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.	)	

DEFENDANT MILTON McGREGOR'S REPLY BRIEF IN SUPPORT OF SECOND MOTION TO DISMISS (REGARDING "HONEST SERVICES" CHARGES)

Milton McGregor respectfully submits this reply brief in support of his motion (Doc. 208) to dismiss all the "honest services" charges against him.

1. Campaign contributions cannot be prosecuted as "honest services" bribes after *Skilling*.

Though the Government contends that campaign contributions can be prosecuted as "bribes" under honest services law, the Government's reasoning is incorrect. At times, the Government's reasoning is merely circular, such as at p. 4 and note 3 of the Government's brief. There, the Government says that "all bribery and kickback schemes are punishable under § 1346 – without limitation," and that *Skilling* amounted to a "broad ratification of all bribery and kickback schemes" as honest services violations. But that begs the question: are campaign contributions "bribes" within the meaning of that term as explicated by the reasoning in *Skilling*? It is not a term used in the statute, after all. It is a term that the Supreme Court used, and it is therefore important to understand the

reasoning that led the Court to use that term, so that this Court can know how far the term goes. It is a question that does not answer itself. And it is a question that the Supreme Court did not squarely face, in all of its particulars, in *Skilling*. But the Supreme Court's *reasoning*, in the *Skilling* opinion, points to the correct answer. The prosecution of campaign contributions as "honest services" bribes is one of the aggressive prosecutor-driven expansions of "honest services" law that does not survive *Skilling*.

As Mr. McGregor showed in his opening brief, the crucial point in *Skilling*'s definition of the scope of "honest services" was the Court's review of the scope of the "core" of pre-*McNally* caselaw. However, the Government fights against the concept that "honest services" after *Skilling* is truly confined within the boundaries defined by the pre-*McNally* consensus "solid core." The Government prefers a vision in which all that *Skilling* did was to limit honest services to whatever can plausibly be squeezed within the new nonstatutory phrase "bribes or kickbacks" – with the boundaries of that category to be fought over, on a forward-going basis, without further reference to the pre-*McNally* core. According to the Government's view, the Supreme Court's invocation of the pre-*McNally* core is now just a historical footnote, one that has no continuing doctrinal importance now that *Skilling* is on the books.

The Government's theory would deprive *Skilling* of its legitimacy as judicial reasoning. What made it legitimate for the Supreme Court to save "honest services" rather than declaring it hopelessly vague, in *Skilling*, was an appeal to legislative intent. This allowed the Supreme Court to act within the reasonable judicial role of interpreting the statute based on what Congress intended – rather than doing something much more

questionable, something more along the lines of judicial re-writing of the legislation. So the Supreme Court understood that it was attempting to discern what Congress meant in 1988, when Congress enacted § 1346 in reaction to *McNally*. According to the Supreme Court, Congress meant to revive the "solid core" of pre-1987 consensus applications of pre-*McNally* "honest services" law. *Skilling*, 130 S.Ct. at 2930

So that is what "honest services" covers, after *Skilling*: an area of which the outer boundaries are defined by the consensus application of the core of pre-*McNally* caselaw. The Supreme Court was not re-writing the statute to say "bribery is covered, with the scope of that term 'bribery' to be determined according to post-*McNally* caselaw and future developments." The Supreme Court was interpreting the statute as a Congressional effort to resuscitate the pre-*McNally* solid core.

And within that pre-*McNally* core, campaign contributions were not prosecuted as "honest services" bribes. Mr. McGregor explained this at length in his opening brief. The Government does not claim that campaign contributions were prosecuted as "honest services" bribes, certainly not with such frequency and consensus application that they were part of the "core" of pre-*McNally* law. (The Government does claim, Brief p. 7, that payments to wives or girlfriends of corrupt officials were prosecuted as bribes before *McNally*. There is a large difference between those sorts of payments and campaign contributions, to say the least. As Mr. McGregor explained in his opening brief, campaign contributions are political speech, with First Amendment interests at stake. That is why the law has been careful in dealing with them, once prosecutors took the notion of calling campaign contributions "bribes.")

