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.	)	

SUPPLEMENTAL SUBMISSION IN SUPPORT OF RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

Milton McGregor submits this supplement to his motion for judgment of acquittal, which has been made and renewed at the close of the defense case and at the close of all evidence. As the Court has noted, Mr. McGregor has so moved, and he has adopted in support of this motion all argument previously made orally and in writing, both by Mr. McGregor and by other counsel. Mr. McGregor supplements the motion with these points:

1. One point, first, to be preserved – even though this Court will likely see itself as not being able to agree with the contention, given existing precedent.

Mr. McGregor contends that, because this criminal prosecution based on campaign contributions so strongly implicates activity that is within the protection of the First Amendment, both this Court and any reviewing Court should consider the Rule 29 motion without deferring to any findings that the jury could make or that the jury may make. The Court and any reviewing court should make an independent assessment of the

evidence, in order to ensure that First Amendment rights are protected, pursuant to such cases as *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Mr. McGregor notes that the same argument was made to the Court of Appeals in *Siegelman*, and was rejected (though without significant discussion). *See United States v. Siegelman*, 640 F.3d 1159, 1165 n.2 (11th Cir. 2011) (*Siegelman II*), application for rehearing pending ("The defendants assert that this is a case in which we owe no deference to the jury's findings of fact, but we disagree.")

2. Regarding Count Three in particular, Mr. McGregor states as follows, in response to the Court's follow-up inquiry regarding the two conversations between Mr. McGregor and Mr. Mask, J-004 and J-006.

As noted previously, the "bribe" alleged in Count 3 is one thing: the $5000 campaign contribution given on the evening of February 15.[1]

The fundamental point is that because the $5000 was given, outright and irretrievably, without a promise or undertaking by Representative Mask that he would vote for the bill – and without any exchange/agreement in that regard – there was no crime under the *McCormick*[2] standard or even under *Siegelman II*.

The Court has inquired (in paraphrase) whether this Count might come within a

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[1] Mr. Mask indicated in J-004, p. 14 lines 13-19, that he did not want campaign contributions from Mr. McGregor, but he indicated that he would like them from other people whom Mr. McGregor could contact. The evidence shows that the campaign contribution, in fact, did not come from Mr. McGregor. It came from a PAC or PACs. There is no evidence, therefore, that Mr. McGregor even made a contribution. Count 3 attempts to hold him criminally liable for allegedly asking another person/entity to make a contribution.

[2] *McCormick v. United States*, 500 U.S. 257 (1991).

doctrine of "attempt" or "intent to make" or "unaccepted offer" of an explicit *quid pro quo* within the *McCormick* standard. The answer again is "no," under the facts even in the light most favorable to the Government. Where the alleged bribe is given without an exchange, without a promise or undertaking, all that can be inferred at most is exactly the sort of thing that *McCormick* held is insufficient to make out the crime.

Taking J-004 first, we lay out what Mr. McGregor would have known at the time the $5000 campaign contribution (the alleged bribe) was given.

As shown in the first pages of J-004, Mr. McGregor began by lobbying Mr. Mask on the politics, merits and popularity of the bill – pure protected political speech. This takes us to page 3 line 21 of J-004.

Next, Mr. McGregor states why he called. Before this conversation (J-004) began, Mr. McGregor had learned of a conversation that Mr. Mask had with a constituent, Mr. Lambert. (The Government has often called Mr. Lambert an employee of Mr. McGregor, but there is no evidence of that). *See* J-004 page 3 lines 22-45.

Mr. McGregor and Mr. Mask then discuss what Mr. Mask had told Mr. Lambert: as Mr. McGregor said, "That you had, you had a concern, uh, and if, if I could, if I could square you away with that concern that you would be fine and that you would support people having the right to vote on the bill. And that concern is that I wouldn't contribute, uh, any at all to any race that involved any of the state gaming commissioners." *See* J-004 page 4 lines 1-4.

Mr. Mask responded not with a definitive 'yes, if that concern is addressed' but with something less definitive, since he had not even yet looked at the bill, which he needed to do: "Well I mean that's my, that's my biggest concern, I mean, you know I, I wish, I wish you wouldn't make any contributions for the privileges but I mean is that prohibition in the bill which I, I'm going to sit down tomorrow and finally look at the bill but …" *See* J-004 page 4 lines 6-9.

Then there ensues several pages of pure lawful political/merits discussion about Representative Mask's concern, and about some tangential political matters immaterial to the charges in this case, *See* J-004 page 4 line 11 to p. 14 line 11.

