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 BRIEF IN SUPPORT OF DOC. 1753, MOTION FOR JUDGMENT OF ACQUITTAL

Milton McGregor respectfully submits this reply brief in support of his motion for judgment of acquittal (Doc. 1753). Without repeating all points made in the opening brief (Doc. 1804), Mr. McGregor notes the following points in particular.

First, the Government incorrectly seeks refuge in the thought that a defendant bears a "heavy burden" on a Rule 29 motion. (Doc. 1852, pp. 4-5). While that might sometimes be said by some courts, it is incorrect, at least in this case. A defendant may have the burden of pointing out the nature of the holes in the Government's case. But the truly relevant burden is on the Government, the heaviest burden in the law: the burden of proving guilt beyond a reasonable doubt. When a jury has found a defendant guilty, it might colloquially be said that the defendant has a heavy burden of showing that the jury's verdict of guilt was wrong. *See United States v. Siegelman*, 640 F.3d 1159, 1164 (11th Cir. 2011) (stating that the case, on appeal after conviction, "has arrived in this court

with the 'sword and buckler' of a jury verdict"). But that is not the case here, as Mr. McGregor has not been found guilty of anything. The burden in this case is squarely on the Government; and the Government has failed.

Count Four (§ 666 regarding Senator Beason)

As shown in our opening brief, the Government completely failed to prove that Mr. McGregor made (or was otherwise criminally liable for) the bribe alleged in Count Four: "$1 million to [Senator Beason], for use at [Beason]'s discretion, which money would be provided to [Beason] as income from, or an equity interest in, a public relations entity." (Indictment, Doc. 3, pp. 42-43, ¶ 196). The charge alleged a bribe offer of a million dollars in Senator Beason's pocket. We showed that Mr. McGregor did not make such an offer, that even Mr. Gilley didn't make or authorize such an offer either, and that nobody even told Mr. McGregor that such an offer was made.

In its response, the Government attempts to leave the impression that Mr. Gilley did tell Mr. McGregor that such a $1 million personal-enrichment offer was made to Senator Beason. *See* Doc. 1852, p. 14 (arguing: "The next day, on February 19, 2010, Massey solidified specifics of the public relations job, offering Beason, on behalf of Gilley and defendant McGregor, $1 million funneled through the public relations firm, which Beason could use at his discretion. Ex. J-009 at 19:34-37. Moreover, Gilley testified that Massey relayed the offer to him, (Trial Tr. vol. 10, 166:17 - 167:2, June 24, 2011), and that he, in turn, passed the information on to defendant McGregor (id. at 167:12-14)."). But this is not candid argument on the Government's part. The cited evidence does *not* show that anyone ever told Mr. McGregor about (in the Government's

words) any "$1 million funneled through the public relations firm, which Beason could use at his discretion." This was a key point in our opening brief, Doc. 1804. If there were evidence to the contrary, the Government would point to it. Rather than doing so, the Government fudges the point with misleading citation to the record. Mr. Gilley does say he told Mr. McGregor about what he had agreed to; but what he had agreed to, even according to himself, was *not* a million dollars funneled through the public relations firm, which Beason could use at his discretion. It was not personal enrichment of Beason at all. According to Mr. Gilley, it was money for campaigns. The relevant testimony is cited and quoted in our opening brief.

Our argument, of course, is not that Mr. McGregor was complicit only in a different type of bribe, a campaign-contribution bribe. The Government suggests that this is the nature of our argument (Doc. 1852, p. 13), but the Government is only amusing itself by saying that. Mr. McGregor showed in previous Rule 29 submissions (e.g., Doc. 1536, pp. 9-14) that he did not offer Senator Beason any campaign-contribution bribe under the *McCormick* "explicit *quid pro quo*" standard. *See McCormick v. United States*, 500 U.S. 257 (1991). After Mr. McGregor made that showing, the Government (in discussions about jury instructions) insisted on the point that Count Four was *only* based on a personal-enrichment bribe offer as contrasted with campaign contributions. This allowed the Government a substantial benefit in the jury instructions, as it removed the necessity of proving an "explicit" *quid pro quo*. And the Court agreed: Count Four was not about campaign contributions. It was about personal enrichment, money in the pocket. The Court instructed the jury accordingly, at the Government's request.

