UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

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

QUINTON T. ROSS, JR.'S NOTICE OF APPEAL OF THE MAGISTRATE JUDGE'S RECOMMENDATION CONCERNING MOTION TO DISMISS REGARDING HOBBS ACT CHARGES (18 U.S.C. §§ 1951 and 2)

Quinton T. Ross, Jr., pursuant to Fed. R. Crim. P 59, hereby appeals to the District Court the Recommendation of the Magistrate Judge regarding Mr. Ross' motion to dismiss the charges against him under the Hobbs Act, 18 U.S.C. §§ 1951 and 2, Counts Seventeen and Eighteen in the indictment. Recommendation (doc. no. 864, filed April 4, 2011); Motion to Dismiss Regarding Hobbs Act Charges (doc. no. 469, filed Feb. 4, 2011). Mr. Ross herein specifically renews his motion to dismiss that was addressed by such Recommendation, as well as his supporting brief (doc. no. 470, filed Feb. 4, 2011). The Magistrate Judge's Recommendation is contrary to law in numerous respects, as set forth in the specific objections set out below.

I. Standard of Review

With respect to "dispositive matters" -- i.e., "any matter that may dispose of a charge or defense," specifically including a defendant's motion to dismiss. Fed. R. Crim. P. 59(b)(1) -- that a district judge refers to a magistrate judge for recommendation, Rule 59 of the Federal Rules of Criminal Procedure provides in pertinent part that "[t]he district judge must consider *de novo* any objection to the

magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, ... or resubmit the matter to the magistrate judge with instructions."[1] Fed. R. Crim. P. 59(b)(3).

II. Objections and Argument

A. Introduction and Summary

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 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)

[1] Given that this motion to dismiss raises only legal issues, Rule 59(b)(3)'s proviso that the district judge may "receive further evidence" would not apply.

(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 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).

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[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.

[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

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 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, 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.

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.

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.

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.*** The Government's failure to allege conduct by Senator Ross that is criminal as defined by 18 U.S.C. §§1951 and 2 requires dismissal of the charges against him brought under the Hobbs Act.

The Magistrate Judge has recommended that Senator Ross' motion to dismiss the Hobbs Act charges against him be denied. But, for these and other reasons explained at more length below, the Court should reject the recommendation of the Magistrate Judge, and dismiss Counts Seventeen and Eighteen, all the Hobbs Act charges, as to Senator Ross.

B. Specific Objections

1. In applying the standards for sufficiency of an indictment so as to decline to dismiss the Hobbs Act charges, the Magistrate Judge failed to apply, or to apply properly, the requirement that the indictment must allege conduct that is illegal. Recommendation (doc. no. 864), at 2; *see* Brief in Support of Motion to Dismiss (doc. no. 470), at 12-13 (stating argument).

Even when construed in a common-sense way, the indictment must charge a crime as to the particular offense, i.e., it must be "legally sufficient to charge an offense." *E.g., United States v. Pendergraft*, 297 F.3d 1198, 1205

(11th Cir. 2002); *see also, e.g., United States v. Bobo*, 344 F.3d at 1076,1083-85 (11th Cir. 2003). "An indictment that requires speculation on a fundamental part of the charge is insufficient." *Bobo*, 344 F.3d at 1084.

The indictment fails to state an offense under 18 U.S.C. §§ 1951 and 2. Counts Seventeen and Eighteen (including the incorporated paragraphs) lack any allegation of an essential element of an "extortion under color of official right" charge involving an elected official's receipt of a campaign contribution, i.e., an explicit *quid pro quo* linking any contribution Senator Ross received with his specific official action, as necessary to distinguish prohibited criminal activity under the Hobbs Act from legitimate campaign fundraising. Nor do those counts (including the incorporated paragraphs) include well-pleaded factual allegations sufficient to show such an explicit *quid pro quo*. And, to construe the Act as requiring something less than an explicit quid pro quo, or to construe the factual allegations of those counts as sufficient to allege such a quid pro quo, would run afoul of First Amendment and constitutional due process requirements and the rule of lenity. The absence of this essential element, and the absence of the requisite shared intent for aiding and abetting, requires dismissal of these charges.

