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.	)	

PROPOSED ADDITIONAL INSTRUCTIONS, WHICH HAVE BECOME RELEVANT DURING THE COURSE OF THE CASE, INCLUDING "THEORY OF DEFENSE" INSTRUCTIONS

Milton McGregor respectfully requests that the jury be instructed as follows, in addition to instructions previously requested.[1]

1. It is not a crime to say that one will give a campaign contribution if the official takes an action. What must be proven, instead, is that a campaign contribution was made in exchange for an explicit promise or undertaking by the official that he would take such action. The distinction I am making, here, is between (for instance) a vote, and an explicit advance promise or undertaking of a vote. There must be an explicit promise or undertaking by the official in advance, as to what action he will take, in exchange for the contribution, in addition to the other elements that I have described.

[Explanation: This is the *McCormick* standard, as explained in the Rule 29 motion

[1] By order (Doc. 1051), the Court required such instructions to be submitted 48 hours before close of evidence based on a good-faith estimate. These instructions are being submitted well in advance of that time, based on a good-faith estimate, and may be supplemented as the floating deadline approaches.

and oral argument. While some proposed instructions already get at the concept, this instruction is proposed to make the distinction clear to the jury, as it became clear during argument on the Rule 29 motion that the Government is trying to expand beyond the *McCormick* formulation in this case.]

2. It is not a crime for a person to give campaign contributions only to officials who take the positions that the person supports, and to refuse to give campaign contributions to officials who take positions that the person opposes.

It is also not a crime for a person to say, to an official or to another person, that this is his approach.

[Explanation: This is an easy-to-understand expression of a principle of law that follows from the *McCormick* standard, above. It will directly assist the jury in assessing certain evidence about statements, in evidence, to the effect of "we support our friends" or "we support those who support us."]

3. In order for an offer of campaign contributions or campaign support to be a *quid pro quo* bribe, the Government must prove beyond a reasonable doubt that the *quid pro quo* was for the exchange of a specific amount in exchange for a promise or undertaking that the official would take a specific action.

[Explanation: As explained in the Rule 29 motion and oral argument, the *quid* should be required to be specific, just as the *quo* must be under *Siegelman II*. No caselaw has been found in which this principle of law had to be addressed, so to the extent it is an open question, Due Process principles require that it be resolved in favor of the defense in this case.]

4. A general promise or offer of future campaign support is not illegal, even if the parties contemplate that the support will be given after the official takes an action (such as a vote) that the potential donor wants.

[Explanation: A further plain-language corollary of the *McCormick* standard, designed to be understandable.]

5. It is not a crime to offer even a specific amount to a legislator in an effort to create a long-term alliance or political realignment. This is not a crime even if the initial manifestation of such a long-term alliance or alignment would be vote on a particular matter.

[Explanation: As discussed in Rule 29 motion and argument, and following from *McCormick* and *Siegelman II*, as well as being required by First Amendment and Due Process].

6. It is not a crime for a person to offer an official a campaign contribution, or to give an official a campaign contribution, with the intent or hope or expectation that it will motivate the official to take an action that the person prefers.

This is not a crime, even if the expectation is that the official may hope or believe that he will then receive further contributions if he takes the action that the contributor prefers.

[Explanation: Again, an effort to put the *McCormick* standard, and First Amendment protections, in plain language for the jury's understanding.]

7. It is not a crime for an official to be concerned about possible political fallout if he takes a position that will be unpopular with some of his existing contributors

or other people. It is further not a crime for an official, who has that concern, to seek campaign support to help him fight back against that fallout. It is further not a crime for a person to be responsive to such concerns. In short, officials can ask people to "have their back" if they take a controversial stance; and people can promise that they will do that.

[Explanation: As discussed in Rule 29 motion and argument.]

8. It is not a crime for a person to tell an official that he will support an opponent of that official, during a re-election campaign, if the official takes action (such as a vote) that the person opposes.

[Explanation: Surely beyond dispute as a matter of law. Necessary, though, in order to make sure the jury knows that certain evidence presented in the case does not make out a crime.]

9. It is not a crime for a person to use money in an effort to build grassroots support or opposition to an issue, bill, or candidate. It is also not a crime for a person to tell an official that he either will or will not do that, depending on the official's actions in regard to an issue that the person is interested in.

[Explanation: Follows from the principles already discussed above, and directly responsive to certain evidence in the case regarding 'Democracy Tour' and the like.]

10. It is not a crime for a person to try to influence an official's vote through tricking the official about what another official is doing or thinking or planning to do.

[Explanation: Surely beyond dispute as a matter of law. Necessary, though, in order to make sure the jury knows that certain evidence presented in the case, regarding

an effort to persuade Senator Preuitt, does not make out a crime.]

11. There is no such crime as having too much influence in politics, nor is there any such crime as conspiring to use too much influence. The only crime to be considered here, as to Mr. McGregor, are crimes allegedly involving bribery as I have carefully defined it.

[Explanation: Plainly correct as a matter of law, and necessary in order to ensure that the jury is not confused about the issues or swayed to convict by evidence of lawful influence].

