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 REGARDING MOTION TO DISMISS CHARGES OF FEDERAL PROGRAM BRIBERY (18 U.S.C. §§666(a)(1)(B), 666(a)(2), AND 18 U.S.C. §2) AND CONSPIRACY TO COMMIT FEDERAL PROGRAMS BRIBERY (18 U.S.C. §371)

Quinton T. Ross, Jr., pursuant to Fed. R. Crim. P 59, hereby appeals to the District Court the Recommendation of the Magistrate Judge regarding the various defendants' motions to dismiss the counts in the indictment based on "honest services" fraud under 18 U.S.C. §§ 1341, 1343, 1346, and 2, as Counts Twenty-Three through Thirty-Three purport to allege (doc. no. 863, filed April 4, 2011), specifically including Mr. Ross' motion to dismiss such charges (doc. no. 471, 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. 472, 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.[1]

[1] Mr. Ross' motion to dismiss reproduced virtually all, if not all, of Mr. McGregor's arguments in support of Mr. McGregor's motions to dismiss those charges and Mr. McGregor's supporting brief (*see* doc. nos. 208 and 209, filed Nov. 12, 2010; doc. no. 450, filed Feb. 4, 2011), although Mr. Ross expanded on those arguments as applied to Mr. Ross specifically. Accordingly, in addition to the objections and grounds for appeal set out below, Mr. Ross adopts and incorporates by reference all objections and supporting arguments asserted by Milton McGregor in Mr. McGregor's appeal of the

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."[2] Fed. R. Crim. P. 59(b)(3).

II. Objections and Argument

A. Introduction and Summary

The Indictment alleges that Senator Ross and others took part in a scheme to deprive the government and the public of the "honest services" of State Legislators and legislative staff. Indictment, ¶ 234. While "honest services" under § 1346 used to be something of a wild-card doctrine, the Supreme Court has now clearly limited the statute to cases of "bribes and kickbacks." *Skilling*, *supra*.

The Government has tried to bring the Indictment within *Skilling* by adopting, as part of the "honest services" charges, the factual allegations of prior portions of the Indictment. *See* ¶ 233. Those incorporated factual allegations demonstrate that the Government is relying on two sorts of allegations, and trying

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same Recommendation as filed April 18, 2011 (doc. no. 918), as authorized by this Court during the hearing of April 15, 2001.

[2] 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.

to term them as "bribes" within the meaning of *Skilling*: (1) primarily, campaign contributions or in-kind campaign support, and (2) to a much lesser extent, personal payments such as alleged payments to defendant Crosby.[3]

This brief demonstrates that neither of those sets of allegations actually makes out an "honest services" charge, even if the Government's allegations are accepted as true for present purposes.

First, campaign contributions (and in-kind campaign support) do not constitute "bribes" for purposes of "honest services" law – not even when it is alleged that the contributions were too-closely connected to some official action.

Second, payment to an individual personally (as distinct from a campaign contribution or in-kind support) cannot constitute "honest services" bribes after *Skilling*, unless it is alleged and proven that the payment was made to influence a specific act. The Indictment here does not allege such a thing, and indeed the Indictment's allegations plainly do not allow such an interpretation.

Senator Ross' statutory construction and constitutional arguments assert, and we believe demonstrate, that campaign contributions cannot constitutionally be prosecuted under §§ 1341, 1343, and 1346. But, even under a construction that allows some room for valid application of §§ 1341, 1343, and 1346 to such contributions, the specific conduct alleged against Senator Ross fails to enter that room.

As an initial matter, the acts of which the indictment accuses Senator Ross are not illegal under those sections as a deprivation of "honest services."

[3] Senator Ross is not alleged to have received any personal payment, or indeed anything other than campaign contributions.

