Ross with Gilley at all (only allegedly indirectly, through defendant Jarrod Massey and "Lobbyist A").

The gravamen, and an essential element, of any conspiracy is an agreement to commit an unlawful act. *E.g., Chandler*, 388 F.3d at 805-06. "[T]he government must prove the existence of an ***agreement*** to achieve an unlawful objective and the defendant's ***knowing*** participation in that agreement." *Id.* at 806 (emphasis in original). "[P]roof of ***knowledge*** of the overall scheme is critical to a finding of conspiratorial intent." *Id.* (emphasis in original). "Proof of a true agreement is the only way to prevent individuals

who are not actually members of the group from being swept into the conspiratorial net." *Id.*

To show a single, overarching conspiracy, as opposed to several, similar, even broadly related conspiracies, there must be proof (or, at this stage, allegations) that the alleged conspirators shared the ***overarching common*** goal. And, with a wheel conspiracy as alleged here (where every co-conspirator are not alleged to have worked with all their co-conspirators), *see id.* at 807 (discussing the differences between "hub-and-spoke" and "rimless wheel" conspiracies), there must be proof (or, again at this stage, allegations) that each individual defendant knew of the existence of other participants (besides himself and the "hub" or key central conspirators) in such an overall scheme. *Id.* at 808.

Stated differently, assuming as true for this motion that Senator Ross agreed to accept a "bribe" or "bribes" (as opposed to lawful campaign contributions) from McGregor (whether directly, or indirectly through defendants Tom Coker or Bob Geddie) and separately from Gilley (indirectly through Massey and Lobbyist A), to show a single conspiracy the indictment still would need to allege (at minimum) that Senator Ross (1) ***knew*** of ***other*** legislators (such as Senators Means, Preuitt, and/or Smith) and/or legislative staff (such as Mr. Crosby) accepting bribes for the ***same overall*** purpose (of buying enough votes to pass the alleged "pro-gambling legislation"), *e.g., Fernandez*, 892 F.2d at 987; and then (2) ***agreed*** to the ***same overall*** purpose.[11] *E.g., Chandler*, 388 F.3d

[11] Analogous considerations apply to the "honest services" fraud charges, where Senator Ross is not expressly connected with the specific acts comprising any of the 11 such counts (and may be implicitly connected with at most 1 of those 11 counts), see Indictment, ¶¶235-236, but instead is connected only through his alleged "knowingly devis[ing] and intend[ing] to devise a scheme and artifice to defraud." *Id.* ¶234. As with

at 808; *see also, e.g., United States v. Ellis*, 709 .2d 688, 690 (11th Cir. 1983); *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978); *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977) (all reversing convictions upon finding no agreement to the overall conspiracy).

The indictment is devoid of any factual allegations showing that Senator Ross allegedly agreed to anything beyond a conspiracy for sale of his own vote (although actually showing only that he solicited and received lawful campaign contributions). It certainly does not allege facts showing any knowledge of, much less participation in, any broader scheme involving anyone else's votes. The facts as alleged reflect Senator Ross requested each contribution on his own behalf. There are no overt acts or other well-pleaded facts that show otherwise. We fully believe that the Government's evidence likewise will fail to show Senator Ross' knowledge of, much less participation in, any overall scheme. While ultimately whether that's true is obviously a matter for the jury, the likelihood of that outcome based on the indictment's allegations and the discovery to date[12] warrants not risking a joint trial of Senator Ross with all other defendants, based on the presence of multiple (and not just one conspiracy). *See, e.g., id.*

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the conspiracy count, there are no facts alleged that would show his knowledge of, much less his knowing participation in, any such overarching scheme to defraud. Accordingly, Senator Ross would be subjected in a joint trial to admission of at least 11 counts worth of acts of wire or mail fraud by ***other*** defendants for which the Government would seek to hold ***him*** criminally liable, but without any facts showing his knowledge of and joinder in the overall scheme.

[12] Senator Ross submitted under seal rough transcripts of all recorded conversations in which he participated, as Exhibits 23-31 in support of his motion to suppress filed February 15, 2011, including all conversations with McGregor noted in the indictment (and more). We adopt and incorporate by reference all such exhibits in support of this motion to sever.

A Joint Trial Would Cause Senator Ross "Compelling Prejudice"

The indictment's allegations show that a joint trial of Senator Ross with the other defendants would satisfy at least one, if not more, of the situations in which severance would be mandatory, so as to avoid prejudicial misjoinder. *E.g., United States v. Blankenship*, 382 F.3d 1110, 1122-25 (11th Cir. 2004). First , the likelihood of evidence inadmissible as to Senator Ross being offered as to his co-defendants in a joint trial is a virtual certainty in a multiple conspiracy situation. And, given the lack of a clear factual (and legal) dividing line between lawful and unlawful campaign contributions (which, as we've argued, causes severe Due Process fair notice and vagueness problems), there is a very real risk that limiting instructions would not prevent a jury from convicting Senator Ross (or another co-defendant) for ***lawful*** contributions where other defendants may be found to have received non-contribution benefits ***or*** received campaign contributions under an express *quid pro quo.*[13]

And, this is the paradigm case where the number of defendants (10), the number of counts (39), and charges with different standards of proof and culpability[14] will make it impossible for the jury to make a proper assessment of the guilt or innocence of each

[13] Senator Ross also notes that his legislative co-defendants all are alleged to have received or been offered amounts far in excess of the contributions received by Senator Ross: Means, $100,000 (Indictment, ¶76-79); Preuitt, $2 million (Indictment, ¶85); and Smith, at least $200,000 (¶148). That too increases the risk of "spillover prejudice" to Senator Ross, in addition to the evidence of crimes beyond the conspiracy alleged against him and thus inadmissible as to him.

[14] In addition to the rapidly changing law in this area, the Government contends (contrary to all the defendants) that the explicit quid pro quo standard does not apply outside the Hobbs Act, even as to campaign contributions. If so, the differing standards for proof – even apart from the differing standards that do apply as between campaign contributions and other types of alleged benefits, *see Evans, supra* – will make confusing instructions even more confusing, depending on which statute the jury is being instructed (and which the jury then attempts to apply to the evidence, for each statute, for each type of benefit, as to each of the 10 defendants).

defendant individually. For all these reasons, and those stated in the motion, severance, if not required, is well within and a wise exercise of this Court's discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 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 to the following:

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