2. The Magistrate Judge erred in applying the lessened quid pro quo standard of *Evans v. United States*, instead of the explicit quid pro quo standard of *McCormick v. United States*, to charges based on solicitation and receipt of pure campaign contributions only.

Viewing *Evans* as modifying *McCormick*'s explicit *quid pro quo* standard – which, as noted above, allows conviction based on the receipt of campaign contributions "only if 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 -- *in the campaign contributions context*, the Magistrate Judge deemed the quid pro quo standard satisfied under *Evans* if Senator Ross is alleged to "'merely know[] the payment was made in return for official acts.'" Recommendation (doc. no. 864), at 4 (quoting *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994)).

The Magistrate Judge's conclusion rests on several errors. First, contrary to the Government's argument (doc. no. 606, at 8), the Magistrate Judge's conclusion (doc. no. 864, at 5), and some of the cases that the Government cites (doc. no. 606, at 7-8) and on which the Magistrate Judge apparently relies (doc. no. 864, at 4)[4], *Evans*, properly understood, did ***not*** involve a conviction based on campaign contributions.[5] Neither through the question presented and decided nor otherwise did the Supreme Court in *Evans* purport to modify *McCormick*'s standard in a campaign contribution context. Accordingly, *McCormick*'s explicit

[4] Specifically including *Blandford, see* 33 F.3d at 696 ("Our reading of Evans – as limited to the campaign contribution context – is bolstered by the fact that the case, after all , involved campaign contributions.").

[5] Defendant Evans received $7,000 in cash, which he did not report as a campaign contribution or as income on his federal income tax return; and a check, payable to his campaign, for $1,000, which he did report as a campaign contribution. The Court viewed the jury as rejecting Evans' claim that the $7,000 in cash was a campaign contribution, and instead finding that Evans received the cash knowing it was intended to ensure his favorable vote on a rezoning application and his efforts to persuade his fellow commissioners to vote likewise. 504 U.S. at 257. The Court granted review to decide "whether an affirmative act of inducement by a public official, such as a demand, is an element" of extortion under color of official right. *Id.* at 256. Nowhere else in the Court's opinion or analysis does it refer to the case as involving campaign contributions, or as turning on any such characterization, in any way.

quid pro quo standard does control in the pure campaign contribution case against Senator Ross.

Perhaps more important than whether *Evans* is properly viewed as not modifying *McCormick*, is that a controlling court here – the Eleventh Circuit – requires application of the *McCormick* standard in a Hobbs Act prosecution based on campaign contributions. The law is clear in this Circuit that *McCormick's* explicit *quid pro quo* standard – i.e., that criminal liability for receipt of contributions is made out "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," 500 U.S. at 272 – governs prosecutions based on campaign contributions.[6] *E.g., United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992), *reh'g granted & modified o.g.*, 30 F.3d 108 (11th Cir. 1994). "A contrary conclusion .. would have

[6] Even *Blandford*, one of two cases specifically cited on this point by the Magistrate Judge, recognizes that as the Eleventh Circuit's position on the issue. 33 F.3d at 695 (citing *Martinez*). The Magistrate Judge errs in relying on *Blandford* in several ways: As a Sixth Circuit case, *Blandford* is not binding on this Court. Moreover, unlike the charges against Senator Ross, *Blandford* did not involve a prosecution based on pure campaign contributions. More important, *Blandford* 's interpretation of the *quid pro quo* standard in the campaign contribution context – suggesting that "merely knowing the payment was made in return for official acts [as opposed to the "explicit promise or undertaking" required by the Supreme Court in *McCormick*] is enough," 33 F.3d at 696, Recommendation (doc. no. 864), at 4 -- is no longer accepted even in the Sixth Circuit. In *United States v. Abbey*, that court clarified that where prosecution for extortion is brought based on a campaign contribution, proof of "'an explicit promise or undertaking by the official to perform or not an official act'" is required for conviction. 560 F.3d 513, 517, 518 (6th Cir. 2009) (quoting *McCormick*, 500 U.S. at 273). And last, but not least, Blandford's interpretation conflicts with controlling precedent in this Circuit.