Moreover, the Government itself told the Supreme Court in *Skilling* what it thought had been the main thrust of pre-*McNally* law, what it thought "bribes and kickbacks" meant in that context; and in none of that discussion did the Government even hint that campaign contributions were ever contemplated as bribes. As shown in Mr. McGregor's opening brief, the Government cited dozens of pre-*McNally* cases representing the scope of pre-*McNally* bribery prosecutions, in its brief to the Supreme Court in *Skilling*. The Supreme Court cited and relied on that catalog. Not one of those cases involved a campaign contribution charged as a bribe. Furthermore, as also shown in Mr. McGregor's opening brief, the Government itself told the Supreme Court that pre-*McNally* cases were about "self-enrichment" schemes. Campaign contributions are simply not the same thing as self-enrichment.

Yet the Government now claims that since it has successfully prosecuted a few campaign-contribution cases over the years under *other* statutes (Hobbs Act extortion, and 18 U.S.C. § 201), such cases must also be susceptible to prosecution as "bribery" cases under post-*Skilling* "honest services" law. Again, this is where the Government misreads *Skilling*, and where the Government's argument would deprive the *Skilling* opinion of its legal legitimacy. The Government wants to treat "bribery" as the new term, with definitions to be supplied as we go along rather than being defined by reference to pre-*McNally* caselaw.

The Government is relying primarily (Brief, p. 5) on the fact that the Supreme Court made mention of some other statutes – including § 666 and § 201 – in one passage of its *Skilling* opinion. This came *after* the Court had already pared down "honest

services" to its pre-*McNally* solid core, in Section III(B)(1)-(3) of the Court's opinion. *Skilling*, 130 S.Ct. at 2928-2933. Only after doing that, did the Court write the passage on which the Government so heavily relies. That passage was a bolstering of the Court's view that the honest services doctrine, once it had been limited to the pre-*McNally* core as it had been on the preceding pages of the opinion, would not be unconstitutionally vague. And that is the context in which, and the purpose for which, the Court cited those other statutes. *Id.* at 2933-34.

The Court was not saying that the boundaries of "bribery" under "honest services" were every bit as wide as the boundaries of what could be prosecuted on a bribery-type theory under those other statutes (whatever those boundaries might ultimately be). The Court was not saying that the Congress had those other statutes or any other statutes in mind, as part of its intent about what it was resuscitating after *McNally* when enacting § 1346. The Court was saying only that, after the boundaries or borders of honest services law had already been marked off by reference to the pre-*McNally* core, the definitions and elements within those other statutes could provide additional notice about what exactly the elements of the crime were, within the boundaries or borders that had already been marked off.

But the Government hopes to leap much farther, using this discussion for the purpose of *expanding* "honest services" beyond any pre-*McNally* consensus application. For instance, the Government relies on *Evans v. United States*, 504 U.S. 255,112 S.Ct. 1881 (1992), and *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991). The Government's reliance on *Evans* and *McCormick* is incomprehensible under the

reasoning of *Skilling*. Those cases were not decided until years after the Congress enacted § 1346 in reaction to *McNally*. Those cases could not have been on Congress's mind, as any part of a supposed legislative intent to encompass campaign-contribution cases within "honest services" law.

The Government also claims that the Supreme Court in *Skilling* ratified the application of "honest services" to campaign-contributions cases, merely by citing to *United States v. Whitfield*, 590 F.3d 325, 352-353 (5th Cir. 2009). *See Skilling*, 130 S.Ct. at 2934. The Government is reading far too much into that single unadorned citation. The Supreme Court was citing *Whitfield* not to say that the Court had reviewed the substantive holding of *Whitfield* and thought *Whitfield* to be correct in its relatively brief treatment of the "honest services" ramifications of campaign contributions. The Supreme Court was citing *Whitfield* for a very different reason, which the Court itself stated. The Court had just stated that the language of other statutes helped give due-process notice of the elements of bribery for those "honest services" cases that are covered within the pre-*McNally* core. *Skilling*, 130 S.Ct. at 2933-34. The Supreme Court was not looking to caselaw that had developed under other statutes, or directing that the future scope of "honest services" law should be guided by that caselaw in all respects. The scope or outer boundaries of "honest services" were already set, by the pre-*McNally* caselaw core. To the extent the *elements* within that scope required further elucidation, other statutes could help. The Supreme Court merely cited *Whitfield* because *Whitfield* had used another statute in that way. The Supreme Court certainly did not say that *Whitfield* got everything right in every other respect (such as its brief discussion of the law of

campaign contributions).