Yet remarkably, when Mr. McGregor has now insisted on the same distinction and has shown that the Government certainly failed to prove that Mr. McGregor offered a personal-enrichment bribe, the Government now characterizes this distinction as "split[ting] hairs." (Doc. 1852, p. 12). Was it splitting hairs when the Government insisted on the distinction between personal enrichment and campaign contributions, in arguments about what the jury instructions would be? Of course not. It was an argument that mattered substantially, which is why the Government made it. By the same token, with the Government having won that skirmish by insisting that Count Four is of the personal-enrichment-bribe type rather than the campaign-contribution type, it is absolutely necessary that the Court continue to treat Count Four in that same way at this juncture.

That is especially important, because of the First Amendment implications of any attempt to treat a campaign contribution as a bribe. Under *McCormick*, anyone charged with having offered a campaign contribution as a bribe has (at least) the protection of the "explicit *quid pro quo*" standard. To take away that protection would completely obscure the line between constitutionally-protected political engagement and crime. But this is exactly what the Government is trying to do: to gain a conviction under the personal-enrichment standard (which is generally held *not* to require proof of an "explicit *quid pro quo*"), while asserting that Mr. McGregor was trying to use the prospect of campaign contributions as political influence. This is exactly the sort of prosecutorial overreaching that *McCormick* was designed to avoid.

The Government seems to suggest at one point that the alleged bribe in Count Four was money for Senator Beason to use as he saw fit *in campaigns* (his own or other peoples'). *See* Doc. 1852, p. 15 ("this testimony establishes that defendant McGregor was certainly aware of and ratified non-contribution bribes to Beason—i.e., money funneled through a public relations job that he could use, at his discretion, for other campaigns."). This theory would suffer from innumerable problems, including (1) it is not what Count Four of the Indictment alleges (because Count Four alleges money to be used at Senator Beason's discretion, *period*, not money to be used at his discretion *in campaigns*); (2) it is yet one more example of the Government's attempt to change its theory to meet the challenges of each new stage in the case, which (as we showed in Doc. 1804 p. 3) is an unlawful way for prosecutors to approach a case; and (3) if the alleged offer was of money that Senator Beason would use in electoral campaigns (his own or others'), it would then be subject to the *McCormick* "explicit *quid pro quo*" standard.

So the fact remains that Mr. McGregor did not make a personal-enrichment bribe offer, of the sort on which Count Four is premised, to Senator Beason. The Government contends that Mr. McGregor participated in some discussion of Senator Beason's involvement in the public relations business, in the February 18 meeting. But no one in that meeting offered the bribe alleged in Count Four (a million dollars to Senator Beason personally), and certainly Mr. McGregor did not. There is a vast difference between what is alleged in Count Four on the one hand (i.e., a million dollars to Senator Beason himself, as income or equity), and mere discussion of the possibility of steering some

public relations business in Senator Beason's direction on the other.[1] If Mr. McGregor took some minor part in discussion of the latter, that does not mean that he offered the former. No one offered the former, in the meeting that Mr. McGregor attended.

Nor did Mr. McGregor aid and abet Mr. Massey in making the offer alleged in Count Four. As we showed in Doc. 1804, Mr. McGregor did not know of the offer alleged in Count Four, did not know of any personal-enrichment bribe offer at all, did not take any steps to assist in its making, and did not share in the intent that it be made. Under the authorities that we cited in Doc. 1804, p. 5, any "aiding and abetting" theory of liability on Count Four must fail.

Finally, *Pinkerton* liability does not solve this problem for the Government. The Government mentions *Pinkerton* only once in its brief (Doc. 1852, p. 44 n.10), in cursory fashion without any citation of evidence to refute the points that Mr. McGregor made about *Pinkerton* liability on Count Four. By making only that cursory and evidence-free argument, the Government has failed to comply with the Court's instructions. *See* Doc. 1796, p. 2 ("All briefs addressing the motion must explain in detail how, point by point, the trial evidence is allegedly lacking or is adequate. Second, any brief addressing the trial evidence should cite where the evidence can be found in the trial transcripts, by page

