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.	)	

OBJECTIONS TO JURY INSTRUCTIONS

Milton McGregor respectfully submits the following objections to the Court's instructions to the jury. Mr. McGregor adopts all objections and discussion in the attached document, which was transmitted to the Court on August 2 in response to a draft of the Court's instructions. Mr. McGregor also adopts all objections filed by other defendants to the Court's instructions. As a belt-and-suspenders approach to ensure preservation of objections, Mr. McGregor further states as follows.

1. Mr. McGregor objects to the Court's refusal of his requested charge based on 18 U.S.C. § 666(c), on both substantive and procedural grounds. Substantively, the Government is wrong in contending that the § 666(c) exclusion cannot apply to "outside" income earned by a public employee. The text of § 666(c), by its plain terms, is not limited to income from the employee's primary public job; outside income, when *bona fide*, is lawful and protected under § 666(c). In *United States v. McNair*, 605 F.3d 1152,

1192 (11th Cir. 2010), the Eleventh Circuit relied on the existence of § 666(c) as one of the reasons for concluding that § 666 overall was sufficiently definite in its scope, to avoid a "rule of lenity" problem. That reference in *McNair* would make no sense whatsoever if (as the Government contends) § 666(c) pertains only to income from the public employee's government job itself. Under that reading, § 666(c) would have had nothing at all to do with the *McNair* case, and the Eleventh Circuit's discussion of § 666(c) would have been a complete *non sequitur*. The jury should be informed of § 666's protection of bona fide compensation, because that is at the heart of the dispute on Counts 15 and 16. The applicability of § 666(c) is a question for the jury to decide. *United States v. Schmitz*, 634 F.3d 1247, 1264 n.13 (11th Cir. 2011). Procedurally, Mr. McGregor objects because the Court informed the parties before closing arguments began that it would give this requested charge, *see* Fed. R. Crim. P. 30(b), and the Court should not retreat from that position.

2. Mr. McGregor objects to the Court's refusal to frame its *quid pro quo* instructions in terms of a "promise" or "undertaking" by the official. This objection is on both substantive and procedural grounds. Substantively, the "promise or undertaking" aspect of the *McCormick* standard is not an esoteric detail, but is a core part of the *McCormick* standard, under the text of *McCormick* itself. It is, for instance, one of the key aspects of the law that makes lawful – not criminal – the New York state marriage-equality example that was discussed in the Rule 29 proceedings. It is a large part of what makes the difference between "we support our friends" and bribery. It is key to

preserving the First Amendment and Due Process rights of Mr. McGregor. The Court's charge allows conviction on no more than a promise or offer, "I will strongly support your campaign if, when you vote, your position has ended up aligning with mine," or more colloquially, "I support my friends." As such the instruction is legally erroneous. Furthermore, Mr. McGregor objects because the Court informed the parties before closing arguments began that it would include this "promise" language in the charge, *see* Fed. R. Crim. P. 30(b), and the Court should not retreat from that position.

3. Mr. McGregor understands the Court's reasoning (as stated on the morning of August 3) to be that *Evans* governs "agreements" while *McCormick* governs unaccepted "offers/promises" on the contributor side and unaccepted "solicitations" on the official side. Mr. McGregor objects to this, and objects to the charge as based on it, including the refusal to charge that an agreement must be "explicit." *Evans* does not modify the *McCormick* standard for agreements, or for any other aspect of *quid pro quo* law in the campaign contribution context. Mr. McGregor objects to the exclusion of the word "explicit" in the portion of the Court's charge dealing with agreements; particularly where that word is included in the portion of the Court's charge dealing with promises, the difference is glaring, important in its implications, and erroneous as a matter of law.

4. Mr. McGregor reiterates his objection to the Court's refusal to give all of Mr. McGregor's requested charges, including "theory of defense" charges, that would have explained to the jury the law of campaign contributions, including delineating for the jury some circumstances in which it is lawful to discuss campaign contributions in some

connection to a desired official action. This includes both the charges requested in Doc. 1195 (including A-1, A-3, A-4, A-5 and A-6 to the extent not covered by the Court's charge [including the requirement of explicitness which is not adequately covered in the Court's charge as explained below], A-8 through –10, and A-13 through -23) and subsequent charges requested in Doc. 1568 (numbers 1 through 12), which are necessary both to convey the meaning of *McCormick*'s standard (including "explicit," "specific," "in return" and "promise or undertaking") and to inform the jury about certain types of linkages between campaign finance and issues that are lawful. These instructions are necessary to preserve Mr. McGregor's First Amendment and Due Process rights. This includes but is not limited to the requested instructions that campaign contributions are not covered by the laws under which Mr. McGregor is charged; the requested instructions about the word "explicit" and its meaning (including instructions that are preserved to overrule *Siegelman*); the requested instructions about the word "corrupt" or "corruptly"; and others as stated above.