The required allegations sufficient to show an explicit quid pro quo, i.e., that "the payments are made in return for an explicit promise or undertaking by [Senator Ross] to perform or not to perform an official act," *McCormick v. United States*, 500 U.S. 257, 273 (1991), as necessary to assert a violation of the "honest services" fraud statute, are absent as to the contributions received and/or solicited by Senator Ross. Further, none of Counts Twenty-Three through Thirty-Three allege "honest services " fraud by Senator Ross, or sufficiently charge Senator Ross with aiding and abetting "honest services" fraud. And, the indictment fails to allege sufficiently the nature of the alleged scheme to defraud.

The Magistrate Judge has recommended that the motions to dismiss the charges premised on "honest services" fraud under 18 U.S.C. §§ 1341, 1343, 1346, and 2, be denied. But, for these and other reasons explained at more length below, including constitutional concerns under the First, Fifth and Tenth Amendments, the Court should reject the recommendation of the Magistrate Judge, and dismiss all these "honest services" fraud -related charges against Senator Ross.

B. Specific Objections

1. The Magistrate Judge erred in rejecting Senator Ross' argument that " honest services" bribery does not include campaign contributions. Recommendation (doc. no. 863), at 2-9; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 3-13 (stating argument). Senator Ross' argument that "honest services" fraud does not extend to campaign contributions has several

sub-parts, and in recommending rejection of that argument, the Magistrate Judge erred in several related ways.

a. The Magistrate Judge erred in finding that not all campaign contribution bribery cases are outside the "pre-McNally[4] core" of valid "honest services" fraud prosecutions. Recommendation (doc. no. 863), at 3-4; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 3-13 (stating argument).

The Recommendation correctly notes that in order to avoid holding the "honest services" law unconstitutionally vague, the Supreme Court in *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2929-33 (2010), saved the law by dramatically cutting back its scope, to its pre-*McNally* "core" of bribes or kickbacks, of the sort that formed the bulk of pre-*McNally* reported decisions. Recommendation (doc. no. 863), at 2-4; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 5-12. "In the main, the pre-McNally cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, §1346 presents no vagueness problem." *Skilling*, 130 S.Ct. at 2928. And, the Recommendation, at least implicitly, agrees that "no campaign contribution bribery-kickback cases were specifically identified as a [sic] pre-McNally core case [sic]." Recommendation (doc. no. 863), at 3; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 3.

[4] *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), as identified in *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2929-33 (2010).

But, contrary to the Recommendation's finding, Recommendation (doc. no. 863), at 3, the lack of any campaign contribution case that was identified as a pre-McNally core case does render alleged campaign contribution bribery cases invalid as being outside of that core. The term "bribery," as that word is used in *Skilling* to refer to the remaining "solid core" of "honest services" doctrine, does not encompass political contributions or in-kind political support. It encompasses only personal self-enrichment, not campaign contributions or other political support. This is the best understanding of what "bribery" means in this particular context, because of (a) pre-*McNally* history, as relied upon in *Skilling*, (b) the due process concerns identified in *Skilling*, and (c) the important First Amendment implications of political contributions and political advocacy, as contrasted with the absence of First Amendment concerns in the context of true bribery.

Campaign contributions and other political advocacy expenditures are protected by the First Amendment to the Constitution. Just last year, the Supreme Court emphasized and expanded the First Amendment protections for political spending. *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010). This is not to say that the First Amendment protection of political spending or contributions is absolute; but it is to say that there are vital First Amendment interests at stake in cases involving campaign contributions and issue-advocacy contributions, issues that make such cases very different from cases involving payments to officials personally.[5]

[5] The Recommendation somewhat misconstrues Senator Ross' argument on this point: We did not contend the First Amendment bars prosecution of campaign contributions as "honest services" fraud, but rather argued that campaign contributions cannot be prosecuted under "honest services" fraud law (as opposed to other criminal statutes)

Courts have often distinguished between campaign contributions and actual "bribes," even in situations where it is alleged that the campaign contributions were linked too closely with some official actions. *See*, *e.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199-200 (2nd Cir. 2010) ("the Connecticut General Assembly enacted the CFRA's ban on contractor contributions in response to a series of scandals in which contractors illegally offered bribes, 'kick-backs,' and campaign contributions to state officials in exchange for contracts with the state."); *McComish v. Bennett*, 605 F.3d 720, 724 (9th Cir. 2010) ("A sting operation caught state legislators on videotape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation.") In other words, the word "bribe" in its most natural usage does not include campaign contributions.