[1] In a State where being a Legislator is a part-time job, Legislators (like other people) network and try to stir up business. Legislators who are lawyers try to get clients. Legislators who are in the PR business try to get clients. Legislators in other businesses try to get clients. This may sometimes appear unseemly to some observers, but it is not a crime. Had the grand jury charged it as a crime in this instance, we could argue about the details of such a charge; but there is no such charge in this case. The charge in this case (as the Government itself says, in Doc. 1852, p. 14) was a million dollars "funneled through" the public relations firm. That's very different from drumming up actual business for Beason in the public relations field.

and line.") If the Government were pressed, it would presumably say that the conspiracy at this point was with Mr. Gilley. But as we have shown, Mr. Gilley's testimony is that all he agreed to was to give campaign contributions to Senator Beason – not to give him any personal-enrichment million dollar bribe. Again, the Government tries to argue as though this distinction doesn't matter. But among the reasons that it matters is in regard to *Pinkerton*. There is no evidence that it was foreseeable to Mr. McGregor that Mr. Massey would offer a million dollar personal enrichment bribe, where neither Mr. McGregor nor even Mr. Gilley was agreeing to any conspiracy of which *that* was a part.

Count Five (§ 666 with regard to Senator Means)

The relevant conversation in Count Five is J-146, and it includes no explicit *quid pro quo* offer[2] by Mr. McGregor that crosses the *McCormick* line. There was no exchange, or offer of exchange, of campaign contributions for the promise of a vote.

When the Government tries to bring this call within the *McCormick* "explicit *quid pro quo*" standard, it does so by incorrectly describing the evidence. The Government says, Doc. 1852, p. 24, that "defendant McGregor explicitly tied a legislator's vote to his offer of campaign support."[3] What part of the conversation is the Government referring

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[2] We showed in Doc. 1804, p. 14 n. 3, that there was certainly no explicit *quid pro quo* agreement between Mr. McGregor and Senator Means; thus the Government's theory must be that Mr. McGregor made an explicit *quid pro quo* offer. And this is in fact what the Government does say: that Mr. McGregor is liable for an offer. (Doc. 1852, p. 24, next-to-last paragraph).

[3] The Government points out that Mr. McGregor was aware that Senator Means had abstained on the BIR vote. Doc. 1852, p. 25. This does not help the Government whatsoever, and the Government does not explain why it should. Mr. McGregor's support for Senator Means was longstanding, and – as his continued support in the face of

to? The Government does not say, and no reasonable answer can be found by looking at the conversation itself. Mr. McGregor did not "tie" his offer of campaign support to Senator Means's vote, at all. He certainly did not do so "explicitly" as the Government claims. If any such words were in J-146, the Government would point to them. They are not there. The Government merely says that the vote and the support were "explicitly tied" by Mr. McGregor; but in fact they were not.

The Government makes the same error in saying that "During the conversation, defendant Means established a direct link between his vote and his desire to secure campaign contributions." Doc. 1852, p. 24. How did Means "establish" a "direct link" between those two things? The Government offers a block quote, not explaining where in that block quote such purported "direct link" was established. Again, the Government is saying something that is not supported by the evidence. The words in J-146 show that Senator Means did *not* "establish" a "direct link" between his vote and campaign finance. True, both things were discussed in one phone call. But that in itself does not "establish[] a direct link" between the two. The presence of both subjects in the phone call is not a crime, and does not suffice as evidence of a crime. The First Amendment, Due Process, and *McCormick* will not allow it. The Supreme Court recognized in *McCormick* that politicians have to raise funds, that they have to take stands on issues, and that much of campaign finance represents the potential donor's response to the officials' past or anticipated future actions. *McCormick*, 500 U.S. at 272. This is lawful and is protected

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Senator Means's abstention on the earlier vote shows – was *not* conditioned on particular votes.

by the Constitution, and "in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* To make out a crime, the Government must have proof beyond the mere fact that a donor and an official discussed issues of policy and that they also discussed campaign support.

This leaves the Government relying on Mr. Gilley's testimony that Mr. McGregor told him (in an unrecorded conversation) that he had Senator Means "under control, that he [Means] was going to be a yes vote from the beginning." The Government attempts to use two words from Mr. Gilley's testimony – "under control" – to establish that there was an unspoken exercise of "control" *of an unlawful sort* in the McGregor-Means conversation, J-146. Assuming that Mr. Gilley's testimony was true, still one does not know from that testimony: was Senator Means "under control" in the sense that Mr. McGregor felt that there was a good strong lawful political alliance, or was he "under control" in an "explicit *quid pro quo*" way that crossed the *McCormick* line? The Government's burden is to show the latter, beyond a reasonable doubt. If it was the former, that is constitutionally protected activity, not crime. Whether it was the former or the latter is not shown by Mr. Gilley's testimony, nor by any invocation of the concept of "inferences" from that testimony. The governing evidence of whether Mr. McGregor made an unlawful offer to Senator Means is J-146. The answer to the question of whether an unlawful "explicit *quid pro quo*" offer was made, or not, does not need to be somehow "inferred" from circumstantial evidence, because the conversation in question was recorded. That evidence does not establish a crime under the *McCormick* standard.

Count Eight (§ 666 with regard to Senator Preuitt)

In Doc. 1804, we made specific arguments showing that Mr. McGregor was entitled to judgment of acquittal on Count Eight. The Government's tactic is to ignore those arguments, and not to respond to them. The Court should recognize the tactic, should disapprove it, and should hold that the Government has failed to meet its burden of proof.

We showed (Doc. 1804, p. 19) that Mr. McGregor did not make any unlawful offer to or agreement with Senator Preuitt, and that the Government's theory was only *Pinkerton* or aiding-and-abetting. The Government does not disagree, and so the Court can begin by taking that as settled. Likewise, we showed that the only thing that Mr. McGregor even knew about, even with the Government's evidence taken as true, was an offer of country music support by Mr. Gilley. Again, the Government does not disagree, and the Court can take that as settled too.

We showed (Doc. 1804, pp. 25-27) various reasons why Mr. McGregor could not be liable under a *Pinkerton* theory on Count Eight. In its discussion of Mr. McGregor and Count Eight (Doc. 1852 p. 34), the Government does not mention this, and certainly does not offer the Court any citation of evidence to establish liability on this theory in response to Mr. McGregor's arguments. As noted above, the Government only mentions *Pinkerton* once in Doc. 1852, in only a boilerplate and conclusory invocation. *See id.*, p. 44 n.10. Again this is insufficient, and contrary to the Court's instructions about briefs on this motion. *See* Doc. 1796, p. 2 ("All briefs addressing the motion must explain in detail how, point by point, the trial evidence is allegedly lacking or is adequate. Second,

any brief addressing the trial evidence should cite where the evidence can be found in the trial transcripts, by page and line.") The Court should therefore hold that the Government has failed to prove liability for Mr. McGregor on a *Pinkerton* theory on Count Eight.

This leaves the possibility of aiding-and-abetting liability. In Doc. 1804, we showed that Mr. McGregor could not be liable on such a theory in Count Eight, because (1) he did not know that Mr. Gilley had made an "explicit *quid pro quo*" offer (but instead, for all Mr. McGregor knew at least, any offer was a lawful one rather than being of the "explicit *quid pro quo*" sort), so he could have no criminal liability; and (2) furthermore that he did not actually do anything to aid or abet any such offer (and, in this vein, that even knowledge and approval of such an offer after-the-fact is not enough to lead to criminal liability).

Those two arguments were explicit, in Doc. 1804, pp. 22-24. The Government, in its one page discussion of Mr. McGregor and Count Eight (Doc. 1852, p. 34) does not respond to those arguments.

The Government cites no evidence that Mr. McGregor knew that Mr. Gilley (or anyone else) had offered country music support (or anything else) as an explicit *quid pro quo* exchange with Senator Preuitt for his vote. This, again, is crucial. If Mr. McGregor knew of an offer but did not know that it was conditioned in the *McCormick* sense on an explicit *quid pro quo*, then what Mr. McGregor knew (and what he is charged with having aided) was lawful constitutionally-protected political activity. He cannot be criminally liable for that. (As shown in our opening brief, one cannot be liable on an "aiding and abetting" theory unless he shares in the requisite criminally culpable state of

mind with the principal.) The Government offers evidence that, when viewed in the light most favorable to the Government, shows that Mr. McGregor knew that Mr. Gilley and Mr. Coker were trying hard to persuade Senator Preuitt; and a promise of campaign support may have been part of that. But again, that is the nature of politics. Contributors often hope that those officials whom they support electorally will support the contributors' policy views. People often think that giving campaign support will increase the likelihood of official actions towards their desired policy outcomes. That is largely what campaign finance is about, even as reflected in the Court's instructions to the jury (Doc. 1640, pp. 20-22). That is the real world of politics, and it is not the same as an unlawful "explicit *quid pro quo*." With the Government not having cited *any* evidence that Mr. McGregor knew of an offer to Senator Preuitt that crossed the line from constitutionally-protected political speech into explicit *quid pro quo* crime, Count Eight fails as against Mr. McGregor.[4]

Moreover, the Government has cited no evidence that Mr. McGregor did anything to "aid and abet" any unlawful offer. Even on the Government's evidence, there was only alleged knowledge and approval, rather than any activity by Mr. McGregor aiding in the making of some as-yet-unmade offer. (The alleged crime in Count Eight against Mr. McGregor is the offer of country-music support, *see* Transcript of July 27, Doc. 1688, p.

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[4] As shown in our earlier brief (Doc. 1804 p. 23), Mr. McGregor certainly did not know of the existence of any *quid pro quo* agreement with Senator Preuitt; on the contrary, Mr. Gilley reported that he was going to stay on Senator Preuitt like white on rice, thus indicating that there was no agreement at the time but was instead a continuing effort to lobby. So, even on the view of the law as reflected in the Court's instructions (Doc. 1640, p. 22), the Government's burden was to prove an "explicit" *quid pro quo* offer.

33 lines 17-22, and that offer was already made by the time Mr. McGregor knew about it. Encouraging Gilley to "stay on" Senator Preuitt would not aid or abet that already-made offer.) And the Government cites no case holding that knowledge of an already-made offer, or even knowledge plus approval, can give rise to aiding and abetting liability.

The Government portrays Mr. McGregor as having encouraged Mr. Coker and Mr. Gilley to keep trying to persuade Senator Preuitt to be a "yes" vote. But persuading Senator Preuitt to be a "yes" vote is not a crime, even if campaign support were part of that. Here again, the Government is dangerously blurring the line between political activity and crime, hoping to convict Mr. McGregor without evidence that he even knew of, much less that he assisted, any unlawful explicit *quid pro quo* offer to Senator Preuitt.

Count Fifteen (§ 666 regarding Mr. Crosby)

The Government has attempted to catalog its evidence that Mr. McGregor's reason for payments to Mr. Crosby was (as the indictment alleges, Doc. 3, p. 52, ¶ 218) "to influence and reward CROSBY in connection with his official acts as they pertained to drafting gambling legislation, including SB380" As the Court put it in jury instructions, the Government's allegation is that Mr. McGregor made the payments in question "for the alleged purpose of drafting gambling legislation favorable to McGregor," and as a *quid pro quo* to that effect. (Doc. 1640, p. 26). But the evidence falls short.

First, the Government says (Doc. 1852, p. 20), "Notably, [Lynn] Byrd testified that she recorded the payments in an accounting ledger devoted to lobbying fees. (Id. at 149:8-19.) This suggests that defendant Crosby received the money in exchange for personal services to defendant McGregor in relation to legislative activity." What the

Government does not mention is that Ms. Byrd testified, without contradiction from any other evidence, that she decided upon that designation of these payments as being related to "lobbying," in Macon County Greyhound's books (Transcript of June 23, Doc. 1647, p. 152 lines 7 to 9). There is no evidence that Mr. McGregor knew of that designation, nor is there evidence that Mr. McGregor told Ms. Byrd anything that gave rise to her choice of designation. This therefore shows nothing about Mr. McGregor's intent, or about the existence of any *quid pro quo* agreement.

Second, the Government says (Doc. 1852, p. 20) that Mr. McGregor and Mr. Crosby spoke numerous times about SB 380. As we pointed out in our opening brief, this does not begin to prove that there was a *quid pro quo* intent or agreement, without (at the very least) some evidence that Mr. Crosby was doing more on SB380 than he did on similarly situated bills on other matters. The Government retorts that there is one call where "McGregor told defendant Crosby not to tell the bill's sponsor, Senator Bedford, about their discussion. Ex. J-127 at 1:29." The Government is straining to obtain unreasonable inferences. The call in question, J-127, merely shows that Mr. McGregor was giving Mr. Crosby an advance heads-up about what Senator Bedford wanted Mr. Crosby to do. Senator Bedford was, at the moment, too busy dealing with the issue of a sick relative, to call Mr. Crosby himself; so Mr. McGregor wanted to give Mr. Crosby the heads-up, to let him get a jump on the task. (J-146, p. 1 lines 18-43, p. 4 lines 26-44, p. 8 lines 24-32, p. 9 lines 7-23). Whatever that may show, it certainly does not show that Mr. McGregor was bribing Mr. Crosby as charged; an inference of bribery simply does not follow to any reasonable person.

As we showed, the fact is that Mr. Crosby wrote various bills that would have been disastrous to Mr. McGregor's interests. This certainly goes against the idea that he was being bribed to help. Yet the Government even claims that Crosby's dutiful drafting of anti-gaming bills is support for the bribery theory.

> [D]efendant Crosby did not necessarily have to favor defendant McGregor's interests all the time. Indeed, to have done so might have exposed the illicit relationship between the two defendants, costing defendant Crosby the very job that justified defendant McGregor's monthly payment. Put differently, protecting both his job and his illicit arrangement required taking action that was not necessarily always consistent with defendant McGregor's interests.

(Doc. 1852, pp. 20-21). This is another example of the Government's failure to confine itself only to reasonable, rather than unreasonable, inferences.

There is no evidence that Mr. Crosby drafted *any* bill in any way contrary to his good-faith understanding of the wishes of its sponsor. There is no evidence that Mr. McGregor ever expected that he would, or that there was any agreement that he would. The Government takes this picture – of Mr. Crosby drafting bills in each instance as each bill's particular sponsor wants – and tries to turn it into a crime by postulating that in each instance Mr. Crosby was really choosing which bills he would skew in Mr. McGregor's favor and which ones he wouldn't. But there is no evidence that any such thing was occurring, and certainly no evidence that Mr. McGregor knew or intended that it would occur. The Government has gone beyond reasonable inference, into invention.

The Government points to one point of drafting, regarding "a reduction in the time period by which gaming appointments would be made." (Doc. 1852, p. 22). Here again, the Government is trying to "infer" something amiss, without proving it. There is no

evidence that Senator Bedford (the sponsor) wanted something different from what Mr. McGregor wanted, on this point about the time period for gaming appointments. There is, also, no evidence that Mr. Crosby's job entailed pushing back against the suggestions of a person who was authorized by the bill's sponsor to work with LRS. There is no evidence that, in drafting other bills, Mr. Crosby ever pushed back against the sponsor or against those people whom the sponsor authorized to work on the bill. The Government, again, is simply postulating that something improper was going on, without proving that Mr. Crosby was doing anything in this instance other than the ordinary course of LRS work.

The Government relies (Doc. 1852, p. 21) on the fact that the payments ended in 2010 not long after the investigation became public. Mr. McGregor already anticipated and rebutted this point (Doc. 1804, p. 33), showing that (like the Government's other contentions on this count) this requires inferences that no reasonable person would draw. Then, the Government relies (Doc. 1852, p. 21) on how Mr. Crosby filled out employment-related forms. But Mr. McGregor has repeatedly pointed out that there was no evidence that Mr. McGregor had any knowledge or intention as to how Mr. Crosby would fill out any such form, and the Government cites no such evidence.

In short, the Government is still wrongly asking the Court to indulge speculation and give free rein to suspicious-minded intuition, rather than making reasonable inferences from actual evidence.

Count One (Conspiracy)

The Government's description of the evidence against Mr. McGregor on Count One is literally one paragraph of bare assertion, with not a single citation of evidence. (Doc. 1852, pp. 43-44). This is not adequate under the Court's instructions. *See* Doc. 1796, p. 2 ("All briefs addressing the motion must explain in detail how, point by point, the trial evidence is allegedly lacking or is adequate. Second, any brief addressing the trial evidence should cite where the evidence can be found in the trial transcripts, by page and line."). The Government has not shown that Mr. McGregor conspired with anyone to violate § 666, and certainly not that he was part of the single overall conspiracy charged in the Indictment. Mr. McGregor pointed out several fact-based reasons for this assertion, in Doc. 1804, and the Government's response is inadequate on all points.