5. Mr. McGregor reiterates his objection to the Court's refusal to give the charges about "alter," "affect," "change," and "prime mover" as being part of the definition of what a bribe is. See requested charges A-14 and A-15, Doc. 1195-1 pp. 16-17. Again, these instructions are necessary to preserve Mr. McGregor's First Amendment and Due Process rights.

6. Mr. McGregor reiterates his objection to the Court's refusal of his requested charges on agency, B-2 through B-4, in Doc. 1195-2 pp. 4-6. Insofar as the Court

indicated that it disagrees with the assertions of law supporting those charges, Mr. McGregor respectfully disagrees. Insofar as the Court indicated that it did not understand the charges, Mr. McGregor respectfully objects to the failure of the Court to give any charge, however written, that encompasses the points and authorities made in B-2 through B-4.

7. Mr. McGregor reiterates his objections to the Court's "honest services" charge, including but not limited to his objection that the Court's charge is misleading in light of *Skilling* (as it risks a guilty verdict that is not tied specifically to a finding of bribery, through use of a paragraph from the pattern instruction that was written before the decision in *Skilling*) and that the Court's charge permits a change in theory by the Government just before closing argument.

8. Mr. McGregor reiterates his objection to the refusal of his proposed charges on unanimity. For "honest services," this is C-5, in Doc. 1195-3 p. 10, supported by Atkinson, 135 F.3d 1363, 1377-78 (11th Cir. 1998). For "conspiracy" this is Doc. 1658 number 17.

9. Mr. McGregor reiterates his objection to inclusion of the *Pinkerton* charge, even as modified, for reasons explained in the attachment and in Doc. 1033.

10. Mr. McGregor reiterates his objection to the Court's refusal to give his proposed instructions, including #B-7 in Doc. 1195-2 p. 9 and other proposals discussed in the attachments, which would call the jury's attention to the necessity of considering each person's guilt based on his own conduct, and which would call the jury's attention

to the necessity of proof of the particular quids, quos, pros and reasons alleged in the Indictment.

Mr. McGregor reiterates all other objections, including his objection to the refusal of all requested charges not given, as stated in the attachment. Mr. McGregor reserves the right to make further objections upon receiving the Court's final charge.

Respectfully submitted,

s/ Benjamin J. Espy
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I hereby certify that on August 4, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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ATTACHMENT

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

RESPONSE OF MILTON McGREGOR TO DRAFT JURY INSTRUCTIONS

Milton McGregor respectfully responds as follows to the Court's draft jury instructions, and to the Court's request for any "objections and suggested changes" thereto. This document is primarily designed to bring to the Court's attention certain matters that we respectfully submit deserve a further look by the Court. However, to the extent the Court does contemplate this to be an "objection" document, Mr. McGregor objects to the Court's rejection of each of his requested charges and each of co-Defendants' requested charges. Mr. McGregor submits, in particular but without limitation, that the refusal of his several requested charges to explain the *McCormick* standard is error. This includes both the charges requested in Doc. 1195 (including A-1, A-3, A-4, A-5 and A-6 to the extent not covered by the Court's charge [including the requirement of explicitness which is not adequately covered in the Court's charge as explained below], A-8 through –10, and A-13 through -23) and subsequent charges

requested in Doc. 1568 (numbers 1 through 12), which are necessary both to convey the meaning of *McCormick*'s standard (including "explicit," "specific," "in return" and "promise or undertaking") and to inform the jury about certain types of linkages between campaign finance and issues that are lawful. In this enormously sensitive area, the jury needs more instruction about the boundaries of the law in order to preserve Mr. McGregor's First Amendment and Due Process rights.

Mr. McGregor also objects further on all points discussed below.

Section I of the Court's draft

1. Mr. McGregor requests that the Court include the "missing witness" instruction, requested in Doc. 1195-5 p. 5 (request E-3). This would fit on page 10, between the paragraph beginning "The testimony of some witnesses must be considered with more caution ..." and the paragraph beginning "This case involves government, politics ..." SA Keith Baker is a primary example of why this instruction is warranted and therefore required. The Government chose not to call him, even after receiving a favorable ruling on its motion *in limine* limiting his cross-examination. Agent McEachern testified that Agent Baker was more knowledgeable than he about various aspects of the case, including some to which McEachern simply professed no knowledge sufficient to testify. The jury should be instructed accordingly.