The other case specifically cited by the Magistrate Judge to contrary effect, *United States v. Inzunza,,*580 F.3d 894 (9th Cir. 2009), actually supports Senator Ross' position that an explicit *quid pro quo* is required. Quoting and following *McCormick*, the Ninth Circuit in *Inzunza* interprets the explicit quid pro quo standard as requiring an explicit promise of official action to support criminal liability based on receipt of campaign contributions. 580 F.3d at 900-01.

the effect of criminalizing conduct traditionally within the law and unavoidable under this country's present system of elected politics." *Martinez*, 14 F.3d at 553.[7]

In addition, the Magistrate Judge has it backward regarding the relationship between the constitutional concerns and the explicit quid pro quo standard that governs prosecution involving campaign contributions. The clearly-implied First Amendment values and explicit fair notice Due Process interest are not *additional* or secondary concerns, Recommendation (doc. no. 864), at 3, 5, but instead the underpinnings that *require*, in the campaign contribution context, imposition of the explicit *quid pro quo* standard for liability.[8] *See McCormick*, 500 U.S. at 272-73.

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.*** The Government's failure to allege conduct by Senator Ross that is criminal as defined by § 1951 requires dismissal of the

[7] *See also, e.g., Davis*, 967 F.2d at 521 ("Indeed, the fear that routine political service to constituents could be the basis for convictions under the Hobbs Act when linked to campaign contributions appeared to be a major concern of the Court in reversing the decision of the Fourth Circuit.").

[8] The proposition that "First Amendment protection does not extend to illegal conduct," Recommendation (doc. no. 864), at 5, while not disputed, merely begs – rather than answering – the question of "what is illegal." Under McCormick, the First Amendment and Due Process concerns as embodied in the explicit *quid pro quo* standard are what define the line between lawful and unlawful campaign contributions.

"extortion under color of official right" charges against him premised on that statute.

3. In applying the incorrect, lessened *quid pro quo* standard of *Evans*, the Magistrate Judge likewise incorrectly found the indictment satisfactorily alleged the required *quid pro quo*. Recommendation (Doc. no. 864), at 3-5; *see* Brief in Support of Motion to Dismiss (doc. no. 470), at 13-21 (stating argument).

4. By applying the incorrect, lessened *quid pro quo* standard of *Evans*, the Magistrate Judge incorrectly found the indictment satisfactorily charged Senator Ross with extortion under color of official right. Recommendation (Doc. no. 864), at 3-5; *see* Brief in Support of Motion to Dismiss (doc. no. 470), at 13-21 (stating argument).

5. Had the Magistrate Judge applied the proper, explicit quid pro quo standard, he would have found the indictment fails to charge Senator Ross with extortion under color of official right. Recommendation (Doc. no. 864), at 3-5; *see* Brief in Support of Motion to Dismiss (doc. no. 470), at 13-21 (stating argument).

Contrary to the Magistrate Judge's finding, Recommendation (doc. no. 864), at 5, the indictment fails to allege the required *quid pro quo*. Although an explicit *quid pro quo* is an element of the offense that must be alleged, *e.g., Inzunza*, 580 F.3d at 906, Mr. Ross does not rely on the indictment's mere failure to say the "magic words," but more particularly its failure to allege facts that would show or support the existence of an explicit *quid pro quo*.

The absence of the required explicit *quid pro quo* – and the result that the indictment thus alleges only lawful, and not unlawful, conduct on Mr. Ross' part – is perhaps best shown by first providing a detailed summary of the indictment's allegations as they relate to Ross.

As relevant to the charges that Senator Ross violated the Hobbs Act and/or aided and abetted violation(s) of the Hobbs Act, the indictment alleges the following:

A. Allegations Set Out in Counts Seventeen and Eighteen

Counts Seventeen and Eighteen state the Hobbs Act charges against Senator Ross in general terms. Both counts assert that Senator Ross, "aided and abetted by others known and unknown to the Grand Jury, did knowingly attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined by" 18 U.S.C. §1951. (Indictment, ¶¶222, 224).