Given this very large and well-recognized distinction between personal enrichment and campaign contributions, it is unsurprising to find that cases involving campaign contributions are not encompassed within *Skilling*'s "solid core" of pre-*McNally* "honest services" doctrine. There was no pre-*McNally* settled understanding that an official or a citizen contributor could be charged with mail- or wire fraud based on an alleged connection between true campaign contributions and an official action.

Even the Government, in its brief to the Supreme Court in *Skilling*, framed its suggested understanding of "honest services" bribery doctrine in terms of *personal enrichment* of officials – without any hint that campaign contributions

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because they are outside the pre-McNally core to which the Supreme Court restricted "honest services" fraud.

were at the core of what the doctrine covered. The Government argued in *Skilling*, "Schemes to deprive others of 'the intangible right of honest services' require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal." *See* Government Brief in *Skilling*, p. 39 (emphasis supplied).[6] At the same page of the Government's brief, the Government described the impermissible motivation as a "personal financial interest." *Id*. (emphasis supplied). And on the next page: "his [i.e., the defendant's] own interests," id., p. 40. And page 42: "whether the office-holder has placed his self-interest above that of the public."

And at page 51 of the Government's brief, and perhaps most strikingly given the way the Supreme Court ultimately disposed of the case, the Government conceded: "the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes." (emphasis supplied). The Government thus admitted that the pre-*McNally* caselaw was almost entirely, and maybe even literally entirely, about "self-enrichment schemes."[7] *Id.* This would

[6] http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1394.mer.aa.pdf .

[7] 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) (all referring to "campaign contribution" or "campaign contributions"). Indeed, as best as can be determined from the language of the indictment, and as can be confirmed from Senator Ross' campaign filings under the Alabama Fair Campaign Practices Act, *see* http://arc-

make up the "core" as the Supreme Court described it in *Skilling*. That is what "bribery" means within the core of *Skilling*. Even according to the Government's own description, there was no settled pre-*McNally* understanding that an official or campaign contributor could be jailed on account of a connection between a campaign contribution and an official act. Most, if indeed not literally all, of the pre-*McNally* "bribery" cases were about personal "self-enrichment" of officials; they were not about campaign contributions.

This is further borne out by the long footnote in the Government's *Skilling* brief, which the Supreme Court then expressly invoked in its discussion of the pre-*McNally* "bribery" caselaw. In the words of the Supreme Court, the Government "cit[ed] dozens of examples" of pre-*McNally* "bribery or kickback" honest services cases. *Skilling*, 130 S.Ct. at 2930, citing Government Brief p. 42 and n.4. This, according to the Court, was a reflection of the doctrine's "solid core," which is what the Court allowed to survive. *Skilling*, 130 S.Ct. at 2930.

Looking to the cited portion of the Government's brief, we find those dozens of examples, elucidating what the pre-*McNally* "solid core" was. These are the cases that the Government itself chose to identify as representing "bribes or kickbacks" cases prior to *McNally*, *see* Government Brief p.42; and the Supreme Court relied on this listing. And here is the striking and dispositive thing: none of them was a case charging a campaign contribution as a bribe or

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sos.state.al.us/cgi/elcdetail.mbr/detail?&elcpass=34856, last accessed Feb. 1, 2011, 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.

kickback. They were, in the phrase quoted above from the Government's brief, self-enrichment cases – envelope-full-of-cash cases, and the like. Twenty-nine cases, selected by the best minds in the Justice Department as representing bribery and kickback "honest services" cases pre-*McNally* – and none of them held that a true campaign contribution amounts to an "honest services" bribe.[8]

If there were any pre-*McNally* "honest services" case premised on a campaign contribution as a supposed bribe, it would have been outside the "core" of honest services bribery as the Government identified it, and as the Supreme Court accepted it, in *Skilling*. After all, the Supreme Court recognized in *Skilling* that there were some pre-*McNally* cases that were outside the "core." Not every pre-*McNally* case survives *Skilling*; only the "core" survives.