12. It is not a crime to try hard to persuade officials to vote, by various means other than bribery, including amending bill to seek their support, including having known allies of theirs speak to them, including asking someone else not to oppose the official's re-election, or including appealing to officials' strengths and weaknesses. You must not convict any defendant for engaging in what you may consider to be unseemly politics, which does not amount to bribery, because unseemliness is not a crime. There is no such crime as conspiring to do something unseemly.

[Explanation: As above – plainly correct, and important to the jury's understanding].

13. As to Count 4, charging Mr. McGregor in regard to Senator Beason, the only alleged bribe involved in that count is $1 million dollars for use at his discretion. You may not consider convicting Mr. McGregor on this count based on a conclusion that he made any offer, promise, or agreement regarding any other thing, other than the $1 million dollars for use at his discretion that the Government has specifically charged.

[Explanation: Indictment, ¶ 196 p. 42. Necessary in order to ensure that Mr. McGregor is not convicted based on a crime not charged.].

14. As to Count 3, charging Mr. McGregor in regard to Representative Mask, the only alleged bribe involved in that count is $5,000. You may not consider convicting Mr. McGregor on this count based on any offer, promise, or agreement regarding any other thing, other than $5,000.

[Explanation: Indictment, ¶ 194, p. 42. Necessary in order to ensure that Mr. McGregor is not convicted based on a crime not charged.]

15. From time to time, the Government has asked witnesses, or witnesses have volunteered, what they thought or understood Mr. McGregor to have meant by some statement. You should never treat any such statement by a witness as actually being evidence that Mr. McGregor meant what the witness says that he meant. What people mean, by the words that they say, is up to you to decide under the specific instructions I have given you. A witness cannot tell you what another person meant. If a witness's impression of what somebody else meant is ever relevant, it would only be to give some context or to explain why the witness then reacted the way he did – and not as evidence that the witness was right in his thinking about what the other person meant.

[Explanation: As discussed throughout the case].

16. You have heard testimony from some witnesses that, in their view, they themselves offered what they considered to be bribes. Such testimony is not evidence that any other person, including Mr. McGregor, offered a bribe to anyone.

[Explanation: As discussed throughout the case].

17. In addition to the other instructions I have given you regarding conspiracy, you may not convict any defendant of conspiracy unless you unanimously agree on the identity of an official who was the recipient of the bribe.

[Explanation: Necessary in order to protect the constitutional right to jury unanimity, particularly since this is such a core aspect of the charges.]

18. You must not engage in a compromise verdict, meaning an agreement to resolve disagreements or doubts among yourselves by rendering a guilty verdict on some counts and a not-guilty verdict on other counts. Rendering such an agreement would be inappropriate and unfair, and you should not be under the illusion that can have any impact on the possible punishment by rendering such a verdict.

[Explanation: Plainly correct, and a useful caution to the jury.]

19. When a jury deliberates, part of the jurors' task is to assess the credibility, that is, the believability of witnesses. In assessing the believability of a witness, you may consider his behavior and manner on the witness stand. If a witness repeatedly engaged in inappropriate behavior on the witness stand, even after I instructed him that he must not do so, you may take that into account.

[Explanation: Tailored, under the circumstances of this case, to Eleventh Circuit Pattern Criminal Instructions, Preliminary Instruction #1 ("In considering the testimony of any witness, you may take into account: … The witness's manner while testifying"); Anderson v. Atlanta, 778 F.2d 678, 689 (11th Cir. 1985) (quoting with approval the following instruction: "You may be guided by the appearance and the conduct of the witness, the manner in which the witness testifies, the character of the testimony given or

by evidence to the contrary. You should carefully scrutinize all the testimony given as I have said and consider each witness's intelligence, motive, state of mind, demeanor and manner while on the stand.")]

20. You have heard testimony in this case about a Monica Cooper, who worked in some capacity in or around the Alabama Legislature. I instruct you that Mr. McGregor is not charged, in any count in this case, with having bribed or otherwise acted unlawfully in respect to Ms. Cooper.

[Explanation: Undoubtedly correct, and useful to avoid jury confusion]

21. Mr. McGregor could have called more witnesses to testify to his good character, but the court restricted the number any defendant could call to five such witnesses. If Mr. McGregor had been allowed to if allowed to call more character witnesses, the additional character witnesses would have testified to Mr. McGregor's good character.

[Explanation: Doc. 1458, pp. 3-4].

22. Mr. McGregor further requests as follows. He has, pursuant to established law including *Siegelman II* and *McCormick*, framed his proposed instructions largely in terms of the requirement of proof of an agreement or exchange. There has been discussion with the Court of whether there could be an offense based on an offer without acceptance. Mr. McGregor submits that, pursuant to *Siegelman II* and *McCormick.*, the jury instructions should be framed in terms of agreement. However, if the Court accepts the Government's position in this regard, Mr. McGregor requests that the Court give each instruction he has requested, changed as necessary in order to make the same points in the

context of an offer. The core of this would be that (even if the Government's approach were correct) it would have to be proven that the alleged payor made an offer that, *if accepted*, would have met all the requirements identified in Mr. McGregor's proposed instructions, including that it was an offer framed in terms of seeking an explicit promise or undertaking by the official that he would vote in favor of SB380, in return or exchange for a contribution.

Respectfully submitted,

s/ Benjamin J. Espy
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I hereby certify that on July 28, 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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