2. In the paragraph on pp. 2-3 beginning "The indictment or formal charge ...," Mr. McGregor requests that the Court change "if a defendant elects not to testify, you should not consider that" to "if a defendant elects not to testify, you must not consider that." The stronger word "must" is legally correct and appropriate.

3. Before the paragraph on p. 3 beginning "When a defendant is charged," Mr. McGregor requests that the Court add the following (from First Circuit Pattern Instruction as requested in Doc. 1195-5 p. 3, #E-1): "The defendants are being tried together because the Government has charged that they acted together. But you will have to give separate consideration to the case against each defendant. Do not think of the defendants as a group."

4. Following that, Mr. McGregor requests that the Court add the following from the Fifth Circuit Pattern Instruction, as requested in Doc. 1195-5, p. 9, #E-7: "The defendants are not on trial for any act, conduct or offense not alleged in the indictment." As will be discussed below, Mr. McGregor submits that the Court's substantive charges do not focus the jury's attention on the specific acts charged – for instance, the specific "quids" alleged in each substantive count, and the specific "quo." Instructions should focus the jury's attention on this, both in the introductory Section I and throughout. While the concept of being charged with "the specific offenses alleged in the indictment" is mentioned near the end of the Court's draft on page 47, it is important that this be prominent, and that it be more specific – not just the "offenses" (which the jury might take to mean "laws") but also "act" and "conduct" as requested in #E-7.

5. In the paragraph on pp. 8-9 beginning, "You should keep in mind, of course, that a simple mistake," the Court should include at the end of that paragraph the "falsus in uno" charge requested in Doc. 1195-5 p. 12, # E-10. As it stands, the charge leans too heavily in favor of forgiving witnesses' false testimony; that should at least be balanced by including also the "falsus in uno" charge as to situations where the jury believes that

the witness "willfully testified falsely as to any material matter either before this Court or under oath elsewhere."

6. In the paragraph on pp. 9-10 regarding cooperating witnesses, Mr. McGregor requests that the Court include at the end of that paragraph the final sentence of the relevant Eleventh Circuit Pattern Instruction, Special #1.2: "And the fact that a witness has pleaded guilty to an offense isn't evidence of the guilt of any other person."

Section II of the Court's draft

Conspiracy

7. While recognizing that the Court's charge is close to or identical to the Eleventh Circuit Pattern Charge, Mr. McGregor respectfully requests that the Court make the nature of "conspiracy" more clear to the jury by including the following plainly-correct principles of law:

* "The Government must prove beyond a reasonable doubt that the defendants knowingly entered into an agreement to commit an unlawful act." Directly supported by *Chandler*, 388 F.3d 796, 800 (11th Cir. 2004) as requested in Doc. 1195-4, p. 6, #D-2.

*"The Government must prove beyond a reasonable doubt that each defendant had a knowing, deliberate, specific intent to join the conspiracy." Directly supported by *Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998) as requested in Doc. 115-4, p. 8, #D-4.

* To the extent the Court contemplates this to be an "objections" document, Mr. McGregor also objects to the failure to give his requested charges D-3 and D-5, as well as his conspiracy-unanimity charge in Doc. 1658 number 17.

Counts 2, 4, 5, 8 and 10

8. Mr. McGregor suggests that the paragraph on pp. 17-18, beginning "A 'thing of value' ..." is likely to confuse the jury and to lead them away from the specific charges in the Indictment. Instead, the Court should say, "Each of these charges alleges a particular 'thing of value,' and you cannot convict any defendant in any count for offering any 'thing of value' other than that alleged in the particular count. Where the 'thing of value' is alleged to be an unspecified amount of campaign contributions, you may consider only that – an unspecified amount – and may not convict based on any other thing of value."

9. Similarly, jumping ahead for a moment to the paragraph defining "official action," p. 21, we respectfully suggest that this takes the jury too far from the specific charges in the Indictment. The Indictment charges specific "official action" that was at issue in Counts 4, 5, 8, and 10: the upcoming vote on SB380. Therefore instead of this paragraph, we suggest language such as "The official action allegedly at issue, as to Counts 4, 5, 8, and 10, was a favorable vote on SB380." See proposed instruction A-12 in Doc, 1195-1 p. 14.

10. Mr. McGregor submits that the Court's charge on the definition of "agent" is insufficient in light of requested charges B-2 through B-4, in Doc. 1195-2 pp. 4-6, and preserves the objection to the refusal of those proposed charges.