Therefore, based on *Skilling*, the proper holding in this case is that a campaign contribution (financial or in-kind) is just not an "honest services" bribe after *Skilling*. The application of "honest services" law to campaign contribution cases, through the assertion that someone linked an official action too closely to a political contribution, is one of those aggressive post-*McNally* prosecutorial

[8] Some of them mention campaign contributions, but not in ways inconsistent with our statements in the text above. *See*, *e.g.*, *U.S. v. Pecora*, 693 F.2d 421 (5th Cir 1982) (a brief mention of a conversation about possible contributions regarding a millage campaign, though with no finding or holding of any relationship between that and the $9,000 cash bribe to the Sheriff and District Attorney); *U.S. v. Craig*, 573 F.2d 455 (7th Cir. 1977) (tens of thousands of dollars in cash-stuffed envelopes, given to officials in exchange for legislation); *id.* at 494 (reflecting the Government's theory was that this was *not* campaign contributions, and the Government's argument to the jury that a defendant's assertion that he received money as a campaign contribution was a fabrication); *U.S. v. Barrett*, 505 F.2d 1091, 1094-97 (7th Cir. 1974) (reflecting that the case was about payments given to the official personally in valises and envelopes full of cash; there seems to have been a request above and beyond that for a political contribution, followed by the funny retort (met with a smile by the official) that the valises and envelopes full of cash were political contributions); *U.S. v. Isaacs*, 493 F.2d 1124, 1132, 1134 (7th Cir. 1974) (occasionally mentioning campaign contributions, though noting that none of them was charged as having been improper).

arguments that the Supreme Court buried in *Skilling*.[9] The "bribery and kickbacks" core of pre-*McNally* law, which the Supreme Court allowed to survive, was a core of cases about personal self-enrichment, not about campaign contributions. And, the two types of cases are very different in their legal implications, largely by virtue of the First Amendment interests that are so important in contribution-related cases.

b. The Magistrate Judge erred in finding that a campaign contribution bribery case can be prosecuted as "honest services" fraud consistent with Due Process. Recommendation (doc. no. 863), at 4-5; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 12-15 (stating argument regarding danger of arbitrary enforcement, lack of fair warning). 16-21 (asserting similar constitutional arguments).

c. The Magistrate Judge erred in finding that this campaign contribution bribery case can be prosecuted against Senator Ross as "honest services" fraud consistent with Due Process. Recommendation (doc. no. 863), at 4-5; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 12-15 (stating argument regarding danger of arbitrary enforcement, lack of fair warning). 16-21 (asserting similar constitutional arguments).

These findings are premised on the Magistrate Judge's conclusion that this case alleges a bribery-and-kickback scheme within the pre-*McNally* core – a

[9] The Government may point to cases dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act. Any such argument would miss the mark, because it would be an attempt to evade the Supreme Court's reasoning in *Skilling*. In *Skilling*, the Supreme Court saved the "honest services" statute by attributing to Congress an intent to resuscitate the pre-*McNally* solid core of "honest services" law – not an intent to use "honest services" to cover things that had previously been prosecuted instead under *other* laws.

conclusion to which we object. Given the Magistrate Judge's apparent agreement with Senator Ross' lack of fair notice claim in the event this case is found to be outside that "honest services" core, *see* Recommendation (doc. no. 863), at 4[10], the Magistrate Judge should have found this prosecution barred as to Senator Ross by Due Process, and erred in not doing so.

