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 either directly or through an allegation of conspiracy, on federal programs bribery under 18 U.S.C. §666 (doc. no. 862, filed April 4, 2011), specifically including Mr. Ross' motion to dismiss such charges (doc. no. 463, 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. 467, 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. 206 and 207, 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 same Recommendation as filed April 18, 2011 (doc. no. 917), as authorized by this Court during the hearing of April 15, 2001.

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

Section 666 is not a general-purpose, catch-all "bribery" statute covering every aspect of State government. Most important for the present case, it does not cover State Legislators' votes on, or the drafting of, State regulatory legislation (especially not legislation to allow a popular vote that would amend the State Constitution). The Court should so conclude, based on the language of section 666 in light of its history, as well as other guidelines for statutory interpretation. This contention, we emphasize, is different from other contentions that the Supreme Court has rejected about the reach of, or constitutionality of, section 666.

Section 666, which was enacted under the Congress's "spending clause" power, was enacted with an eye towards the ways in which state and local

[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.

government, and private beneficiaries of federal assistance, use their funds and other property. As we will show, section 666 is about the use of funds – about the business and transactions by which covered entities (state and local government, and private recipients of federal funds), spend money or otherwise take part in commerce. As the Supreme Court put it, "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain," *Sabri v. United States*, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947 (2004) (emphasis supplied).[3] So, the archetypal § 666 case is – for instance – about allegations of bribery in the awarding of government contracts. *See*, *e.g.*, *U.S. v. McNair*, 605 F.3d 1152 (11th Cir. 2010).

This case involves something very different. Here, the supposed object of the alleged "bribes," the thing supposedly to be influenced or rewarded, was not a decision about how the state government would use money or other property (in public contracting or otherwise). The supposed object of the alleged "bribes" in this case was instead an act at the very core of the process of State sovereignty: the decision of State Legislators, as to how they would vote on a matter of regulatory legislation, and indeed on legislation to allow a popular vote that would amend the State Constitution.

The crucial questions of statutory interpretation, for purposes of this motion, are (a) whether State Legislators and legislative staff are "agents" of the State of Alabama, in regard to the matters at issue in this case, within the meaning of this statute; and (b) whether the allegations of the Indictment come

[3] The actual funds involved can be local funds rather than federal funds, since money is fungible. *Sabri*, 541 U.S. at 606, 124 S.Ct. at 1946.

within the statute's coverage in terms of "any business, transaction, or series of transactions of such … government … involving anything of value of $ 5,000 or more." As we will show, this case – even on the allegations of the Indictment – does not come within this statute's scope.

Even if the Court has doubt about the correctness of these arguments about the scope of § 666, the governing law requires that those doubts be resolved in Senator Ross' favor. Among the reasons for this conclusion is the doctrine of "fair warning" or "fair notice," regarding the scope of federal criminal laws. As the Supreme Court has explained, that doctrine is essentially equivalent to the familiar – and extremely protective – "clearly established law" doctrine that is the basis for qualified immunity in civil cases against government officials. Under that standard, Senator Ross cannot be subjected to charges under § 666 where there is (to say the least) a set of serious and unresolved questions about whether that statute even applies to the allegations set forth in the Indictment.

Senator Ross' statutory construction and constitutional arguments assert, and we believe demonstrate, that campaign contributions cannot constitutionally be prosecuted under §666. But, even under a construction that allows some room for valid application of §666 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 Ross are not illegal under any proper interpretation of §666.

The Magistrate Judge has recommended that the motions to dismiss the federal programs bribery charges premised on §666, or a conspiracy to commit federal programs bribery under §371, 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 all these federal programs bribery-related charges against Senator Ross.

B. Specific Objections

1. The Magistrate Judge erred in rejecting Senator Ross' argument that §666 does not reach "alleged attempts to influence State Legislators and legislative staff, in matters that are purely a matter of the State's sovereign role as regulator (i.e., drafting and voting on legislation, indeed legislation that would amend the State Constitution)." Recommendation (doc. no. 862), at 1, 3; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 4 (stating argument).

The starting point in this argument is the language of the statute, as well as the common meanings of the words used. Section 666 provides in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> …
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such

> organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(emphasis supplied). Further, the statute defines "agent," in Section 666(d)(1): "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."

Senator Ross' argument that §666 does not reach the situation alleged in the indictment 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 rejecting the argument in no. 1 as a matter of statutory interpretation. Recommendation (doc. no. 862), at 3-7; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 3-10 (stating argument). This error has several components, identified in the following items b through f.

b. Contrary to the Magistrate Judge's finding, Recommendation (doc. no. 862), at 4, 5, **section 666's use of "business" or "transaction[s]" of the entity receiving federal funds excludes the voting on or drafting of legislation to amend the State Constitution.** *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 6-8 (stating argument).

c. Related to item b, the Magistrate Judge erred in applying a "non-commercial reading of the terms 'business' and 'transaction,'" Recommendation (doc. no. 862), at 4; **and in concluding that the drafting of and voting on legislation "can be considered 'business' or 'transactions' under" section 666.** *Id*.

Section 666's use of "business, transaction, or series of transactions" of such an entity is limited to efforts to influence people in connection with "business" or "transaction[s]" of the entity receiving federal funds (here, allegedly, the State of Alabama). Those words – "business" and "transaction" – call up in the mind of a reasonable reader the understanding of an exchange involving the purchase or provision of goods or services. That is the ordinary meaning of those words. *See*, *e.g.*, *Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1371 (11th Cir. 1998) ("The ordinary meaning of 'transaction' necessarily implies some type of business dealing between parties. … In other words, when we speak of 'transactions,' we refer to consensual or contractual arrangements …"); *Flava Works, Inc. v. City of Miami*, 609 F.3d 1233, 1239 (11th Cir. 2010) ("This seems

to comport with the common definition of a business, which is '[a] commercial enterprise carried on for profit.' Black's Law Dictionary 211 (8th ed. 2004)").[4]

In this regard, the words "business" and "transaction" naturally echo a fundamental and legally-recognized distinction between two sorts of roles that a government (including the State of Alabama) occupies. This is the distinction between government as regulator (writing and enacting rules, i.e., laws, to govern citizens' conduct) and government as market-participant (buying, selling, and otherwise providing or obtaining goods and services). There is a settled legal understanding that this role as market participant is conceptually different from the role as regulator, in various ways, with various legal consequences. *See*, *e.g.*, *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 128 S.Ct. 1801 (2008) (exploring this distinction, in terms of its effect on Commerce Clause doctrine); *Building Trades Council v. Associated Builders*, 507 U.S. 218, 113 S.Ct. 1190 (1993) (exploring this distinction, in terms of its effect on labor law preemption doctrine).

By using the words "business" and "transaction" to describe the category of decisionmaking topics in which § 666 prohibits corrupt attempts to influence, Congress was using words that point towards the market-participant side of this distinction. Voting on legislation to amend the State Constitution, and drafting such legislation, simply do not constitute a "transaction" or "business" of the State of Alabama, in that normal sense of those words. (An alleged "bribe" is not itself the sort of "transaction" that can trigger the statute's applicability. The

[4] Even if one omitted the "for profit" aspect of this common understanding of the word "business," still the core would remain: business is commerce in goods or services.

"transaction" or "business" must be "of" the entity that is receiving the federal funds, not just a "transaction" or "business" of the allegedly influenced person him- or herself.)

The Magistrate Judge failed to address the common understanding of the terms "business" or "transaction." Instead, the Magistrate Judge incorrectly deemed the Eleventh Circuit's recent decision in *United States v. Townsend*, 630 F.3d 1003 (11th Cir. 2011), as controlling on the meaning and scope of "business" or "transaction. *See* Recommendation (doc. no. 862), at 3-5.

The questions in *Townsend* were whether freedom was a thing of value that could meet the statute's $5000 valuation element, or whether only tangibles were things of value, 630 F.3d at 1010-11; and whether the amount of a bribe could be used as a proxy for valuation of an intangible. *Id.* at 1011-12. *Townsend* does ***not*** address the meaning of the words "business" or "transactions" in §666 (in particular, whether drafting and voting on legislation is "business" or "transaction").[5] And, even if *Townsend* had addressed the legal issue of whether enforcing conditions of pretrial release was "business" or a "transaction" within the meaning of §666, that would ***not*** answer the question whether writing and voting on legislation is "business" or a "transaction" too.

[5] Likewise, as to the other cases cited by the Magistrate Judge for the proposition that a commercial component is not a required element or a limitation under section 666, *see* Recommendation (doc. no. 862), at 4, 5, 9, ***none*** of those cases addresses the meaning of "business" or "transaction." Instead, each simply addresses one or both of the questions addressed by Townsend, i.e., whether an intangible can be a "thing of value" for the statute's $5000 valuation requirement, or how such an intangible is to be valued. Accordingly, none of those cases establishes – even in their own circuit – that the scope of section 666 extends beyond the normal understanding of "business" or "transaction" as an exchange involving the purchase or provision of goods or services, the limitation on the scope of section 666 that the statutory language imposes.

Enforcing conditions of pretrial release is much closer to the sort of service function that can be covered by those statutory terms than to the purely regulatory/sovereign function of creating legislation.

d. The Magistrate Judge erred in finding, at least implicitly, that a legislator introducing or voting on legislation satisfies the element of being an "agent" as defined by section 666. Recommendation (doc. no. 862), at 5-6; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 7-9 (stating argument).

The statute requires the Government to prove that the person to be influenced or rewarded was an "agent" of the entity that receives federal funds. Both the common understanding of the word "agent," and the statute's particular definition of that term, lead to the understanding that a State Legislator, when voting or deciding how to vote on a regulatory Act to amend the State Constitution, is not an "agent" of the State. *See Single Moms, Inc. v. Montana Power Co*., 331 F.3d 743, 747 (9th Cir. 2003) (noting, in a different context, that State Legislators are not "agents" of the State when they draft and vote on bills).

The statute uses the word "agent" in a way that parallels its focus on "business" and "transaction" that has been discussed above: an agent is one who acts on behalf of the entity receiving funds, with regard to "business" or "transaction" in the normal sense of those words. This is the ordinary meaning of the first part of the statutory definition of "agent" in § 666(d): "the term 'agent' means a person authorized to act on behalf of another person or a government." A State Legislator, when voting or deciding how to vote on a statute, is not acting

"on behalf of" the government of the State of Alabama. If he or she is acting "on behalf of" anyone, it is his or her constituents – not the State itself.

Similarly, the second half of the statutory definition of "agent" in § 666(d) confirms its focus on agency in the "business" or "transaction" sense, and confirms that State Legislators are outside that focus. That is, the statute goes on to say that the word "agent," "in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." Each such term has to do with people who act on behalf of entities in their business or transaction, rather than referring to the sovereign activity of Legislators voting on regulatory legislation.

Against this backdrop, the Magistrate Judge again erred in finding *Townsend* dispositive, Recommendation (doc. no. 862), at 5-6, as Townsend does not address the meaning of the word "agent" in § 666; nor, with one exception, do any of the cases cited in the Magistrate Judge's block quote taken from *Townsend*. For that reason, the Magistrate's reliance on those cases to find that "there is no commercial requirement to the agency," *id.* at 6, is likewise error: it is difficult to see how cases that do not discuss the meaning of "agent" can be held to have ***decided*** that "agent" has "no commercial requirement."[6]

[6] The Fifth Circuit's decision in *United States v. Marmelejo*, 89 F.3d 1185 (5th Cir. 1986), does reject, almost summarily, the argument of defendants (a former county sheriff and chief deputy) that the Sheriff's office was not an agent of a local government as required by §666(a)(1). *Id.* at 1194. But, defendants did not argue that the agency required a commercial component – indeed, defendants argued in a different context, relating to the dollar amount received by the local government within the requisite time period, that the contractual arrangement between the federal agency and the county "was a commercial transaction," *id*. at 1190 – and *Marmelejo* did not involve the type of activity, of legislators voting on regulatory legislation, involved here. Accordingly, *Marmelejo* does not support the Magistrate Judge's finding here.

e. The Magistrate Judge erred in rejecting "the notion that the legislative history of the act requires reading a commercial activity into 'agent,' 'business,' or 'transaction.'" Recommendation (doc. no. 862), at 7; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 10-14 (stating argument).

In rejecting Mr. Ross' argument that the history leading to the enactment of section 666 required such a reading of these statutory terms, the Magistrate Judge again deemed *Townsend* dispositive. *See* Recommendation (doc. no. 862), at 7. In so doing, he again erred, as *Townsend* does not address the legislative history of § 666 at all, nor do any of the other cited cases address legislative history as to those terms. That error in turn led the Magistrate Judge not to address the legislative history leading to enactment of § 666 discussed by Mr. Ross – another error to which Mr. Ross objects.

f. The Magistrate Judge erred in not addressing Mr. Ross' statutory interpretation argument based on a comparison of the text of 18 U.S.C. § 201 to the text of § 666. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 14-17 (stating argument).

g. The Magistrate Judge erred in finding that § 666 does not impermissibly encroach on state sovereignty if the indictment's allegations are taken as true. Recommendation (doc. no. 862), at 7-9; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 17-26 (stating argument).

h. The Magistrate Judge erred in rejecting the argument that exclusion of legislative votes on regulatory legislation is constitutionally

required. Recommendation (doc. no. 862), at 9; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at 17-26 (stating argument).

2. The Magistrate Judge erred in not addressing specifically whether § 666 covers campaign contributions or other campaign support. *See* Recommendation (doc. no. 862), at 4; Brief in Support of Motion to Dismiss (doc. no. 467), at 20-26 (stating argument).

3. The Magistrate Judge failed to address any distinction between campaign contributions or other campaign support, and any other type of "thing of value," in the applicability of § 666 to the allegations in the indictment. *See* Recommendation (doc. no. 862), at 4; Brief in Support of Motion to Dismiss (doc. no. 467), at 20-22 (stating argument).

4. The Magistrate Judge erred in not addressing specifically whether, or under what circumstances, § 666 can constitutionally be construed to include campaign contributions, including but not limited to whether a *quid pro quo* is required for violation of the statute. *See* Recommendation (doc. no. 862), at 4; Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-23, 28-29, 37-40, 42-43 (stating argument).

As to objections 2 through 4, the sole reference to campaign contributions anywhere in the Recommendation is found in the discussion of the meaning and scope of the statutory terms "business" and "transaction": "The court is not bothered by … *Townsend's* failure to specifically address campaign contributions." Recommendation (doc. no. 862), at 4. In *Townsend* the Eleventh Circuit was not presented with, and therefore did not decide anything about, the

unique and constitutionally significant matter of the applicability of § 666 to campaign contributions. Contrary to the Magistrate Judge's suggestion, that absence from *Townsend* of any issue or even discussion regarding campaign contributions means *Townsend* does not contain any holding, and does not even actually contain any dicta answering the specific questions about § 666 raised in Mr. Ross' motion.

5. The Magistrate Judge erred in not finding § 666 unconstitutionally vague and as failing to provide fair notice of prohibited conduct as applied to attempts to influence State legislators and legislative employees in the drafting and voting on regulatory legislation. Recommendation (doc. no. 862), at 9-10; *see* Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-20 (stating argument).

6. The Magistrate Judge erred in not addressing whether § 666 is unconstitutionally vague as applied to campaign contributions or other campaign support. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-21, 28-29, 37-40 (stating argument).

7. The Magistrate Judge erred in not finding § 666 unconstitutionally vague as applied to campaign contributions or other campaign support. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-21, 28-29, 37-40 (stating argument).

8. The Magistrate Judge erred in not addressing whether § 666 is unconstitutionally vague as applied to the indictment's allegations as to

Senator Ross. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-21, 28-29, 37-43 (stating argument).

9. The Magistrate Judge erred in not finding § 666 unconstitutionally vague as applied to the indictment's allegations as to Senator Ross. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at, *e.g.*, 17-21, 28-29, 37-43 (stating argument).

10. The Magistrate Judge erred in not addressing whether § 666 applies to the indictment's allegations as to Senator Ross. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 26-43 (stating argument).

11. The Magistrate Judge erred in not finding that § 666 does not cover or apply to the indictment's allegations as to Senator Ross. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 26-43 (stating argument).

12. The Magistrate Judge erred in not addressing whether the indictment's allegations as to Senator Ross state an offense under § 666. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 26-43 (stating argument).

13. The Magistrate Judge erred in not finding that the indictment's allegations as to Senator Ross do not state an offense and/or do not state conduct illegal under § 666. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 26-43 (stating argument).

Even assuming for sake of argument the existence of a construction that allows some room for valid application of § 666 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 § 666.

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) (all referring to "campaign contribution" or "campaign contributions"). Indeed, as best as can be determined from the language of the indictment[7], 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

[7] 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.

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.[8] (*See* ¶¶119, 128-129, 131).

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

[8] 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. Stated differently, none of these allegations – e.g., whether "demanding," "soliciting and pressuring," or "intending to be influenced and rewarded"—amount to an explicit *quid pro quo*. As shown below, an explicit *quid pro quo* is constitutionally required for conviction under each statute that Senator Ross is charged with violating. And, each such allegation – again, e.g., whether "demanding," "soliciting and pressuring," or "intending to be influenced and rewarded"— is unconstitutionally vague to impose criminal liability on Senator Ross for any of the contributions that the indictment alleges.

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.[9]

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

[9] 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). 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).

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 § 666 requires dismissal of the charges against him premised on that statute.

a. Summary of the Indictment

As relevant to the charges premised on § 666, the indictment alleges the following.

Count One, the conspiracy count, alleges that all defendants conspired "to commit federal programs bribery" in that (A) the defendants and others "corruptly gave, offered, and agreed to give money and other things of value to Alabama state legislators and legislative staff … with the intent to influence and reward them in connection with pro-gambling legislation," and correspondingly (B) "Alabama State legislators and legislative staff … corruptly solicited, demanded, accepted and agreed to accept money and things of value from defendants and others, intending to be influenced and rewarded in connection with" such legislation. (¶28)

Purposes alleged for the conspiracy were for a) defendants McGregor and Gilley to provide "payments and campaign contributions," b) legislators, including Senator Ross, and staff to accept those "payments and campaign contributions," and c) the lobbyist defendants (and defendant Senator Smith) to assist McGregor and Gilley in making such "payments and campaign contributions" to legislators, including Senator Ross, in a way to conceal that McGregor and Gilley were the

source, "in return for their favorable votes on and support of pro-gambling legislation." (¶¶ 29-31).

Counts Ten through Twelve state the §666 charges against Senator Ross in general terms. Count Ten alleges that defendants "Gilley, Massey, McGregor, Coker, and Lobbyist A promised to give campaign contributions, including promises of $25,000 and other unspecified amounts, to Ross … to influence and reward Ross in connection with an upcoming vote on pro-gambling legislation." (¶208). Counts Eleven and Twelve allege that Senator Ross agreed to accept "campaign contributions," "of at least $20,000 from Gilley, Massey, and Lobbyist A" (Count Eleven) and "an unspecified amount of campaign contributions from McGregor and Coker" (Count Twelve), "intending to be influenced and rewarded in connection with an upcoming vote on pro-gambling legislation." (¶¶210, 212).

Counts Ten through Twelve themselves state minimal factual detail regarding the charges against Senator Ross. Apparently to try to support these sparsely alleged charges with factual detail, the indictment incorporates in both counts the allegations contained in 178 earlier paragraphs (¶¶ 1 through 26 and 39 through 190 of the indictment), 152 of which are listed in Count One and labeled as alleging "overt acts" in furtherance of the conspiracy. Most of them do not mention and have nothing to do with Senator Ross.

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

[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

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*.

b. Allegations Incorporated by Reference in Counts Ten through Twelve

With respect to Senator Ross, the paragraphs incorporated in Counts Ten through Twelve 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

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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).

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

[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).

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 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

[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.

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

[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.'"

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).

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-

[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).

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.

c. McCormick defines lawful and unlawful campaign contributions

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 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

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[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.

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.

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. These values are discussed in greater detail in Senator Ross' brief in support of his motion to dismiss the charges under the Hobbs Act, 18 U.S.C. §1951; we adopt but don't repeat that discussion here.

In the context of prosecuting campaign contributions under § 666, in which the required mental state is either the "intent to influence or reward" (§ 666(a)(2)) or "intending to be influenced or rewarded" (§ 666(a)(1)(B)), the statute's

[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.

sweeping in (on its face) of lawful campaign contributions, and the special protection (such as *McCormick*'s explicit *quid pro quo* requirement) needed in this context, is encapsulated by the Sixth Circuit's observation about McCormick: "The McCormick Court observed … that the campaign contribution context is unique because almost all lawful contributions are given to influence future legislative or executive actions." *United States v. Abbey*, 560 F.3d 313, 516 (6th Cir. 2009) (§ 666 case not involving campaign contributions).

d. The indictment's allegations against Senator Ross fail to state an offense under § 666

Against this backdrop, it is apparent that Counts One and Ten through Twelve lack any allegation of an essential element of a § 666 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 statute from legitimate campaign fundraising.

> For an indictment to be valid, it must "contain[] the elements of the offense intended to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet." "An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute." Furthermore, if the indictment tracks the language of the statute, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged." When the indictment uses generic terms it must state the offense with particularity.

United States v. Bobo, 344 F.3d 1076, 1083 (11th Cir. 2003) (quoting *Russell v. United States*, 369 U.S. 749, 763, 765 (1962)). 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., Bobo*, 344 F.3d at 1083-85. "An indictment that requires speculation on a fundamental part of the charge is insufficient." *Bobo*, 344 F.3d at 1084.

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. None of Counts One or Ten through Twelve (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. To the contrary, the ***facts*** alleged all show political campaign fundraising activity on the lawful side of the line.

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)

to see how the Government ***could*** sufficiently allege the explicit *quid pro quo* necessary to state a federal programs bribery offense.[17]

In essence, Counts One and Ten through Twelve (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 federal programs bribery would conflict with the area of First Amendment-protected political campaign activity of an elected official carved out 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.[18] *See, e.g., Skilling*, 130 S.Ct. at 2927-28.

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[17] 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.

[18] 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

And, even if it could colorably be claimed that the conduct alleged *might* come within the coverage of 18 U.S.C. §666, 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).

14. The Magistrate Judge erred in not addressing whether the indictment's allegations as to Senator Ross state a valid conspiracy claim. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 43-44 (stating argument).

15. The Magistrate Judge erred in not finding that the indictment's allegations as to Senator Ross do not state a valid conspiracy claim. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 43-44 (stating argument).

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

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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 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.

The substance of Count 1 tells a different story. Instead of a single, massive conspiracy in which all alleged conspirators, named and unnamed, conspired together to corrupt the Alabama ***Legislature***, there are multiple, distinct conspiracies in which certain groupings of co-conspirators are alleged to have conspired together to corrupt certain individual Alabama ***Legislators*** and staff.

The gravamen, and an essential element, of any conspiracy is an agreement to commit an unlawful act. *E.g., United States v.Chandler*, 388 F.3d 796, 805-06 (11th Cir. 2004). "[I]t is essential that the object of the agreement must be illegal." *United States v. Hansen*, 262 F.3d 1217, 1246 (11th Cir. 2001). "[T]he government must prove the existence of an ***agreement*** to achieve an unlawful objective and the defendant's ***knowing*** participation in that agreement." *Chandler*, 388 F.3d at 806 (emphasis in original). "[P]roof of ***knowledge*** of the overall scheme is critical to a finding of conspiratorial intent." *Id.* (emphasis in original). "Proof of a true agreement is the only way to prevent individuals who are not actually members of the group from being swept into the conspiratorial net." *Id.*

To show a single, overarching conspiracy, as opposed to several, similar, even broadly related conspiracies, there must be proof (or, at this stage, allegations) that the alleged conspirators shared the ***overarching common*** goal. And, with a wheel conspiracy as alleged here (where every co-conspirator is not alleged to have worked with all their co-conspirators), *see id.* at 807 (discussing the differences between "hub-and-spoke" and "rimless wheel"

conspiracies), there must be proof (or, again at this stage, allegations) that each individual defendant knew of the existence of other participants (besides himself and the "hub" or key central conspirators) in such an overall scheme. *Id.* at 808.

Stated differently, assuming as true for this motion that Senator Ross agreed to accept a "bribe" or "bribes" (as opposed to lawful campaign contributions) from McGregor (whether directly, or indirectly through defendants Tom Coker or Bob Geddie) and separately from Gilley (indirectly through Massey and Lobbyist A), to show a single conspiracy the indictment still would need to allege (at minimum) that Senator Ross (1) ***knew*** of ***other*** legislators (such as Senators Means, Preuitt, and/or Smith) and/or legislative staff (such as Mr. Crosby) accepting bribes for the ***same overall*** purpose (of buying enough votes to pass the alleged "pro-gambling legislation"), *e.g., United States v. Fernandez*, 892 F.2d 967, 987 (11th Cir. 1990); and then (2) ***agreed*** to the ***same overall*** purpose. *E.g., Chandler*, 388 F.3d at 808; *see also, e.g., United States v. Ellis*, 709 .2d 688, 690 (11th Cir. 1983); *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978); *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977) (all reversing convictions upon finding no agreement to the overall conspiracy).

The indictment is devoid of any factual allegations showing that Senator Ross allegedly agreed to anything beyond a conspiracy relating to his own vote (although actually showing only that he solicited and received lawful campaign contributions). It certainly does not allege facts showing any knowledge of, much less participation in, any broader scheme involving anyone else's votes. The

facts as alleged reflect Senator Ross requested each contribution on his own behalf. There are no overt acts or other well-pleaded facts that show otherwise.

Indeed, the ***facts*** alleged by the indictment – i.e., the lack of facts showing the necessary culpable intent through, at minimum, an explicit *quid pro quo* – show the only agreement Senator Ross entered into was to accept ***lawful*** campaign contributions. For these reasons, Count One charging conspiracy must be dismissed.

14. The Magistrate Judge erred in not addressing whether the indictment sufficiently charges Senator Ross with aiding and abetting federal programs bribery. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 44-45 (stating argument).

15. The Magistrate Judge erred in not finding that the indictment fails sufficiently to charge Senator Ross with aiding and abetting federal programs bribery. *See* Brief in Support of Motion to Dismiss (doc. no. 467), at 44-45 (stating argument).

Count Ten alleges that four defendants and Lobbyist A, "aided and abetted by others known and unknown to the Grand Jury," promised to give campaign contributions to Ross "to influence and reward Ross in connection with an upcoming vote on pro-gambling legislation" in violation of 18 U.S.C. §§ 2 and 666(a)(2). (¶208) Both Counts Eleven and Twelve allege that Senator Ross, "aided and abetted by others known and unknown to the Grand Jury" agreed to accept campaign contributions from those four defendants and Lobbyist A, "intending to be influenced and rewarded in connection with an upcoming vote on

pro-gambling legislation" in violation of 18 U.S.C. §§ 2 and 666(a)(1)(B). (¶¶210, 212). As best as can be determined, there are no other ways in which Senator Ross is alleged to have aided and abetted federal programs bribery; and apart from the contributions he solicited, he is not alleged to have aided and abetted any other charged instance of federal programs bribery.

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 Ten through Twelve (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.*

This particular case would be the sort of case where application of § 666 would be unconstitutional. This case is at the core of State sovereign power, a case where the federal "power of the purse" cannot be allowed to buy the right to set the terms of conduct for State Legislators and for citizens who support or oppose them. There may well be other cases that fall into a grayer area, an area in which it is not so clear whether the situation involves "business" or "transactions" within the proper boundaries of federal control. This, however, is

the extreme case, the case right at the heart of State sovereign functioning, in which § 666 does not and cannot apply.

Alternatively, Counts One and Ten through Twelve 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 federal programs bribery. The indictment's failure to allege an essential element necessary to charge the crime of federal programs bribery (including aiding and abetting) requires dismissal of Counts One and Ten through Twelve 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 federal programs bribery under § 666, or conspiracy to commit federal programs bribery (doc. no. 862); 2) sustaining these objections to such Recommendation; and 3) granting Senator Ross' motion to dismiss regarding Counts One and Ten through Twelve.

Respectfully submitted,

H. LEWIS GILLIS (GIL001)
TYRONE C. MEANS (MEA003)

OF COUNSEL:

THOMAS, MEANS, GILLIS & SEAY, P.C.
3121 Zelda Court
Montgomery, Alabama 36103-5058
Telephone: (334) 270-1033
Facsimile: (334) 260-9396
hlgillis@tmgslaw.com
tcmeans@tmgslaw.com

/s/ Mark Englehart
MARK ENGLEHART (ENG007)

OF COUNSEL:

ENGLEHART LAW OFFICES
9457 Alysbury Place
Montgomery, Alabama 36117-6005
Telephone: (334) 782-5258
Facsimile: (334) 270-8390
jmenglehart@gmail.com

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:

Louis V. Franklin, Sr. Assistant U. S. Attorney 131 Clayton Street Montgomery, Alabama 36104 Louis.franklin@usdoj.gov Stephen P. Feaga U.S. Attorney's Office P.O. Box 197 Montgomery, AL 36101-0197 Steve.feaga@usdoj.gov Justin V. Shur Peter J. Ainsworth Brenda Morris Eric Olshan Barak Cohen Emily Rae Woods U.S. Department of Justice Public Integrity Section 1400 New York Avenue-NW 12th Floor Washington, DC 20005 Justin.Shur@usdoj.gov Peter.Ainsworth@usdoj.gov Brenda.Morris@usdoj.gov Eric.olshan@usdoj.gov Barak.cohen@usdoj.gov Rae.woods@usdoj.gov Robert D. Segall David Martin Shannon Holliday Clayton R. Tartt Ashley N. Penhale COPELAND, FRANCO, SCREWS & GILL, P.A. P.O. Box 347 Montgomery, Alabama 3610 1-0347 segall@copelandfranco.com	Joe C. Espy, III William M. Espy Benjamin J. Espy MELTON, ESPY & WILLIAMS, PC P.O. Box Drawer 5130 Montgomery, AL 36103 jespy@mewlegal.com wespy@mewlegal.com bespy@mewlegal.com Fred D. Gray Walter E. McGowan GRAY, LANGFORD, SAPP, McGOWAN, GRAY, GRAY & NATHANSON, P.C. P.O. Box 830239 Tuskegee, AL 36083-0239 fgray@glsmgn.com wem@glsmgn.com David McKnight William J. Baxley Joel E. Dillard Baxley, Dillard, Dauphin, McKnight & Barclift 2008 Third Avenue South Birmingham, AL 3523 dmcknight@bddmc.com bbaxley@bddmc.com jdillard@bddmc.com Brett M. Bloomston Joseph J. Basgier, III Bloomston & Basgier 1330 21st Way South, Suite 120 Birmingham, AL 35235 brettbloomston@hotmail.com joebasgier@gmail.com

martin@copelandfranco.com holliday@copelandfranco.com tartt@copelandfranco.com penhale@copelandfranco.com Sam Heldman THE GARDNER FIRM, P.C. 2805 31st Street NW Washington, DC 20008 sam@heldman.net James W. Parkman, III Richard Martin Adams William C. White, II Parkman, Adams & White 505 20th Street North, Suite 825 Birmingham, AL 35203 parkman@parkmanlawfirm.com adams@parkmanlawfirm.com wwhite@parkmanlawfirm.com Susan G. James Denise A. Simmons Susan G. James & Associates 600 S. McDonough Street Montgomery, AL 36104 sgjamesandassoc@aol.com dsimlaw@aol.com Thomas M. Goggans Attorney at Law 2030 East Second Street Montgomery, AL 36106 tgoggans@tgoggans.com Samuel H. Franklin Jackson R. Sharman, III LIGHTFOOT, FRANKLIN & WHITE, L.L.C. The Clark Building 400 North 20th Street Birmingham, AL 35203 sfranklin@lightfootlaw.com jsharman@lightfootlaw.com James D. Judkins	William N. Clark Stephen W. Shaw William Mills Redden Mills & Clark 505 North 20th Street, Suite 940 Birmingham, AL 35203 wnc@rmclaw.com sws@rmclaw.com whm@rmclaw.com Ron W. Wise Attorney at Law 200 Interstate Park Drive, Suite 105 Montgomery, AL 36109 ronwise@aol.com G. Douglas Jones Thomas J. Butler Anil A. Mujumdar Haskell Slaughter Young & Rediker, LLC 1400 Park Place Tower 2001 Park Place Birmingham, AL 35203 Phone: (205) 251-1000 gdj@hsy.com tb@hsy.com aam@hsy.com Sandra Payne Hagood (ASB-0360-S73H) 7660 Fay Avenue Suite H-526 LaJolla, CA 92307 sandra@hagoodappellate.com Jeremy S Walker Haskell Slaughter Young & Gallion, LLC 305 South Lawrence Street Montgomery, Alabama 36104 jsw@hsy.com Joshua L. McKeown The Cochran Firm Criminal Defense-Birmingham LLC

Larry Dean Simpson Judkins, Simpson, High & Schulte P.O. Box 10368 Tallahassee, FL 32302 jjudkins@readyfortrial.com lsimpson@readyfortrial.com	505 20th Street North Suite 825 Birmingham, AL 35203 jmckeown@parkmanlawfirm.com Jeffery Clyde Duffey Law Office of Jeffery C. Duffey 600 South McDonough Street Montgomery, AL 36104 jcduffey@aol.com

/s/ Mark Englehart
MARK ENGLEHART