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.	)	

RENEWED MOTION TO DISMISS
BASED ON GRAND JURY INSTRUCTIONS

Milton McGregor respectfully renews his motion (Doc. 1212, pending) to dismiss based on improper legal instructions given to the grand jury.

As discussed in Doc. 1212, it is appropriate to dismiss an indictment based on flaws in the instructions that the prosecutors gave to the grand jury about the governing law, where there is grave doubt whether the grand jury would have indicted if it had known what the law is. *See, e.g., United States v. Stevens*, 771 F.Supp.2d 556, 566-68 (D.Md. 2011).

As shown in Doc. 1212, the grand jury in this case must not have been instructed on the law of *quid pro quo* – not on "explicit *quid pro quo*" for campaign contributions, and indeed not on any sort of *quid pro quo* in any regard. This inference is inescapable given the contentions that the Government has made about the law, in this Court. The Government did not agree, at least not until well into the progress of this case, that the laws under which Mr. McGregor is charged (§ 666 and "honest services") are governed

by any *quid pro quo* requirement at all. Nor did the Government agree, at least not until well into the progress of this case (and maybe the Government will not commit even now) that the *McCormick* "explicit *quid pro quo*" standard applies to matters involving campaign contributions under these laws. Therefore, the inescapable inference – or at least the best inference, until and unless the transcript of grand jury instructions is disclosed – is that the grand jury was not instructed on these aspects of the law.

Developments in the case since the submission of Doc. 1212 have made it all the more clear that there is grave doubt whether the grand jury would have indicted, if it had been instructed on the law of *quid pro quo*. These developments include the following:

1. Rule 29 judgment of acquittal on Count 3. The Court entered a Rule 29 judgment of acquittal in favor of Mr. McGregor on Count 3. The Court recognized that the Government's theory – that $ 5000 in campaign contributions to Rep. Mask were unlawful as a supposed bribe under § 666 – was incorrect. *See* Doc. 1601 ("As to Count 3, the evidence presented by the government under the theory it asserted to the court is insufficient to support a conviction under this count."). The flaw in the Government's theory, as embodied in Count 3, was not just a lack of evidence but a lack of understanding on the Government's part about what the law is. The $ 5000 campaign contribution could not be an unlawful bribe unless (at least) there was evidence of an "explicit *quid pro quo*." The key evidence, i.e., the recording, simply did not rise to that "explicit *quid pro quo*" level. The Government advanced the theory that this contribution would be a crime *without* a *quid pro quo* agreement (even without an offer in *quid pro quo* terms). The Government's theory is that it would be a crime merely on a showing of

unilateral desire on the contributor's part that the official would be influenced. (Transcript of July 27, pp. 25-28, Doc. 1688). The Court, in entering judgment of acquittal on Count 3, rejected that theory.

The fact that this was the Government's theory even at the end of its case, as reflected in the July 27 oral argument on Rule 29 motions, confirms the inference that the grand jury was not instructed on the law of "explicit *quid pro quo*." The Government didn't believe that the law required an "explicit *quid pro quo*" exchange, even as of July 27. Therefore it is correct to infer that the Government had not told the grand jury that such was an element of the law.

Surely no grand jury would have even agreed to indict on Count 3, had it known the law of "explicit *quid pro quo*." The evidence did not even arguably rise to that level.

2. Acquittal on Count 10. The jury acquitted Mr. McGregor on Count 10, pertaining to a conversation between Mr. McGregor and Senator Ross in which campaign contributions were mentioned. The Court had instructed the jury about the law of "explicit *quid pro quo*," for Count 10, and the jury delivered the obviously appropriate answer on that Count. In the recorded conversation, which was the key central evidence, there was simply nothing that would even arguably rise to the level of an explicit *quid pro quo* exchange.

As seen above, the grand jury did not have the benefit of being told about that governing law. There is certainly grave doubt whether the grand jury would have brought Count 10 at all, if it had been told of the law of "explicit *quid pro quo*."

These developments confirm not only that Counts 3 and 10 should never have been brought. Beyond that, they confirm the point underlying the original motion, Doc. 1212: that there is grave doubt whether the grand jury would have brought *any* of the present charges against Mr. McGregor, had the grand jury been told about the law of *quid pro quo*. There is no reason to trust that the grand jury would have believed, for instance, that Count 5 (pertaining to a call between Mr. McGregor and Senator Means) involved an "explicit *quid pro quo*" exchange; the grand jury indicted, one can fairly infer, because the grand jury did not know that such an exchange was a required element. Similarly with Count 8 (pertaining to Senator Preuitt); there is no reason to believe that the grand jury would have concluded that Mr. McGregor was complicit in any "explicit *quid pro quo*" exchange or even "explicit *quid pro quo*" offer, and again the grand jury's inclusion of Mr. McGregor in Count 8 is fairly attributable to the fact that the grand jury did not know of this required element. Even as to the counts that are not based on campaign contributions, there is grave doubt whether the grand jury would have concluded that there was actually any "*quid pro quo*" offer or agreement, as opposed to a mere unilateral hope of some sort of influencing effect. Likewise, a grand jury properly instructed on the law of *quid pro quo* would not have brought the single far-reaching conspiracy count, which encompasses the matters involved in Counts 3 and 10 along with other matters.

For these reasons, along with those stated in Doc. 1212, the Court should dismiss all remaining charges. In the alternative, the Court should order disclosure of all legal instructions that the Government gave the grand jury, which will surely confirm the

absence of proper instructions on the law of *quid pro quo*; following that, the Court should dismiss all remaining charges.

Respectfully submitted,

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I hereby certify that on October 3, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF electronic filing system, and that a copy of the foregoing will be served on the below listed counsel of record via such system:

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