2. In applying the standards for sufficiency of an indictment so as to decline to dismiss the "honest services" 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. 863), at 3-4; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 23 (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. As noted above, campaign contribution bribery charges are outside the pre-*McNally* core of "honest services" law and thus may not be validly prosecuted under that statute. As noted below, even if solicitation and receipt of a campaign contribution may be prosecuted as "honest services" fraud, the indictment here fails to satisfactorily allege an explicit quid pro quo, or even facts sufficient to show such

[10] "Defendants' contention … that … they were not given sufficient notice that their conduct would be subject to honest services prosecution …would be true if this prosecution fell outside the core." *Id.; see also id.* at 10 ("And, as long as prosecutions under the honest-services doctrines remain within the core there can be no vagueness or due process concerns.").

an explicit quid pro, as at least minimally required for a campaign contribution to be subject to criminal prohibition. Where, as here, the indictment alleges as to Senator Ross only lawful conduct, the Magistrate Judge erred in not recommending dismissal of the "honest services" charges.

3. The Magistrate Judge erred in failing to resolve statutory interpretation issues in favor of the defense, so as to avoid Due Process vagueness and other constitutional issues. *See* Recommendation (doc. no. 863), at 4-6; Brief in Support of Motion to Dismiss (doc. no. 472), at 16-21 (stating argument).

4. Although correctly holding that "any honest-services bribery must involve a personal benefit to the 'offender,'" Recommendation (doc. no. 863), at 8, **the Magistrate Judge incorrectly interpreted personal benefit or enrichment as possibly including campaign contributions; and erred in either failing to address specifically whether the indictment sufficiently alleged Senator Ross received any personal benefit or enrichment, or implicitly finding that the indictment sufficiently alleged that Senator Ross received the required personal benefit or enrichment.** Recommendation (doc. no. 863), at 8-9; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 23 (incorporating argument as part of the *quid pro quo* argument from the brief in support of motion to dismiss federal programs bribery charges).

In objection 1(a), at pages 6-11 above, we show that the pre-McNally bribery core of "honest services" law encompasses only personal self-enrichment, not campaign contributions or in-kind political support. To construe

personal benefit or enrichment for "honest services" fraud purposes as including campaign contributions would render the "honest services" statute unconstitutionally vague and overbroad because such a reading would sweep in considerable protected political conduct. *See McCormick*, 500 U.S. at 272-73.

Further, the Government's claim that "promised and realized contributions result in a direct benefit to the candidate" is not contained in the indictment.[11] The indictment's sole reference regarding any personal benefit to Senator Ross is the conclusory allegation that "a purpose of the conspiracy [was] for members and staff of the Alabama Legislature, including [Ross and four other defendants], to enrich themselves by corruptly accepting payments, campaign contributions, and offers of payments and campaign contributions." (Indictment, ¶ 30). As noted above, at 8 n. 7, the only "benefits" solicited or received by Senator Ross were pure campaign contributions.[12]

Applying the view of the Government and the Magistrate Judge to construe personal benefit for "honest services" purposes as including campaign contributions runs afoul of the pre-McNally core to which the Supreme Court limited that statute . And, such a view of personal benefit for "honest services" purposes, in the absence of allegations showing an explicit *quid pro quo* between

[11] It may be worth pointing out that Mr. Ross requested a bill of particulars regarding identification of any "thing of value" or benefit other than campaign contributions that the Government is claiming Ross received, doc. no. 506, at 3-4, which the Government opposed, doc. no. 580, and the Magistrate Judge denied.

[12] In fact, that barebones allegation of Senator Ross' "self-enrichment" is not even part of the "honest services" counts, or for that matter, any count involving Senator Ross other than Count One's federal programs bribery conspiracy claim: ¶30 is not among the paragraphs incorporated by any of the counts against Ross.

contributions and one or more official acts, runs into Due Process and First Amendment problems.[13] *See McCormick*, 500 U.S. at 272-73.

5. The Magistrate Judge erred in apparently rejecting the argument that the indictment must allege the payment was made to influence a specific act or specific acts. Recommendation (doc. no. 863), at 10; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 13-16 (stating argument).

6. The Magistrate Judge erred in finding that "honest services" fraud involving campaign contributions does not require identifying a quid pro quo as an element of the offense. Recommendation (doc. no. 863), at 11; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 21-23 (stating argument).