The Government also cites *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009), *vacated*, 130 S.Ct. 3542 (2010) as a case in which campaign contributions were prosecuted under § 666 and "honest services." That case is now back in the Eleventh Circuit, having been vacated and remanded by the Supreme Court for further consideration in light of *Skilling*. Governor Siegelman has raised, in that case, arguments much like those raised herein about campaign contributions and "honest services." It may be useful for the Court to note that the Eleventh Circuit has recently set the case for a second oral argument on January 19, 2011. Therefore one cannot anticipate with any certainty that the Eleventh Circuit will issue a ruling in that case before the presently-set trial date in this case. Mr. McGregor respectfully submits that this Court should not wait on a ruling from the Eleventh Circuit in that case, before dismissing the "honest services" charges based on the arguments made herein.

It is interesting to note one particular point brought up by the Government's citation to *Siegelman*, because it is powerful evidence of the Government's tactics and its approach to the law. In this case – because it is useful to the way the Government seeks to argue against this motion – the Government argues affirmatively that *Skilling* incorporated the *McCormick v. United States* Hobbs Act "explicit *quid pro quo*" standard for campaign-contribution "honest services" cases. (Brief, p. 10 n. 6 ("That *Skilling* incorporated this heightened showing for campaign contribution bribe payments blunts defendant McGregor's claim that applying § 1346 in this context somehow impermissibly would implicate First Amendment concerns.")). In *Siegelman*, by

contrast, the Government has still notably refused even to agree that the *McCormick* standard applies to "honest services" or to § 666 cases involving campaign contributions; it has denied even that any Court of Appeals has applied the *McCormick* "explicit *quid pro quo*" standard to "honest services" campaign contribution cases; and it has denied that *Skilling* resolves that question. *See* Supplemental Brief for the United States on Remand from the Supreme Court, filed August 31, 2010, at pp. 21-24. Apparently the Government argues whichever side of a legal issue seems most convenient to an immediate victory in any particular case, regardless of what it has argued in other cases pending at the same time. This Court should reject those tactics, with an appropriately restrained reading of "honest services" law.

2. The Government also errs in its discussion of non-campaign-contribution "honest services" law.

In his opening brief, Mr. McGregor also addressed the requirements of "honest services" in regard to payments that are not campaign contributions or campaign support. The brief showed that, as with the discussion about campaign contributions, the question concerns the meaning of the non-statutory words "bribe" or "bribery" as the Supreme Court used them in *Skilling*. Again, as we have stated above, those words are not self-defining. Among the questions that arise, in any attempt to define them, is whether there must be proof that a payment was made with intent to influence or reward a specific, identifiable act.

The Government, in response to the motion, does not assert that Mr. McGregor had that sort of intent. The Government does not commit itself to proving any such thing.

The Government's theory is that "bribery" as used in *Skilling* has a looser definition.

Even the Government's theory, as stated in its brief, has a central ambiguity. Is the Government admitting that it must at least prove that there was a fixed intent to exchange a particular *series* of payments for a particular *series* of acts? At some points, it seems so. *See, e.g.*, Government Brief p. 12, *citing United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (suggesting that a situation involving "these for these" is just as bad as "this for that.") But at other points, the Government seeks to give itself a much looser and easier-to-meet standard, a sort of "retainer" theory – according to which a payment is a "bribe" if it is meant to gain generalized influence to be held in reserve in case it might be useful someday.

One can imagine laws being drafted to fit within any of these various standards (including the various, and varying, standards that the Government itself seems to rely on in turn). There could be policy-based reasons why a legislature might well choose one or another. A legislature could write a law requiring prosecutorial proof of intent to influence a specific act. A legislature could write a law requiring prosecutorial proof of intent to influence any one or more of specific series of acts. Or a legislature could write a law requiring only proof of intent to generate influence to be held in reserve for unknown future occasions in which it might prove useful. The problem is that it is still being debated which of those standards applies under "honest services" after *Skilling*, and there is no clarity at all.