11. The Court's "quid pro quo" instructions on campaign contributions (pp. 18-22) do not adequately focus the jury's attention on part of the *McCormick* formulation: the "promise or undertaking" by the official. *See McCormick*, 500 U.S. 257, 273 (1991) ("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. In such situations the official asserts

that his official conduct will be controlled by the terms of the promise or undertaking.") Mr. McGregor requests that the Court revise its charge throughout to reflect that it is this "promise or undertaking," as distinct from "official action" itself, that must be the "*quo*" in the "*quid pro quo*" in order to make out any crime. For instance, in the paragraph beginning "However, when there is a quid pro quo agreement ..." (pp. 19-20), the Court should replace "the performance of a specific official action" with "the official's promising or undertaking that he will perform a specific official action." If the Court agrees with Mr. McGregor on this assertion of law (the distinction between "action" and "promise or undertaking") but believes that it is adequately covered by the following sentence ("in exchange for the official agreeing to take or forego ..."), Mr. McGregor respectfully submits that the point is not clear enough.

12. In the same paragraph just discussed, pp. 19-20, the word "explicit" should be used – for instance replacing the phrase "mutual understanding" with "explicit mutual understanding." This would be consistent with the Court's use of the word "explicit" in the subsequent paragraph (the one beginning, "A promise of a campaign contribution ..."

13. In the paragraph on pp. 20-21, beginning "A promise of a campaign contribution ...," the concept of "promise or undertaking" by the official is missing and should be included consistent with the discussion above. So, replace "conditioned on the performance of a specific official action" with "conditioned on the official's promising or undertaking that he will perform a specific official action." Also, suggest making clear that it is the condition as well as the contributor's promise that must be "explicit," by changing "To be explicit, the promise or solicitation need not be in writing ..." to "To be

explicit, the promise or solicitation, and its being conditioned on the official's making a promise or undertaking in return, need not be in writing ..."

14. The paragraph on pp. 20-21 ("It is not a defense that the agent would have ...") is, we submit, contrary to the law including *Siegelman*, 640 F.3d 1159, 1177 (11th Cir. 2011) ("The evidence that Adams intended to alter his official actions as a result of the receipt of benefits from Scrushy is insufficient, and Scrushy's convictions on Counts 8 and 9 must be reversed."), and other cases such as *Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action – a quid pro quo"). Mr. McGregor respectfully asks the Court to reconsider and eliminate this paragraph, and requests that the Court instead include his requested charges A-14 and A-15, Doc. 1195-1 pp. 16-17. Mr. McGregor submits that it is a deprivation of due process to resolve this question of law against him, where there is Eleventh Circuit precedent in his favor as cited. If the Court believes that this paragraph of the Court's draft addresses a question that is distinct from the proposition that Mr. McGregor has requested (as supported by authorities including *Siegleman* and *Kummer*) and not necessarily inconsistent with it, then at least the Court should include Mr. McGregor's requested instructions as well as this paragraph.[1]

[1] The "not concerned with the wisdom or results" aspect of this paragraph of the Court's draft instruction seems to come from *Lopez-Lukis*, 102 F.3d 1164, 1169 n.13 (11th Cir. 1997). That pre-*Skilling* case, even if still viable in any respect, does *not* stand for the proposition that there can be a bribe that *does not affect* the action in question. It may stand for the proposition that the wisdom or beneficiality of the decision is not the question. But that is very different from saying that it doesn't matter whether the official would have taken the same action regardless. "Results," in the sense used in *Lopez-Lukis*, refers to the "results" of the legislation, i.e., whether it is good for the public or not, not the "result" in the sense of how the legislator votes.

Counts 15 and 16

15. "McGregor" is sometimes spelled "MgGregor" in this section, and a global search for "MgGregor" might find other examples throughout.

16. The paragraph on page 26 defining "An 'official action'" is erroneous and prejudicial for reasons like those already discussed. The Indictment alleged specific action, and a specific reason for the payments: "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." Indictment, Doc. 3, pp. 52-53, ¶¶ 218 and 220. Therefore this paragraph should be replaced with language as follows: "The Indictment charges that payments were made to influence or reward Mr. Crosby 'in connection with his official acts as they pertained to drafting gambling legislation, including SB380.' You may not convict either Mr. McGregor or Mr. Crosby on the theory that the payments were made for any reason other than that. Only if the Government has proven that beyond a reasonable doubt, in addition to the other elements as I have described them, could you find either defendant guilty on these charges."

17. The paragraph on page 26, beginning "It is not a defense ..." is incorrect and inconsistent with *Siegelman* and *Kummer* and other authorities as explained above. The Court should replace this paragraph with proposed instructions A-14 and A-15, Doc. 1195-1 pp. 16-17, or should at least include those in addition to this paragraph. Again, refusal of these instructions and inclusion of the Court's contrary instruction would violate Mr. McGregor's due process rights in light of the present state of the law.