Both counts themselves state only minimal factual detail regarding the charges against Senator Ross. Count Seventeen alleges only that "in or about March 2010," Senator Ross, "while serving as a member of the Alabama Senate, engaged in a course of conduct, whereby Ross solicited and, directly and through others[9], pressured [co-defendants Milton] McGregor and [Thomas] Coker, under the color of official right, to consent to provide an unspecified amount of campaign contributions for the benefit of Ross, which money was not due to Ross." (¶222). The allegations in Count Eighteen differ only in that the

[9] Nowhere in the indictment are "others" identified through whom Senator Ross allegedly "pressured" anyone named in counts 17 and 18 (or elsewhere).

time period is identified as "in or about December 2009 through in or about March 2010"; the persons Senator Ross "solicited and … pressured" for campaign contributions are identified as co-defendants Ronald Gilley and Jarrod Massey and "Lobbyist A"; and the amount Senator Ross "solicited and … pressured" them "to consent to provide" is "approximately $25,000 in campaign contributions." (¶224).

B. Allegations Set Forth in the Incorporated Paragraphs

In an apparent effort to support these sparsely alleged charges with factual detail, the Indictment incorporates in both counts 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).

Other than one paragraph identifying him as an elected senator, the handful of paragraphs with factual allegations that do mention Senator Ross[10] 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*.

[10] 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).

C. Allegations Incorporated by Reference in Counts Seventeen and Eighteen

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 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."[11] (¶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.[12] (¶¶118, 121-123).

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

[11] 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).

[12] 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 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.

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).

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. [13] (¶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 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."[14] (¶129).

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[13] 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.'"

[14] 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).

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

Counts Seventeen and Eighteen (including the incorporated paragraphs) lack any allegation of an essential element of an "extortion under color of official right" charge involving an elected official's receipt of a campaign contribution, i.e., an explicit *quid pro quo* linking any contribution Senator Ross received with his specific official action, as necessary to distinguish prohibited criminal activity

under the Hobbs Act from legitimate campaign fundraising. Nor do those counts (including the incorporated paragraphs) include factual allegations sufficient to show such an explicit *quid pro quo*. And, to construe the Act as requiring something less than an explicit quid pro quo, or to construe the factual allegations of those counts as sufficient to allege such a quid pro quo, would run afoul of First Amendment and constitutional due process requirements and the rule of lenity. The absence of this essential element, and the absence of the requisite shared intent for aiding and abetting, requires dismissal of these charges.

With respect to the indictment's failure to allege an offense against Senator Ross for extortion under color of official right, "[t]he Hobbs Act imposes criminal sanctions on those who affect interstate commerce by extortion." *Pendergraft*, 297 F.3d at 1205; *see* 18 U.S.C. §1951(a). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951(b)(2). Counts Seventeen and Eighteen of the Indictment allege Senator Ross committed extortion "under color of official right," and aided and abetted extortion under color of official right.

As noted above, In *McCormick* the Supreme Court considered when, if ever, an elected public official's acceptance of a campaign contribution can be prosecuted as extortion of property under color of official right in violation of the Hobbs Act. 500 U.S. at 259; *see id* at 267 n. 5 (also noting "[w]e do address … the issue of what proof is necessary to show that the receipt of a campaign

contribution by an elected official is violative of the Hobbs Act"). Recognizing that campaign contributions are a constant in the real life of politicians, as noted above the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n. 9 (formulating the question in that way).

The Court's opinion noted several truths regarding the electoral campaign and election process. First, "serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *Id.,* 500 U.S. at 272. Second, "campaigns must be run and financed." *Id.* As many elected officials (who must become candidates in order to remain elected officials) are heard to complain, "[m]oney is constantly being solicited on behalf of candidates." *Id.* To obtain financing and other support for their campaigns, candidates "run on platforms and … claim support on the basis of their views and what they intend to do or have done."[15] *Id.*

In view of those hard, cold, sometimes unpleasant (if not unseemly) realities of the electoral process – and particularly apropos as applied to Senator Ross and the conduct alleged in the indictment --, the Court asserted that

> to hold legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those

[15] Indeed, the Eleventh Circuit has read *McCormick* as confirming that "legitimate campaign contributions … often involve expectation of benefit." *United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992), *vacated and rev'd o.g. on panel rehearing*, 30 F.3d 108 (11th Cir. 1994). In explaining the Supreme Court's decision in McCormick, the *Davis* court further noted: "Indeed, the fear that routine political service to constituents could be the basis for convictions under the Hobbs Act when limited to campaign contributions appeared to be a major concern of the Court in reversing the decision of the Fourth Circuit." 967 F.2d at 521.

> beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Id.

In contrast to that broad swath of protected conduct, the Court defined illegal conduct as follows:

> The receipt of such contributions is … vulnerable under the Act as having been taken under color of official right, but **only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.**

Id., 500 U.S. at 273 (emphasis added). The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for his contribution, in which "the official **asserts** that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* (emphasis added).[16]

And, in rejecting a view that would criminalize as extortion "act[ing] for the benefit of constituents or support[ing]] legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, the Court warned:

> To hold otherwise would open to prosecution not only **conduct** that has **long** been **thought to be well within the law**, but also conduct that, in a very real sense, is **unavoidable** so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

[16] Although Justice Stevens in dissent would have allowed conviction based on an "implicit" *quid pro quo* linkage between a contribution and a "specific" official action, *id.*, 500 U.S. at 282-83 (Stevens, J., dissenting), the Court rejected that in favor of the stricter requirement of an "explicit promise or undertaking," in which the official "asserts" an overtly and expressly stated *quid pro quo*. *Id.*, 500 U.S. at 273.

Id., 500 U.S. at 272 (emphasis added). The Court pointedly added: "It would require statutory language **more explicit than the Hobbs Act contains** to justify a contrary conclusion." *Id.*, 500 U.S. at 272-73 (emphasis added).

Without stating the concerns, the Court's emphatic statement that broader liability could arise only from more-explicit statutory language hints at, and hinges on, two significant constitutional values, protected by the First Amendment and Due Process.

Campaign contributions and expenditures "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Restrictions on contributions and expenditures in political campaigns "necessarily reduce[] the quantity of expression" on political issues and the speaker's ability to communicate because, as the Supreme Court recognized thirty-five years ago, "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.*, 424 U.S. at 19. Indeed, just one year ago, the Court emphasized and expanded the First Amendment protections for political spending. *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010). Although not absolute, vital First Amendment interests are at stake in cases involving campaign contributions, making such cases very different from cases involving payments to elected officials personally.[17]

[17] There is no claim in the indictment that Senator Ross received any payment or other, non-campaign-contribution personally. If the indictment ***had*** charged Senator Ross with receiving something other than a campaign contribution, the Government to convict would still be required to show a quid pro quo between the benefit and Senator Ross' official act(s), *Evans*, 504 U.S. at 268, which the Eleventh Circuit has interpreted as

And, strictly applying *McCormick*'s explicit (and actually expressed) *quid pro quo* requirement is particularly important here, as the First Amendment is implicated in both sides of the alleged connection between the contributions and Senator Ross' vote or other official acts.[18] "First Amendment freedoms need breathing space to survive." *Citizens United*, 130 S.Ct. at 892. "An intent test provides none." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) (plurality opinion).

Requiring "statutory language more explicit than the Hobbs Act contains," *McCormick*, 500 U.S. at 272-73, is necessary to satisfy core constitutional due process values as well.[19] Key due process concerns involve providing "fair notice" and preventing "arbitrary and discriminatory prosecutions." *Skilling v. United States*, ___ U.S. ___, 130 S.C. 2896, 2933 (2010).

> 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."

Id., 130 S.Ct. at 2927-28 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 1983)).

Both sets of due process concerns are triggered here, or at least potentially. In the absence of allegations of facts showing the required explicit

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meaning an "**explicit** promise by a public official to act or not act." *Davis*, 30 F.3d at 109 (emphasis added); *see also Martinez*, 14 F.3d at 552-53. Regardless, the allegations of the indictment as to Senator Ross cannot be fairly construed as supporting even an **implied** *quid pro quo*, and certainly not sufficiently to avoid due process concerns.

[18] Another vice of loose application of the explicit quid pro quo requirement to the indictment arises here too, in that the indictment never states what act(s) of Senator Ross the contributions are alleged to be connected to.

