

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CR. NO. 2:10cr186-MHT
)	
MILTON E. McGREGOR,)	
)	
Defendant.)	

**REPLY IN SUPPORT OF MOTION [DOC. 359]
FOR ORDER REQUIRING BILL OF PARTICULARS**

Milton McGregor respectfully submits this reply in support of his motion (Doc. 359) for an order requiring the Government to provide a bill of particulars on the “honest services” charges against him.

The Government emphasizes (Doc. 386, pp. 2-3) that the “honest services” charges begin with an incorporation of prior allegations in earlier parts of the Indictment, including the “overt acts” alleged in the conspiracy charge. This argument by the Government is hard to square with the Eleventh Circuit’s decision in *United States v. Bobo*, 344 F.3d 1076, 1085 (11th Cir. 2003) (rejecting the Government’s argument that clarity on the nature of the alleged “scheme to defraud,” for fraud counts, could be provided by factual allegations of “overt acts” in a preceding conspiracy count).

Nonetheless, the Government’s position does provide clarity on one limited point. Mr. McGregor’s motion had pointed out (Doc. 359 pp. 4, 5) that the “honest services” charges alleged a scheme to deprive the public of the “honest services” of Legislators and

“employees.” Mr. McGregor pointed out that this might indicate that the range of such Legislators and employees, whose “honest services” were allegedly part of some “scheme,” included people who were not named or otherwise individually identified elsewhere in the Indictment. But from the Government’s response – and in particular its strong emphasis on the fact that the “honest services” charges begin with an incorporation of the earlier allegations in the Indictment – it is fair to understand that the Government has now committed itself to agreeing that the only people whose “honest services” were allegedly at stake were those who are named or otherwise individually identified in the Indictment. (Therefore, the Indictment’s reference to “employees” in the plural must have been error, since the Indictment gives no clue of any “employee” other than Mr. Crosby whose “honest services” were conceivably at stake.) If this understanding is incorrect, the Government should explain as soon as possible; there is no justifiable reason for maintaining a lack of clarity on this point.

But as to the rest of the problems identified in Mr. McGregor’s motion, the Government’s response does nothing to reduce the unfairness. The Government is, as anticipated, intent on keeping its position fluid and unspecified for as long as possible. The Government wants not to commit itself to anything about what it must, or what it will, prove. The Government wants to go to trial on a single undifferentiated “scheme” (covering both Legislators and staff, and covering both campaign contributions and other things); but the Government wants to be able to say at trial that it does not matter whether it succeeds in proving that entire alleged “scheme” or only some parts of it. The

Government also wants to go to trial in a way that glosses over, or at least postpones the day it must reckon with, the critical legal distinction between campaign contributions and personal benefits. The Government wants to keep its options open; and as shown by the caselaw that Mr. McGregor cited in his motion, a prosecutorial insistence on keeping options open, as to what the charges are, will inevitably lead to unfairness.

If the Government keeps its options open, it will harm not only Mr. McGregor, but also the Court. Lack of clarity on the contours of the “honest services” charges, if allowed to last until trial, will inevitably bring up difficult issues of jury unanimity,¹ of variance between the indictment and the proof,² of substantive jury instructions,³ and the like. The Court could reduce these problems by requiring the Government to commit itself now to what it says it must prove in particular, in order to make out each of the several “honest services” charges. It would be reasonable, therefore, for the Court to require the Government to provide answers to the questions that Mr. McGregor posed in

¹ See, e.g., *United States v. Atkinson*, 135 F.3d 1363, 1377-78 (11th Cir. 1998) (addressing the problem of how to ensure that the jury understands and obeys the requirement of unanimity, where (as here) the Indictment alleges a mail or wire fraud scheme that is so vague that it apparently encompasses multiple alleged overt acts); see also *Bobo*, 344 F.3d at 1085.

² See, e.g., *Bobo*, 344 F.3d at 1086 n.9;

³ For instance, the Government contends (Doc. 386, p. 7 n.4) that it can prove a post-*Skilling* “honest services” charge without proving that Mr. McGregor bribed anyone. The Government’s suggestion is confusing, especially when considered in the context of alleged campaign contributions as the alleged “bribe” (which is the context for most of this case). Earlier in this case, the Government conceded that for campaign contributions it will at least have to meet the *McCormick v. United States* “explicit *quid pro quo*” standard, under which a campaign contribution could be unlawful only if there were an “explicit *quid pro quo*” exchange of the contribution for a specific action. (Doc. 237, pp. 9-10 n.6). Mr. McGregor does not assume that the Government is now retreating from that position. If the Government is trying to keep its options open in this regard as well, then that is a further problem.

his motion. This is not a request for a recounting of the Government's *evidence*. It is, in large part, a request that the Government commit itself to what *elements* it admits it must prove in order to convict, in regard to the questions posed by Mr. McGregor's motion.

Respectfully submitted,

/s/ Joe Espy, III
Joe Espy, III (ASB-6591-S82J)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Benjamin J. Espy (ASB-0699-A64E)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.

P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 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 all counsel of record.

/s/ Joe Espy, III

Of Counsel