7. The Magistrate Judge erred in finding that any required allegation of quid pro quo need not be express. Recommendation (doc. no. 863), at 11; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 21-23 (stating argument).

8. The Magistrate Judge erred in finding that the indictment satisfactorily alleged a quid pro quo as to Senator Ross. Recommendation (doc. no. 863), at 11; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 21-23 (stating argument).

9. The Magistrate Judge erred in failing to address whether the indictment's specific allegations against Senator Ross allege conduct that

[13] The Government's theory of "direct benefit," as accepted by the Magistrate Judge, seems to contradict certain uses of campaign funds that the Alabama Fair Campaign Practices Act specifically allows. *See* Code of Alabama §17-5-7(a). Such a reading of "direct benefit" arguably subjects state candidates to federal prosecution for conduct state law expressly permits.

constitutes illegal deprivation of "honest services." *See* Brief in Support of Motion to Dismiss (doc. no. 472), at 21-23 (stating argument).

10. To the extent the Magistrate Judge may have considered the indictment's specific allegations against Senator Ross, the Magistrate Judge erred in implicitly finding the indictment adequately alleges conduct that constitutes illegal deprivation of "honest services." Recommendation (doc. no. 863), at 11; *See* Brief in Support of Motion to Dismiss (doc. no. 472), at 21-23 (stating argument).

With respect to objections 6 through 10, the statutory construction and constitutional arguments above assert, and we believe demonstrate, that campaign contributions cannot constitutionally be prosecuted under §§ 1341, 1343, and 1346. But, even under a construction that allows some room for valid application of §§ 1341, 1343, and 1346 to such contributions, the specific conduct alleged against Senator Ross fails to enter that room. Stated differently, the acts of which the indictment accuses Senator are not illegal under those sections as a deprivation of "honest services."

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.

Reversing a conviction in a case arising under the Hobbs Act, 18 U.S.C. §1951, 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 v. United States*, 500 U.S. 257, 273 (1991). Certainly, conduct not prohibited by one statute may nonetheless be criminalized under another. But, given the clearly-implied First Amendment and explicit Due Process concerns on which that ruling was founded, *id.* at 272-73, the *McCormick* Court's line-drawing between lawful and unlawful campaign contributions – which was based little, if at all, on interpretation of the Act's statutory language, much less the Act's (unmentioned) legislative history – applies equally to prosecutions under other federal criminal statutes for giving and receiving campaign contributions, including the conspiracy, federal programs bribery, and "honest services" fraud laws invoked here.[14]

It must be noted that the Magistrate Judge erred in applying the *quid pro quo* standard set forth in *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994). Recommendation (doc. nos. 863), at 11; *see also* Recommendation regarding Hobbs Act charges (doc. no. 864), at 4-5 (expanding on *Blandford*

[14] In reviewing the convictions of former Alabama Governor Don Siegelman and HealthSouth founder and former CEO Richard Scrushy on federal funds bribery (§ 666(a)(1)(B)) and "honest services" fraud (18 U.S.C. §§ 1341, 1346) charges, the Eleventh Circuit cited approvingly the application of the *McCormick* explicit *quid pro quo* standard to campaign contributions prosecuted under the conspiracy, federal funds bribery, and honest services mail fraud statutes. *United States v. Siegelman*, 561 F.3d 1215, 1225 (11th Cir. 2009); *see also, e.g., United States v. Ganim*, 510 F.3 134, 142 (2nd Cir..2007) (Sotomayor, J.); United States v. Allen, 10 F.3d 405, 410-11 (7th Cir. 1993). The Eleventh Circuit's affirmance of defendants' convictions was vacated and remanded by the Supreme Court for further consideration in light of the Court's decision in *Skilling.* ___ U.S. ___, 130 S.Ct. 3542 (2010).

standard). 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 application 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 (cited in Hobbs Act 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).