[19] Indeed, the *McCormick* Court suggested that its limiting interpretation of the conduct properly prohibited by the Hobbs Act was required by due process: "This [explicit promise or undertaking] formulation defines the forbidden zone with sufficient clarity." 500 U.S. at 273.

quid pro quo, Senator Ross is being prosecuted -- without advance notice that his specific conduct would be deemed unlawful -- for, at most, voting for SB380 (and possibly other, unidentified official acts), because he requested and accepted campaign contributions from some persons with financial interests in the expansion of non-indian gaming in Alabama, before and after his vote.[20] And, that is notwithstanding that, as the Supreme Court acknowledged, such conduct "has long been thought to be well within the law," as well as "unavoidable" in a system of privately-financed election campaigns. *McCormick*, 500 U.S. at 272. As Justice Scalia noted in addressing fair notice concerns, in dissenting from the Court's denial of certiorari in an "honest services" case the year before the Court accepted and decided *Skilling*: "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. U.S.*, ___ U.S. ___, 129 S.Ct. 1308 (2009). And, the possibility of arbitrary enforcement is raised by the absence of any prosecution, e.g., of any legislator who voted ***against*** SB380 shortly before or after receiving a campaign contribution from an individual or group whose financial interests would be furthered by halting the expansion of non-Indian gaming in Alabama, as well as by the still-unexplained total-but-maybe-not-total recusal of the U.S. Attorney's office for this district.[21]

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[20] That is, being prosecuted regardless of his motive or the fact that many of his constituents favored the bill and (ultimately) might have benefitted from tax revenues potentially to be generated, if the general electorate approved the proposed constitutional amendment.

[21] *See* "Montgomery-based U.S. attorney absent at bingo indictment announcement," Mobile Press-Register, Oct. 4, 2010, http://blog.al.com/live/2010/10/montgomery-based_us_attorney_a.html; Bush U.S. Attorney M.I.A. at Major DOJ News Conference, Main Justice: Politics, Policy and the Law, Oct. 4, 2010,

The indictment fails to allege, even generally, an explicit *quid pro quo* between any contribution Senator Ross received and any specific official action of his.[22] Neither of Counts Seventeen and Eighteen (including the incorporated paragraphs) allege any ***facts*** that show, or even support, that anyone (identified or unidentified) made a political contribution (specified or unspecified) to Senator Ross in return for his promise to vote or take other specified official action in a particular way.

The indictment alleges conversations between Senator Ross and three others (Lobbyist A, Massey, McGregor, and, by hearsay, Coker) concerning campaign contributions. But, out of all those conversations in which Senator Ross was a party, as alleged, ***none*** discussed or addressed in any way 1) his vote or his position on SB380, or even other "pro-gambling legislation; 2) any future official action by Senator Ross; 3) any request that Senator Ross take any action, specific or otherwise; or 4) Senator Ross' intentions regarding SB380 or even other "pro-gambling legislation." (*See* ¶¶ 119, 125, 128-129). None of those types of facts are alleged in connection with the conversations in which Senator Ross did not participate but his name came up, either. (*See* ¶¶ 126-127, 131) Without alleging such facts, or similar ones, it is difficult (if not impossible)

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http://www.mainjustice.com/2010/10/04/bush-u-s-attorney-m-i-a-at-major-doj-news-conference/, both last accessed Feb. 3, 2011.

[22] Both counts allege that Senator Ross "solicited and … pressured" specified persons "to consent to provide … campaign contributions ***for the benefit of*** Ross, which money ***was not due to*** Ross." (¶¶222, 224) (emphasis added). But, allegations of a) "benefit" to Ross and b) money that was "not due to" Ross fail to amount to an explicit *quid pro quo*, as required to allege a crime in this context. And, the indictment is devoid of any factual assertions regarding what "benefit" other than campaign contributions Senator Ross received, or showing that he benefitted ***personally*** in any way; or how Senator Ross was "not due" the campaign contributions, especially in a prohibited way.

to see how the Government ***could*** sufficiently allege the explicit *quid pro quo* necessary to state a Hobbs Act offense.[23]

In essence, Counts Seventeen and Eighteen (including the incorporated paragraphs) allege that Senator Ross solicited campaign contributions, more than once with certain specified persons, once purportedly saying he "deserved" such a contribution because he had sponsored a specific "pro-gambling" bill in the previous legislative session, and sometimes in close proximity to anticipated legislative action on "pro-gambling legislation"; he sponsored two "pro-gambling" bills, in the 2009 and 2010 sessions; he voted in favor of SB380; and he received several contributions from persons who had financial interests in passage of SB380 or other "pro-gambling legislation, both before and after he sponsored "pro-gambling legislation" and voted in favor of SB380.

