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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR	)	
RONALD E. GILLEY	)	
THOMAS E. COKER	)	
ROBERT B. GEDDIE, JR.	)	
LARRY P. MEANS	)	
JAMES E. PREUITT	)	
QUINTON T. ROSS, JR.	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER, JR.	)	
JOSEPH R. CROSBY	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Defendants have filed Motions to Dismiss the counts in the indictment based either directly or through an allegation of conspiracy, under 18 U.S.C. § 1346 ("honest services"). Motions to Dismiss (Docs. #208, 411, 437, 442, 445, 450, 456, 460, 471, 474, 485 and 486). The court received briefing from both sides and for the reasons that follow, the undersigned RECOMMENDS that the Motions be DENIED.

I. DISCUSSION

Defendants raise two central points: (1) "that the term 'bribery' as that word is used in [*Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896 (2010)] to refer to the remaining 'solid core' or 'honest services' doctrine, does not encompass political contributions or in-kind political support," McGregor's Brief (Doc. #209) at 7, and (2) that personal payments

"cannot constitute 'honest services' bribes after *Skilling*, unless it is alleged and proven that the payment was made to influence a specific act." *Id*. at 13.

A. Whether 'honest services' bribery includes campaign contributions.

Defendants argue that following the Supreme Court's ruling in *Skilling*, the offering or giving of "campaign contributions, or in-kind campaign support, does not constitute a violation of 'honest services' law - not even if it is alleged that there was a connection between such contributions and some official action." McGregor's Brief (Doc. #209) at 3. Defendants correctly set forth that, after *Skilling*, only "bribes and kick-backs" prosecutions survived. *See id*. at 5-7; *see also, Skilling*, 130 S.Ct. at 2931. Defendants emphasize that the Supreme Court specified "that § 1346 criminalizes only the bribe-and-kickback core of the pre- *McNally* case law." *Id*. at 2931. Defendants argue that the bribery alleged in the Indictment, falls outside of the pre-*McNally* core and therefore did not survive the *Skilling* decision. Defendants also argue that the solid core cases only involved cases of "personal self-enrichment, not campaign contributions or political support." McGregor's Brief (Doc. #209) at 7. Defendants raise three primary reasons for the exclusion of campaign contributions from the core of honest services bribes : (1) pre-McNally history, as relied upon in *Skilling*; (2) due process concerns; and (3) First Amendment implications.

(1) Pre-McNally history

The Supreme Court determined to "salvage" the honest-services doctrine, rather than invalidate it in total, "by confining its scope to the core pre- *McNally* applications." *Skilling*,

130 S.Ct. at 2931. That core was defined as bribe-and-kickback cases. *Id*. Defendants argue that campaign contribution bribery cases do not fit within the *pre-McNally* core cases.

In narrowing the honest services doctrine, the Supreme Court invalidated prosecutions under § 1346 based on a conflict-of-interest theory. *Id.* at 2931-32. In narrowing § 1346 prosecutions to bribery cases, the court did not set forth a specific form in which the bribery-and-kickback scheme must appear, and nor could they since such schemes could appear in almost infinite forms and evolve over time. Simply because no campaign contribution bribery-kickback cases were specifically identified as a pre-*McNally* core case does not mean that all campaign contribution bribery cases would be invalid as being outside of the core. Rather, it is the bribery-and-kickback scheme that survives, not the precise form in which they took place pre-*McNally*. *See United States v. Lupton*, 620 F.3d 790, 804 (7th Cir. 2010) ("What supports Lupton's conviction is substantial evidence showing the existence, intent, and advancement of his scheme, not the precise means by which he planned to carry it out.").

The crux of *Skilling* was to eliminate non-bribery schemes from honest services prosecutions. The Government has alleged a bribery-and-kickback scheme in the Indictment in that money and things of value were given in exchange for passing favorable legislation. "By now, it is axiomatic that an indictment is sufficient if it '(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.'" *United*

States v. Woodruff, 296 F.3d 1041, 1046 (11th Cir. 2002) (quoting *United States v. Steele*, 178 F.3d 1230, 1233-34 (11th Cir.1999)). In analyzing the Indictment under these directives when considering the Motions to Dismiss, the Court finds that the Government has made factual allegations sufficient to charge Defendants. *See United States v. Sharpe*, 438 F.3d 1257, 1258 (11th Cir. 2006).

(2) Due Process

Defendants also raise due process concerns with the prosecution of a bribery scheme involving campaign contributions. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The void-for-vagueness doctrine embraces these requirements." *Skilling*, 130 S.Ct. at 2927-28. Following the void-for-vagueness doctrine, the Supreme Court construed, rather than invalidated, § 1346 to apply only to the bribery-and-kickback schemes. Because "honest-services decisions preceding *McNally* were not models of clarity or consistency[,]" cases outside of the core "would raise the due process concerns underlying the vagueness doctrine." *Id*. at 2929.