As support for its internally-variable theory, the Government relies almost exclusively on cases that were decided between *McNally* and *Skilling*. But here again,

the Government has missed the statutory-interpretation holding of *Skilling*. The Supreme Court inferred that Congress meant to resuscitate the core consensus of pre-*McNally* law. Congress did not somehow predict, and ratify in advance, what courts would do *after McNally*. And the Government has also missed the point that the very essence of *Skilling* is that some lower courts were often taking "honest services" too far, in that 20-plus-year span from *McNally* to *Skilling*. If the reasoning of *Skilling* is to be taken seriously, it must be accepted (as we have noted above) that "bribery" means only the consensus core from the pre-*McNally* era, based on an attribution of Congressional intent to revive that pre-*McNally* consensus core. That is the fundamental meaning of *Skilling*.

The Government cites to only one single pre-*McNally* "honest services" case as endorsing the Government's so-called "stream of influence" theory of bribery. (Brief, p. 12, citing *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984)). This is one of those too-frequent and unfortunate instances in which the Government cites a case for its fact pattern and then argues that the case thereby establishes a legal principle covering that fact pattern. True enough, *Gorny* involved an "honest services" charge and the prosecution's theory was that there did not need to be proof of intent to influence a specific act; and true enough, the conviction was upheld. But this does not mean that the case stands as a legal matter for the proposition that the Government's "stream of benefits" theory is the right interpretation of "honest services" law – because this point of law was not one of the things that was disputed in the case. (In fact, the Court even noted that it wasn't disputed; the Court quoted the relevant jury instruction and pointed out that the defendant had not objected. *Gorny*, 732 F.2d at 600. Gorny argued that the

payments were gifts, or not intended to influence him – rather than arguing about what type of intent to influence, exactly, made out the crime. *Id.*) This is the sort of incorrect legal argument that the Government often makes: it claims that every affirmance is precedent against every argument that *could have been* raised on the facts of the case. In reality, cases are precedent on the issues that are argued and addressed, not on legal issues that are not argued or addressed.

The Government also claims (Brief, p. 12) that the Supreme Court in *Skilling* "fully endorsed" some of the post-*McNally* caselaw that it cites, including those cases' discussion of the so-called "stream of benefits" theory. But this is a significant overstatement by the Government. As we have explained above regarding *Whitfield* (which is one of the cases cited), the Supreme Court pointed towards that caselaw, in its discussion of how statutes other than § 1346 could bolster the fair notice that due process requires, about the elements of the crime within the boundaries set by the pre-*McNally* core. *Skilling*, 130 S.Ct. at 2934. The Court therefore pointed towards three cases that had used references to other statutes to develop the elements of "honest services" law. This certainly does not mean that the Supreme Court reviewed and affirmed every holding of those cases; that is not the way the Supreme Court works. The better interpretation is that the Supreme Court was merely endorsing the method in general terms – the looking at other statutes such as § 201 and § 666, to further elucidate the particular elements that are required for proof of "bribery" in the pre-*McNally* core sense – and not necessarily endorsing the results in any particular case.

Unfortunately, as Mr. McGregor showed in his opening brief, this method itself

leads to more confusion and disarray than the Supreme Court may have realized, given the lack of clarity about the standards that apply to "bribery" cases under § 666 and § 201. Mr. McGregor noted in his opening brief, for instance, that § 201 (unlike some conceivable ways of writing a bribery statute) requires proof of intent to influence a specific act. But the Government – rather heatedly – says that this is a misreading of *United States v. Sun-Diamond Growers*, 526 U.S. 398, 119 S.Ct. 1402 (1999). The Government insists that under *Sun-Diamond* only a "gratuity" charge under § 201(c) requires proof of a connection to a specific act – but the Government says that a "bribery" charge under § 201(b) does not. After enough experience in this sort of case, one should learn never to be surprised at the Government's efforts to read its Supreme Court losses narrowly and its prosecutorial power broadly. This is that sort of argument.