But, to hold that those allegations are sufficient to prosecute Senator Ross for extortion under color of official right would conflict with the area of First Amendment-protected political campaign activity of an elected official carved out from the Hobbs Act by the Supreme Court in *McCormick*. *See* 500 U.S. at 272. It likewise would subject Senator Ross to potential criminal liability without fair advance notice that such conduct violates the law, in violation of his due process rights.[24] *See, e.g., Skilling*, 130 S.Ct. at 2927-28.

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[23] And, even if the Government somehow contended Senator Ross received some (unspecified) benefit other than campaign contributions, the facts alleged fail to support even an **implied** *quid pro quo* – and certainly not one sufficient to get out of the area of legitimate contributions.

[24] The fair notice requirement of due process is especially important where, as here, various factual circumstances the indictment cites in support of Senator Ross having committed illegal activity (such as his receiving contributions from PACs, co-defendants making contributions to PACs which then made contributions to him as a candidate, and

And, even if it could colorably be claimed that the conduct alleged *might* come within the coverage of 18 U.S.C. §1951, under the rule of lenity the ambiguity regarding the statute's coverage of such conduct, and the absence of law "clearly establishing" such conduct comes within the statute's prohibitions, *see, e.g., United States v. Lanier,* 520 U.S. 259, 271 (1997), would require that any such ambiguity be resolved in Senator Ross' favor and in favor of dismissal. *E.g., Skilling*, 130 S.Ct. at 2932; *United States v. Granderson*, 511 U.S. 39, 54 (1994).

6. The Magistrate Judge erred in not finding that the indictment fails sufficiently to charge Senator Ross with aiding and abetting extortion under color of federal right. Recommendation (doc. no. 864), at 6; *see* Brief in Support of Motion to Dismiss (doc. no. 470), at 21-22 (stating argument).

Both Counts Seventeen and Eighteen allege that Senator Ross, "aided and abetted by others known and unknown to the Grand Jury did knowingly attempt" to interfere with commerce "by extortion … under color of official right." (¶¶222, 224). This he is alleged to have done by "solicit[ing] and … pressur[ing]" specified others for campaign contributions, for his "benefit" and "which money was not due to" him. (*Id.*) As best as can be determined, there are no other ways in which Senator Ross is alleged to have aided and abetted extortion under color of official right; and apart from the contributions he solicited, he is not alleged to have aided and abetted any other charged instance of extortion.

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his raising money as a candidate even though he ran unopposed) are all permitted under Alabama campaign finance law. *See, e.g.,* Code of Alabama §§17-5-2(a)(8) and (10), 17-5-7, 17-5-8, 17-5-14.

To convict of aiding and abetting, the Government must prove: 1) "a substantive offense was committed." 2) "the defendant associated himself with the criminal venture," 3) "he committed some act which furthered the crime," and 4) "the defendant shared the same unlawful intent as the actual perpetrator." *United States v. Hansen*, 262 F.3d 1217, 1262 (11th Cir. 2001).

As demonstrated above, Counts Seventeen and Eighteen (including the incorporated paragraphs) do not allege the required intent for Senator Ross – i.e., the explicit promise to perform or not to perform an official act -- to have committed the charged offense himself. Those counts accordingly could not have alleged a shared unlawful intent to assist someone else to commit that offense. *See id.*

WHEREFORE, PREMISES CONSIDERED, Senator Ross requests that this Court enter an order 1) setting for oral argument this appeal of, and these objections to, the Magistrate Judge's Recommendation relating to Mr. Ross' motion to dismiss the Hobbs Act charges (doc. no. 8624; 2) sustaining these objections to such Recommendation; and 3) granting Mr. Ross' motion to dismiss Counts Seventeen and Eighteen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 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 the following:

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