Defendants' contention is that, because this case is outside of the pre-*McNally* core, they were not given sufficient notice that their conduct would be subject to honest services prosecution. Certainly that would be true if this prosecution fell outside the core. However,

as stated above the Government alleges a bribery-and-kickback scheme and the Indictment is sufficient to on its face to make that charge. If at trial the Government proves a core bribery-and-kickback scheme, as they have alleged, then due process is not offended.

(3) First Amendment

Defendants argue that the making of political contributions is protected under the First Amendment and, thus, they cannot be prosecuted for such under § 1346. Defendant Gilley filed a separate Motion to Dismiss (Doc. #485) on this issue which the court will also address here.[1] Although the giving of a campaign contribution may be considered First Amendment activity, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976), "the First Amendment does not protect political contributions made in return for an explicit promise by the official to perform an official act." *United States v. Jackson*, 72 F.3d 1370, 1376 (9th Cir. 1995); *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."); *see* Gov.'s Resp. To Gilley's Motion (Doc. #604) at 1-2. In his Brief, McGregor cites the Supreme Court's recent decision in *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876 (2010), for the proposition that the Court has "emphasized and expanded the First

[1] Gilley moved for Dismissal, based on the First Amendment, of his honest services charges under 18 U.S.C. §§ 1341, 1343, and 1346, as well as the bribery charges pursuant to 18 U.S.C. § 666. The analysis of his claims as to the bribery and honest services charges is the same.

Amendment protections for political spending." McGregor Brief (Doc. #309) at 7. While this may be true, that case does not affect the court's analysis, because *Citizens United* dealt with independent expenditures and, "[u]nlike large campaign contributions, expenditures do 'not presently appear to pose dangers of real or apparent corruption.'" *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1071 (S.D. Cal. 2010) (quoting Buckley, 424 U.S. at 46.).

The Court of Appeals for the Eleventh Circuit has rejected a facial "overbreadth" challenge to this statute based on the First Amendment. *United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995) ("Assuming arguendo that certain marginal applications of section 1346 would impermissibly intrude on First Amendment rights, we hold that such potential problems with section 1346 are insubstantial when judged in relation to the statute's plainly legitimate sweep."). In evaluating this case as to these Defendants at this point in time, and utilizing the standards for determining motions to dismiss, the Court finds that the Government can sustain a bribery charge against Defendants without offending the First Amendment. If at trial the Government can show that there was a bribery scheme to deprive the citizenry of honest services, then Defendants' conduct, not their speech, will have been regulated by the statute.

(4) Personal Enrichment

Defendants also argue that campaign contributions fall outside of the definition of bribery because bribery is defined, in terms of the honest services statute, as involving

personal enrichment. *See* McGregor Brief (Doc. #209) at 9. Defendants cite this court to two Courts of Appeals' opinions wherein the courts distinguished between bribery and campaign contributions in describing illicit schemes, s*ee id*. at 8 (citing *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199-200 (2nd Cir. 2010) and *McComish v. Bennett*, 605 F.3d 720, 724 (9th Cir. 2010)), as well as to the Government's brief in *Skilling*, i*d*. at 9-10.

The Government contends the statutes incorporated by the Supreme Court in *Skilling* required payment of a thing of value, but that those statutes "recognize that a third-party payment is equally viable." Gov.'s Resp. (Doc. #237) at 6. The Government also points to two pre-*McNally* honest services cases in which the courts upheld convictions for bribery payments made through third party individuals. *Id*. at 7 (citing *United States v. Mandel*, 591 F.2d 1347, 1356 (jewelry for defendant's wife in addition to direct payments) and *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976) (rental payments for defendant's girlfriend)).

In *Skilling*, "[t]he Court did not resolve-or even discuss-whether a state law violation, economic harm, and/or private gain were necessary elements (though bribery and kickbacks by their nature involve gain to the defendant)." Sara Sun Beale, *TERM PAPER: An Honest Services Debate*, 8 Ohio St. J. Crim. L. 251, 252 (2010). However, the Court directed that the narrowing down of the honest-services doctrine would be guided by pre-*McNally* precedent and this court looks to that precedent to instruct. The Court in *Skilling* also described the development of the honest-services doctrine as follows:

> While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss.

130 S.Ct. at 2926. In the above quote, the Court speaks in terms of enrichment for the offender. The cases cited in *Skilling* as core cases also describe cases of personal enrichment. Indeed, even the two cases cited by the Government involved personal enrichment. In *Mandel*, the defendant, a former Governor of Maryland, was convicted for accepting bribes in exchange for lobbying to secure the passage of a bill that would benefit a Maryland horse racing track. The scheme involved "undisclosed financial and other benefits" to the former Governor. 591 f.2d at 1356 (benefits included clothes for himself, jewelry for his wife, and money from real estate deals). In *Brown*, the Court held that "the profits from the demolition contracts [in exchange for the rental agreement for brown's girlfriend] were intended to benefit Brown," and that "the rental payments [were] made for his benefit." 540 F.2d at 374-375.