Most important, *Blandford*'s interpretation of the quid pro quo standard in the campaign contribution context conflicts with authority that does control this Court. To the extent that the Magistrate Judge here may rely on *Evans v. United States*, 504 U.S. 255 (1992), in which the Hobbs Act prosecution was not based on campaign contributions, the law is clear in this Circuit that *McCormick's* explicit *quid pro quo* standard – i.e., that 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 – applies to prosecutions based on campaign contributions. *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 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.[15]

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 §§ 1341, 1343, and 1346 requires dismissal of the "honest services" charges against him premised on those statutes. The failure of the indictment to allege the necessary *quid pro quo* is set forth in detail at pages 15-32 of Senator Ross' appeal (also filed this date) of the Magistrate Judge's recommendation regarding Ross' motion to dismiss the federal programs bribery charges, and we adopt and incorporate those arguments by reference here.

11. The Magistrate Judge erred in failing to address whether each or any of Counts Twenty-Three through Thirty-Three allege "honest services" fraud as to Senator Ross specifically. Recommendation (doc. no. 863), at 11;

[15] *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.").

see Brief in Support of Motion to Dismiss (doc. no. 472), at 23-25 (stating argument).

12. To the extent the Magistrate Judge may have considered the indictment's specific allegations against Senator Ross, the Magistrate Judge erred in implicitly finding that Counts Twenty-Three through Thirty-Three allege "honest services" fraud as to Senator Ross specifically. Recommendation (doc. no. 863), at 11; *see* Brief in Support of Motion to Dismiss (doc. no. 472), at 23-25 (stating argument).

13. The Magistrate Judge erred in not addressing whether the indictment sufficiently charges Senator Ross with aiding and abetting "honest services" fraud. *See* Brief in Support of Motion to Dismiss (doc. no. 472), at 25-26 (stating argument).

14. The Magistrate Judge erred in not finding that the indictment fails sufficiently to charge Senator Ross with aiding and abetting "honest services" fraud. *See* Brief in Support of Motion to Dismiss (doc. no. 472), at 25-26 (stating argument).

As best as can be determined, nowhere does the indictment set out for any mailing or telephone call identified in any of the Counts 23 through 33. 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." *Hansen*, 262 F.3d at 1262.

As demonstrated above, Counts Twenty-Three through Thirty-Three (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 knowingly participated in the alleged scheme to defraud. Those counts accordingly could not have alleged a shared unlawful intent to assist someone else to commit that offense. *See id.* And, nowhere does the indictment allege any act by Senator Ross that caused or furthered any of the mailings alleged as mail fraud (Counts 23 through 27) or any of the telephone calls alleged as wire fraud (Counts 28 through 33). Accordingly, for each of Counts Twenty-Three through Thirty-Three, the indictment has failed to allege sufficiently aiding and abetting, requiring dismissal of all those counts as to Senator Ross.

Alternatively, Counts Twenty-Three through Thirty-Three fail to allege the necessary explicit *quid pro quo* or unlawful intent necessary to distinguish prohibited criminal conduct from an elected official's legitimate campaign fundraising activity, for Senator Ross to have either committed or aided and abetted another in committing "honest services" fraud. The indictment's failure to allege an essential element necessary to charge the crime of "honest services" fraud (including aiding and abetting) requires dismissal of Counts Twenty-Three through Thirty-Three as to Senator Ross. *E.g., Bobo*, 344 F.3d at 1086; *Pendergraft*, 297 F.3d at 1208, 1209; *United States v. Adkinson*, 135 F.3d 1363, 1372 n. 23, 1377 n. 37 (11th Cir. 1998) ("The failure to allege the element which establishes the very illegality of the behavior and the court's jurisdiction is fatal to the indictment.")

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 the motion to dismiss the charges premised on "honest services" fraud under §§ 1341, 1343, 1346, and 2 (doc. no. 863); 2) sustaining these objections to such Recommendation; and 3) granting Senator Ross' motion to dismiss regarding Counts Twenty-Three through Thirty-Three.

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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