18. Mr. McGregor submits that, in light of the Government's erroneous attempt to muddy the waters through discussion at trial about state law and employment manuals, it

is very important that the Court give his requested instructions in Doc. 1575 and Mr. Crosby's requested instructions in Doc. 1574. The jury has been left with the severe potential for the impression that Mr. Crosby can be convicted based on a perceived violation of state law or employment handbook, either in regard to the receipt of the payments or in regard to their disclosure by him or Mr. McGregor. The Court should give the requested instructions to avoid that prejudicial error. With regard to the instructions requested in Doc. 1575 in particular, the Government (for instance through questioning of Mr. Whittaker intensely attempted to make the jury believe that payments to Mr. Crosby had to be disclosed on a lobbying disclosure form. There is a substantial chance that the Government will make this contention in closing argument as well, since the Government made it a theme of its case regarding Counts 15 and 16. The instructions requested in Doc. 1575, clarifying that the Government's theory is mistaken, are important in order to avoid the clear danger that the jury will be misled and confused about this matter of state law, and that the jury will use a mistaken understanding of state law as a reason to convict Mr. McGregor on the mistaken theory that he was violating some legal duty in an effort to hide some guilty act or state of mind.

19. The Court should certainly include an instruction on 18 U.S.C. § 666(c), as requested in Doc. 1195-1 p. 23, #A-20, and 1195-2 p. 7, #B-5. This is a specific exclusion from § 666 that appears in the statute itself. Especially given the thinness of the Government's proof on the reason for the payments, the jury could certainly conclude that the Government has failed to prove the inapplicability of this exception. *See* 18 U.S.C. § 666(c): "This section does not apply to bona fide salary, wages, fees, or other

compensation paid, or expenses paid or reimbursed, in the usual course of business." The Court has no basis upon which to take this aspect of the statute away from the jury's consideration.

Counts 23 through 33

20. The Court should omit the paragraph on page 32 beginning "To act with 'intent to defraud' ..." Including that paragraph in the charge would constitute a new revision to the Government's theory of the prosecution. The Indictment alleges "concealment of material information" (Doc. 3 p. 58 ¶ 234) and the Government responded to the Court's inquiries at oral argument by advancing theories about what that "concealment" was. The Government did not advance the theories that are implicit in this paragraph, but instead committed itself only to other alleged concealments. To allow the Government to change its theory now would be an impermissible amendment of the Indictment and a deprivation of due process through changing theories on-the-fly at the end of trial. The Court should instead give charge C-2 in Doc. 1195-3 p. 7.

21. The paragraph on page 21 beginning "To 'deprive someone else of the intangible ..." is an incorrect statement of law and is misleading after *Skilling*. It is not the law that public officials "must act in the public's best interest" under "honest services" law. All that they must do is not take bribes and kickbacks, as the law defines those. And bribery is not a "for example," but is instead the definition (along with "kickbacks") of "honest services." This paragraph wrongly induces a jury to convict for things other than bribery in this case, and is therefore incorrect and prejudicial. It should be replaced with a paragraph simply stating, "You may not convict any defendant on

these charges unless there is proof beyond a reasonable doubt of bribery as I have defined that term to you, along with the other elements of the charges that I have described."

22. Mr. McGregor respectfully requests that the Court reconsider and include his requested charge C-5, in Doc. 1195-3 p. 10, regarding unanimity on certain aspects of the fraud charges. This is supported by *Atkinson*, 135 F.3d 1363, 1377-78 (11th Cir. 1998).

Section 3

23. Mr. McGregor submits that the Court should not give this "Pinkerton" charge at all, for reasons explained in Doc. 1033. This indictment plainly does not contemplate Pinkerton liability, as each count charges only those defendants who are alleged to have personally participated. Furthermore, as stated in Doc. 609, the Government committed itself to the proposition that each defendant is charged in substantive counts on account of his own alleged conduct. Therefore, Section 3 should be replaced entirely with Mr. McGregor's requested instruction #B-7 in Doc. 1195-2 p. 9.

24. Furthermore, the Pinkerton charge as drafted will confuse the jury because it makes so little sense as to so many of the charges, particularly in light of the way that the Indictment must be redacted if it is to be given to the jury. The Court should at least add the following, at the end, if the Court gives any Pinkerton instruction at all: "This does not mean that you may consider convicting any defendant on any count in which he is not charged, nor may you consider convicting any defendant on any count for any actions that are not charged in that count. You must consider each count separately, and each defendant separately, considering whether each defendant has been proven guilty beyond a reasonable doubt on each separate charge against him."

Respectfully submitted,

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