The Supreme Court in *Sun-Diamond* held that a gratuity charge under § 201 requires proof of the statutory connection to a specific official act. The first and foremost reason for that holding – a reason which was then supplemented by other follow-up rationales as well – was based firmly in a particular phrase in the language of the statute. The "gratuity" section, 201(c), requires proof of a thing given "for or because of any official act performed or to be performed by such public official." *Sun-Diamond*, 526 U.S. at 404, 119 S.Ct. at 1406. The Supreme Court focused its attention especially on that phrase "any official act." The Court noted that the Government's theory was that the gift did not have to be tied into anything in particular; the Court said that this could not be squared with the statutory focus on "any official act."

> In our view, [the Government's] interpretation does not fit comfortably

> with the statutory text, which prohibits only gratuities given or received "for or because of *any official act* performed or to be performed" (emphasis added). It seems to us that this means "for or because of some particular official act of whatever identity" -- just as the question "Do you like any composer?" normally means "Do you like some particular composer?" It is linguistically possible, of course, for the phrase to mean "for or because of official acts in general, without specification as to which one" -- just as the question "Do you like any composer?" could mean "Do you like all composers, no matter what their names or music?" But the former seems to us the more natural meaning, especially given the complex structure of the provision before us here. ... The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.

Sun-Diamond, 526 U.S. at 406, 119 S.Ct. at 1407 (underlining emphasis added).

So yes, *Sun-Diamond*'s immediate holding about the necessity of proof of a specific act, when viewed most narrowly, was about the "gratuity" part of § 201. One would have hoped that everyone would immediately agree that the same principle was applicable also to the "bribery" part of § 201, i.e., § 201(b), because § 201(b)(1) *also* requires proof of a connection to "any official act," just as the "gratuity" part does. That was the crucial phrase that drove the Supreme Court's decision as to § 201(c), and it appears in § 201(b)(1) as well. The difference between them is in what *type* of intended connection must be shown, between the payment and the "official act." *See Sun-Diamond*, 526 U.S. at 404-05, 119 S.Ct. at 1406 ("The distinguishing feature of each crime is its intent element. Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid pro quo* -- a specific intent to give or receive something of value in exchange for an official act.").

In fact, in *Sun-Diamond* the trial court had correctly agreed that proof of a connection to a specific act is required for bribery, even while wrongly holding that such proof is not required for gratuity. That is the error that the Supreme Court straightened out. "The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*. The point in controversy here is that the instructions went on to suggest that § 201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act." *Sun-Diamond*, 526 U.S. at 405, 129 S.Ct. at 1406.

That is enough for now about § 201. We now know that we have a dispute about what that statute means, too, but there are no charges in this case under that statute. The relevant point in Mr. McGregor's opening brief had been that, by referring to § 201 as guidance for the definition of "bribery" for "honest services" purposes, some clarity could be gleaned from *Sun-Diamond*. But the Government is insistent on fighting any clarity. The Government has a theory that the phrase "any official act" doesn't mean the same thing in § 201(b) that it means in § 201(c). So the Court is left, apparently, without *any* agreed guidance from any source about what "bribery" means in the honest services context. Does it require a connection to a specific known act, or a specific known series of acts, or to nothing known at all? Everyone is left simply to wonder, with a statute (§ 1346) that gives not the slightest textual clue.

In short, the attempt to use "honest services" law as a meaningful "bribery" law is still a very troublesome project after *Skilling*. It involves a Congress that has not been willing or able to say what the boundaries of the crime are, under a statute (§ 1346) that

does not define "bribery" (and that, for that matter, does not even use the word or any similar term). It involves an Executive Branch that always seeks the most expansive reading of the law and that trusts itself to use that expanded power wisely. That is not the way our criminal law is supposed to work. That is the main point of *Skilling*, in the end. The judiciary's role in this should be to insist on true legal clarity, in advance, before people may be prosecuted. Until and unless Congress acts, the word "bribery" under post-*Skilling* "honest services" law should be taken in its narrowest sense, among the many conceivable definitions of the term. That is especially important in a case like this one, which implicates federalism and First Amendment concerns.

For these reasons and the reasons explained in Mr. McGregor's opening brief, the Court should dismiss the "honest services" charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2010, 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