The court agrees with Defendants that any honest-services bribery must involve a personal benefit to the "offender." *See Ryan v. United States*, --- F. Supp. 2d ---, 2010 WL 5495015 at *2 (N.D. Ill. Dec. 21, 2010) ("George Ryan, on the other hand, held statewide elected office, and as more fully described below, the conduct for which he was convicted-steering contracts, leases, and other governmental benefits in exchange for private gain-was well-recognized before his conviction as conduct that falls into the "solid core" of honest

services fraud. Such conduct was identified by the Court in Skilling as the proper target of § 1346."). Nevertheless, the court also agrees with the Government, as guided by the above referenced cases and *Skilling*, that the benefit would not have to be in the form of a direct payment of cash to the individual in question. Without retelling all the details of the Indictment, it alleges many things of value other than campaign contributions, including payments to opposition legislators to withdraw from races, promises of employment, purchases of vehicles, and appearances at political functions by music stars. Further, even the allegations of direct payments to campaigns do not necessarily preclude the Government from showing a personal benefit gained by a defendant. As the Government states in its brief, "[p]romised and realized contributions result in a direct benefit to the candidate, who can use the funds, at his or her discretion, for all manner of self-promotion in order to secure an election victory. The more contributions a candidate solicits, the less money he or she must personally contribute to his campaign." Gov.'s Resp. (Doc. # 237) at 10. While this might seem a bit unwieldy, the court cannot now say, prior to the presentation of evidence, that the Government would be incapable to showing personal benefit simply because the bribes were made indirectly and through campaign contributions. For the purposes for determining of resolving the motions to dismiss, the court finds the allegations in the Indictment to be sufficient.

B. Whether the indictment must allege the bribes were made with intent to influence a specific act.

Defendants argue that the Indictment must allege that the bribes were made with intent

to influence a specific act. The Government responds that *Skilling* endorses "stream- of-benefits" bribery, where a stream of benefits is given in exchange for favorable dealings. *See, e.g., United States v. Kemp*, 500 F.3d 257, 281 (3rd Cir. 2007). Although the defendants in *Kemp* were convicted under 18 U.S.C. § 201 for a stream-of-benefits bribery, the court finds it instructive that the Supreme Court in *Skilling* observed "[a] criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." 130 S.Ct. at 2934. Defendants direct this court to *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), for the proposition that it is "clear under § 201 that there is a bribe only if a payment is made with the specific intent to influence a specific, identifiable, and known act." However, the court agrees with the Government that the *Sun-Diamond* holding was distinguishing between § 201(b), 201(c), and § 666. *See United States v. McNair*, 605 F.3d 1152, 1190-91 (11th Cir. 2010). Further, the *Skilling* Court also cited to *Ganim*, where the court held that "bribery can be accomplished through an ongoing course of conduct, so long as evidence shows that the 'favors and gifts flowing to a public official [are] in exchange for a pattern of official actions favorable to the donor.'" 510 F.3d at 149 (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)).

The court takes these citations by the Court in *Skilling* as instructive about the core cases that survived. And, as long as prosecutions under the honest-services doctrines remain within the core there can be no vagueness or due process concerns. *See Skilling*, 130 S.Ct.

at 2929.

(C) Whether The Indictment must allege a Quid Pro Quo

In McGregor's and Coker's "Third Motions to Dismiss" (Docs. #450 & 486) and in Crosby's Motion (Doc. #456), Defendants argue that the failure to allege an explicit *quid pro quo* in the Indictment is fatal to these charges. The court discusses this issue in more detail in its Recommendation, filed contemporaneously, which addresses Gilley's Motion to Dismiss (Doc. #488). In short, this court agrees with its sister court that it "is not prepared to find that an honest services mail fraud charge alleging a bribery scheme requires identifying a quid pro quo as an element of the offense." *United States v. Nelson*, 2010 WL 4639236 at *2 (M.D. Fla. Nov. 8, 2010). Further, even were the court to assume that the *McCormick* (Hobbs Act), standard of pleading were required for the bribery charges in this case, it has been met through the allegations of the quid pro quo in the Indictment. "Put simply, [*Evans v. United States*, 504 U.S. 255 (1992)] instructed that by 'explicit,' *McCormick* did not mean express." *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994).

II. CONCLUSION

For the reasons stated above, the Magistrate Judge RECOMMENDS that the Motions to Dismiss (Docs. #208, 411, 437, 442, 445, 450, 456, 460, 471, 474, 485 and 486) be DENIED.

Further, it is

ORDERED that the parties are DIRECTED to file any objections to the said Recommendation **by April 18, 2011**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); *see also Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

DONE this 4th day of April, 2011.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE