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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	
RONALD GILLEY, et. al.	)	
	)	
Defendants.	)	

RONALD E. GILLEY'S OBJECTIONS
TO RECOMMENDATION OF THE MAGISTRATE JUDGE, DOC. 861

Comes now Defendant Ronald E. Gilley and submits this brief in support of his objections to Recommendation of the Magistrate Judge, Doc. 861 (hereinafter, "the Recommendation"). Gilley filed a motion to dismiss counts under 18 U.S.C. § 666 (hereinafter "Federal Programs Bribery") and 18 U.S.C. §§ 1341, 1343, 1346 & 2 (hereinafter, "Honest Services Bribery") for failure to include the elements of a bribery offense where campaign contributions are at issue. Doc. 488.

Gilley objects to the Recommendation's conclusion that his motion to dismiss, Doc. 488, be denied.

Summary of the Basis for Gilley's Motion to Dismiss

Gilley will not repeat his arguments in their entirety here, but in summary, Gilley's motion to dismiss is based on two main contentions: first, that an indictment must contain all of the elements of the offense charged; and second, that *where a campaign contribution is at issue*, Federal Programs and Honest Services Bribery require an explicit quid pro quo. See Gilley's Brief in Support, Doc. 489.

In *McCormick v. United States*, 500 U.S. 257 (1991), a Hobbs Act case,[1] the Supreme Court recognized that, where campaign contributions are concerned, drawing a line between the legal and illegal presents a particular challenge. The Supreme Court explained that conduct by elected officials which might raise ethical concerns or even inferences of bribery in other contexts cannot do so on the basis of campaign contributions because it is legal, commonplace, and unavoidable that campaign contributions will be given and received to some degree "in exchange" for influence. *McCormick v. United States*, 500 U.S. 257, 272-73 (1991).

The Eleventh Circuit itself has endorsed the reasoning of *McCormick* in accord with the explanation above:

> [Campaign donations] impact the First Amendment's core values-protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. . .
> [Thus, in *McCormick*,] [t]he Supreme Court has sought to protect against this possibility [of instructing a jury that they may convict a defendant for his exercise of his First Amendment rights] by requiring more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor. *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991).

United States v. Siegelman, 561 F.3d 1215, --- (11th Cir. 2009) (*vacated by Siegelman v. United States*, 130 S. Ct. 3542 (2010) and *Scrushy v. United States*, 130 S. Ct. 3541 (2010).[2]

[1] The Hobbs Act prohibits a public official from receiving money "under color of official right." 18 U.S.C. § 1951.

[2] The Supreme Court granted the Siegelman defendants' petition for certiorari and vacated the Eleventh Circuit's opinion and remanded the case to the Eleventh Circuit with instructions to reconsider the case in light of the Supreme Court's opinion in *Skilling v. United States*, 130 S.Ct. 2896 (2010). Thus, the precise grounds for the vacatur was not specified by the Supreme Court. For this reason, it would appear that the Government has no basis for its assertion in its Opposition to Defendant Gilley's Motion to Dismiss on Free Speech and Due Process Grounds that *Siegelman* was "vacated on other grounds." Doc. 604, p. 3.

In *McCormick*, the Supreme Court held that an elected official violates the Hobbs Act by receiving a campaign contribution only "if the payments are made in return for an **explicit** promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991) (emphasis added). Thus, Gilley argues that the logic and rationale of *McCormick* apply with equal force to prosecutions pertaining to campaign contributions under federal programs bribery and honest services bribery.

Objections to the Recommendation

1. The Recommendation appears to be based on a complete failure to understand that Gilley argues that the logic of reasoning of *McCormick* apply to his prosecution because *campaign contributions* are at issue. The Recommendation states at page two, "Gilley's request that the court apply the pleading standard of the Hobbs Act, an act prohibiting extortion by public officials, to the charges he faces under the federal programs and honest-services bribery statutes is a stretch." However, as Gilley pointed out in his brief in support, in *Siegelman*, **the Eleventh Circuit itself acknowledged that several courts have reasoned that the rationale of *McCormick* applies to other bribery statutes when campaign contributions are at issue.** *United States v. Siegelman*, 561 F.3d 1215, 1225 (11th Cir. 2009).

While not deciding the issue, the Eleventh Circuit stated, "We acknowledge, as the defendants point out, that several district courts, in unpublished opinions, have extended the *McCormick* rationale to the [federal programs] bribery and honest service [bribery] statutes." *Siegelman*, 561 F.3d at 1215 n. 14. The Eleventh Circuit added, "The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions." *Id.*

The Recommendation's reliance on *McNair* is thus completely misplaced because *McNair* did not involve campaign contributions. For the same reason, the Recommendation's approval of the Government's reliance on *United States v. Nelson*, 2010 WL 4639236 (M.D. Fla. Nov. 8, 2010) is also misplaced. The Recommendation is based on a failure to understand the significance of the fact that, as the motion to dismiss makes clear in the very first paragraph, the motion is directed at the counts involving campaign contributions.

2. The Recommendation's out-of-hand dismissal of Gilley's contention that the *McCormick* requirement should apply to federal programs and honest services bribery also appears to be based on a failure to understand that, as far as is relevant for present purposes, "extortion" by a public official is nothing more than bribery with the added element that the recipient is a public official. *See Evans v. United States*, 504 U.S. 255, 267-68 (1992); *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987), *vacated on other grounds*, 484 U.S. 807 (1987); *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). *See also*, *Siegelman*, 561 F.3d at 1225 ("While the Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar 'explicit promise,' the Seventh Circuit Court of Appeals has observed that extortion and bribery are but 'different sides of the same coin.'").

As the Seventh Circuit has explained, "Given the minimal difference between extortion under [the Hobbs Act] and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act." *U.S. v. Allen*, 10 F.3d 405, 411.

Thus, Gilley's argument is simply that if, as the Supreme Court has held, an explicit quid pro quo is required for a *campaign contribution* under the Hobbs Act to distinguish criminal conduct from non-criminal conduct, there is no logical reason an explicit quid pro quo is not also required for a campaign contribution under federal programs bribery or honest services bribery.

3. The Recommendation concludes that, even if the *McCormick* explicit quid pro is required for bribery under federal programs bribery and honest services bribery, the indictment is adequate because the indictment alleges conduct amounting to "an explicit quid pro quo scheme." Doc. 861, p. 3. This conclusion is based in part on the court's conclusion that "explicit" does not mean "express." *Id.* The Recommendation cites a Sixth Circuit case, *U.S. v. Blandford*, 33 F.3d 685, 695-97 (6th Cir. 1994), for this proposition. However, Gilley takes issue with it for several reasons. First, *Blandford* is not controlling authority, and the Recommendation provides no analysis of its own. Second, as even the *Blandford* opinion acknowledges, "Exactly what effect *Evans* had on *McCormick* is not altogether clear." *Blandford*, 33 F.3d 685, 695-97. *Id.* (citing the Eleventh Circuit's opinion in *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir.1994), as showing that the Eleventh Circuit views *Evans* differently from the Sixth Circuit). The Sixth Circuit explains that its reading is different from that of the Eleventh Circuit because along with other circuits, the Eleventh Circuit "assume[s] that [*Evans*] establishes a modified or relaxed quid pro quo standard to be applied in non-campaign contribution cases." *Id.* But the Sixth Circuit reads *Evans* as addressed only to "the issue on which certiorari was granted, the issue of inducement," and "limited to the campaign contribution context" and not as "differentiat[ing] campaign contribution cases from non-campaign contribution cases. *Id.*

Second, if "explicit" does not mean "express," that would seem to render the additional protection of First Amendment activity recognized in *McCormick* illusory. The entire premise of *McCormick* is that in the campaign contribution context, a more robust protection is needed for legal conduct. And finally, *Blandford's* assertion about the meaning of "explicit" in *McCormick* comes not from *McCormick* and not even from the opinion in *Evans*, but from the concurrence of Justice Kennedy in *Evans*. *Blandford*, 33 F.3d 685, 696.

Conclusion

In light of the preceding objections, under Federal Rule of Criminal Procedure 59(b)(3), Gilley requests that the Court reject the Recommendation. In addition, Gilley urges the Court to grant Gilley's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 20th day of April, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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