In the midst of that purely lawful constitutionally-protected political discussion, Mr. McGregor stated, "I would not be a part of asking you a house member to vote for a constitutional amendment on this issue until it has passed the senate." *See* J-004 page 9 line 44 to page 10 line 2. Thus Mr. McGregor made clear: he was not seeking a "promise or undertaking" (*see McCormick*, 500 U.S. at 273) from Mr. Mask at this juncture, or at any time before the bill passed the Senate.[3]

The conversation then turned back to pure lawful politics and the merits of the bill: it is a "fairness" issue and a "jobs" issue, as both Mr. McGregor and Mr. Mask discussed. *See* J-004, p. 10 lines 15-28.

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[3] There was some discussion later – and yet still before Representative Mask attempted to turn the call to campaign finance – about the possibility that the bill would come to the Senate as early as that week. There was, however, no hint that it would come to the House that day, or even the next. *See* J-004, p. 12 line 1. This call was taking place on a Monday, February 15.

Mr. McGregor stated that he did want ("need") Mr. Mask to be part of the 63 votes in the House, p. 13 line 38, and he tied this not to any campaign contribution or anything of the sort, but instead to the prior discussion about how Mr. Mask could possibly see his way clear to voting for the bill if the concern previously discussed was addressed. Thus Mr. McGregor took the conversation back to what Mr. Mask had said to Mr. Lambert, and to Mr. McGregor himself, about the merits of the vote: "I need your help and, and, and I was delighted to hear what, what Robert Lambert told me and I'm, I'm glad to hear you confirm what he told me so you will never be sorry. I promise you this. You will never be sorry that you vote to let the people vote and I wanted to call and thank you for what you told Robert Lambert and I want [Inaudible]." J-004, p. 14 lines 4-8.

At this point, logically speaking there is either a commitment by Mr. Mask to vote for the bill, or not. One can perhaps read Mr. McGregor's last-quoted comment as suggesting that he thought he had Representative Mask's concern squared away on the merits, and that Mask was on board, *without* anyone ever yet having said a word about campaign contributions. Or, one can read the conversation as Mr. Mask not yet having committed – that he still (as he said earlier in the conversation) needed to read the bill, and that he was (as he said later in the conversation, p. 18 line 12) "on the fence." Under that alternative understanding, there is still certainly no commitment in exchange for a contribution – because on this reading of the call there's no commitment, and there's been no discussion of a contribution.

Whichever of those readings the Court adopts is fine. The second reading – that Representative Mask had made no commitment at all – is the better reading. But even if the Court disagrees, neither one leads to a crime, as we will explain below in discussion of *McCormick* and *Siegelman*.

And it is at this point (page 14 line 13) that Representative Mask turns the discussion to campaign finance. He wants (or says he wants) campaign contributions. Mr. McGregor steers the conversation towards the Poarch Creek Tribe (p. 14 line 33 to p. 15 line 9), but Mr. Mask tries to steer it back towards his request for campaign contributions. There is some discussion of that. The Court may take it that Mr. McGregor indicates a positive response.

But here again, we go back to where we were before: either Mr. Mask had already committed, *before* he steered the conversation towards campaign contributions, when the conversation had been only about the merits of the bill – or Mr. Mask hadn't committed, *and he became no more committed after he brought up campaign contributions than he was before*. He speaks of himself not as committed but as an "if" – "I got a bunch of guys in my caucus just like me, I mean, you know is it, is there any of them that if I'm persuaded that I can, can help you with." p. 16 lines 10-12. Even after the discussion of campaign finance, Mr. Mask still describes himself as being "on the fence." *See* p. 18 lines 11-12 ("There's a handful of others just like me. You know for example Benjamin Lewis. He sorta on the fence like I am.") And Mr. McGregor's response is a mini-lecture on the merits and popularity of the bill. *See* p. 18, lines 29-37.

And after all this and other discussion, Mr. Mask brings up the steak dinner that night – the place where the alleged $5000 bribe, which is the crime charged, took place. *See* p. 19 lines 38-40. The conversation winds up with some further discussion, which again contains no further or new commitment by Mr. Mask to vote for the bill which (as he emphasized at the beginning) he hadn't even read.

Then comes the steak dinner and the $5000 contribution. There was no relevant conversation that accompanied the $5000 contribution – no discussion of gaming legislation or anything of the sort.[4]

What Mr. McGregor knew at this time, when the $5000 contribution was given, simply cannot come within the *McCormick* or *Siegelman II* standards. The contribution was given, irretrievably and unconditionally. And it was not, not under any reasonable assessment of the evidence, given *in exchange* (i.e., *in return*) for any promise or undertaking by Representative Mask that he would vote for the bill.

The *McCormick* formulation is precise, precisely because the Supreme Court saw the necessity of being precise. It does not cover attempts to influence or inspire, by giving a contribution. It also, for that matter, does not cover contributions given in appreciation for a stance. "Money is constantly being solicited on behalf of candidates,

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[4] Doc. 1551, June 20 Transcript, p. 235 lines 12-21 (testimony of Representative Mask:"
Q. You've already established the fact that as far as Mr. Geddie is concerned, he didn't ask you to do anything and you didn't agree to do anything, right?
A. That's correct.
Q. You didn't solicit a contribution, nor did you promise that you would do anything in exchange for this contribution to Mr. Geddie, did you?
A. No, sir.
Q. Not to Mr. Patterson either, correct?
A. No, sir.

who run on platforms and who claim support on the basis of their views and what they intend to do or have done." *McCormick*, 500 U.S. at 272. It covers one thing: campaign contributions *given* in *exchange* for a *commitment*, a promise or undertaking that one *will* take the action in question. There is a crime "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*, 500 U.S. at 273. It is future tense on the part of the official: I will vote that way, in exchange for the contribution. "In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*

The *Siegelman II* formulation, while lacking in other respects, is correct in this same focus on the necessity of an exchange for an advance commitment by the official, a future-tense statement as to what he will do. This is necessary in order to differentiate the crime of bribery from the norm of campaign contributions given or discussed as inspiration for a vote yet to be committed, or in appreciation for a vote once it is taken. Those are routine and lawful. What the *Siegelman II* standard covers, like the *McCormick* standard, is the exchange for advance commitment by the official. The jury instruction approved in *Siegelman II* required that ""the defendant and the official agree that the official will take specific action in exchange for the thing of value." *Siegelman*, 640 F.3d at 1170 (second emphasis added). Again, it is an exchange for a commitment in advance. This is what makes the formulation different from every political contribution that is given in appreciation or in hopes of inspiration.[5] Other courts (even when getting

[5] The *Siegelman II* Court did not have to belabor this future-tense aspect of the point, and also

other parts of the issue wrong, in our view) agree that there must be an exchange involving an advance commitment. *See, e.g., United States v. Whitfield*, 590 F.3d 325, 350 (5th Cir. 2009) ("so long as the payor and payee agreed upon a specific type of action to be taken in the future.")

As we have stated above, if Representative Mask was committed following the merits discussion that occupied the first part of J-004, then the $5000 was not given in exchange for that commitment. (And it certainly was not given in exchange for a vote, for that matter, since Representative Mask had not voted). If the Court interprets the conversation that way – as Mr. Mask having committed himself in response to the merits discussion – then the $5000 was perhaps given in constitutionally-protected *appreciation* or *support* for that merits-based choice by Representative Mask, but that is true of innumerable (even most, if not all) campaign contributions. Again, as the Supreme Court said, "Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done." *McCormick*, 500 U.S. at 272. "The law recognizes that virtually every campaign contribution is given to an elected public official because the give[r] supports the acts done or to be done by the elected official." *United States v. Ring*, 768 F.Supp.2d 302, ___ (D.D.C. 2011).

And if the Court reads the conversation taking Mr. Mask at his word – that he was an "if" and was "on the fence" – then again there was no *McCormick* or *Siegelman*

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could not have held otherwise in any binding fashion, because *Siegelman* (on the Court's view) simply was a future-tense case: the campaign contribution was given, allegedly in exchange for a commitment that Governor Siegelman *would* appoint Mr. Scrushy to the C.O.N. Board.

exchange at the time of the $5000. There just was no promise or undertaking by Representative Mask, on this reading, as to what he would do. If you gave somebody something flat out and they haven't yet committed, what you gave them *cannot* be in exchange for a commitment.

The Court has inquired about the possibility of an "intent" conviction, even without a completed agreement. There can be no such conviction on Count 3, under the clear terms of *McCormick*, where the $5000 was given in the circumstances we have discussed. An "intent" that the irrevocable and unconditional donation might *lead to* a commitment by the Representative would not be enough under *McCormick*. This, in fact, was one of the core problems that the Supreme Court found with the jury instructions that had been given in *McCormick*: they allowed conviction on proof that the contributions were given with the expectation on the contributor's part that the official would be influenced, and with the official's knowledge of that expectation. "[A]s we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation." *McCormick*, 500 U.S. at 274. The Supreme Court reversed because that instruction was bad. Even a bilateral expectation that the contribution would influence the official was not enough to make out the crime, according to the Supreme Court. Certainly a unilateral expectation, hope or intent is therefore *a fortiori* not enough.

The Court has also inquired about what J-006 does, if anything, to bolster the Government's case. It does nothing. It changes nothing about whether there was a commitment by Representative Mask, nor about whether there was an exchange of the $5000 contribution for such commitment. Representative Mask said nothing about how he would vote, nor was he asked. Even if he had said something or had been asked, such after-the-fact conversations could not make an already-made and irretrievable contribution into an exchange. But this is academic, because still Representative Mask's position on the vote was no different than it had been, and Mr. McGregor did not even try to make it different in J-006 for that matter.

For these reasons, as well as those previously explained, the Court should grant a judgment of acquittal on Count 3 and on all other charges against Mr. McGregor.

Respectfully submitted,

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