The Government mentions the name "Mask" in this single evidence-free paragraph. Earlier, the Government had discussed Rep. Mask in connection with Count Four. But even there, there is no demonstration that Mr. McGregor conspired to bribe Rep. Mask. There was no bribe, and there was no conspiracy. The only campaign contribution that was given was not a bribe, as reflected in the judgment of acquittal on Count Three. Nor is there any evidence that Mr. McGregor conspired with anyone to offer any other campaign contribution to Rep. Mask on an "explicit *quid pro quo*" basis. Mr. McGregor made no such "explicit *quid pro quo*" offer, and there is no evidence that he agreed (conspired) with anyone else that such an offer would be made. In its discussion of Rep. Mask, the Government does exactly what it did in its erroneous discussion of Senator Means: that is, the Government baldly *asserts* that Mr. McGregor

"tied his 'significant support' to Mask's vote on pro-gambling legislation." (Doc. 1852, p. 17). But the Government cites no part of the conversation in which Mr. McGregor "tied" the two; the Government merely asserts it, contrary to the evidence.

The Government also mentions the name "Ross" in its single evidence-free conspiracy paragraph about Mr. McGregor. But the Government does not even bother to explain who Mr. McGregor supposedly conspired with in that regard, or what the alleged conspiracy to bribe Senator Ross consisted of; certainly the Government cites no evidence to show such things, neither in this paragraph nor in any other place in Doc. 1852. The Government, again, is relying on allegation rather than evidence.

The Government mentions Senator Means in this paragraph as well. As we have shown above, Mr. McGregor's interaction with Senator Means was lawful and constitutionally protected. There is no evidence, in those conversations or elsewhere, that Mr. McGregor agreed (conspired) with anyone else that any "explicit *quid pro quo*" offer would be made to Senator Means. No such offer was made, and none was planned by any conspiracy of which Mr. McGregor was a part; there is no evidence of any. Again, the Government is dangerously attempting to erase the line between protected political speech and crime.

As to Senators Preuitt and Beason, those interactions too have been discussed above. Mr. McGregor did not conspire with anyone to offer them any bribe, either of the "explicit *quid pro quo*" variety for campaign support or otherwise. (The Government does not even assert that its evidence was sufficient to meet the "explicit *quid pro quo*" *McCormick* standard, on Senator Beason.) Even if the Court held that the Government's

evidence might be enough to dispute that assertion, still even then the Government has failed to prove the single conspiracy charged in the Indictment.

Honest Services Counts

We showed various reasons (even aside from Double Jeopardy) why the various Honest Services charges against Mr. McGregor lacked merit. We stand by those arguments, with brief reply on some of them in footnotes here. *See* Doc. 1804, pp. 46 (no knowing involvement in "bribery" by Mr. McGregor and no intent to defraud); pp. 61-63 (checks to Mr. Crosby were not "in furtherance of" any scheme to bribe legislators, even if such scheme existed)[5]; pp. 64-65 (Mr. McGregor not involved in any alleged scheme to bribe Senator Smith)[6]; pp. 65-66 (no proof of scheme "substantially the same as" the one alleged in the indictment); pp. 68-69 (calls merely touching upon the legislative process were not "in furtherance" of any bribery scheme).

We also showed (Doc. 1804, pp. 66-68) that under *United States v. Langford*, 647 F.3d 1309 (11th Cir. 2011), proof of an "honest services" bribery scheme requires proof of concealment of the payment that allegedly constitutes the bribe. The Government responds that this cannot be the law because then "the law would completely exempt

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[5] The Government responds that the checks were in furtherance of a scheme to bribe Mr. Crosby. At least that is what the Government seems to be saying, Doc. 1852, p. 49 ("More importantly, the fraud scheme charged in the Indictment (and supported by the evidence at trial) entailed payments to legislative staff."). But that theory is inconsistent with the Court's judgment of acquittal in favor of Mr. Crosby on all "honest services" counts. The necessary predicate for the Court's action, in that regard, was that the "honest services" counts did *not* encompass any scheme to bribe Mr. Crosby.

[6] The Government does not claim that there was such evidence, and cites no such evidence.

campaign-contribution-based bribes from prosecution, so long as the contribution itself was reported." (Doc. 1852, p. 48). From the Government's perspective, this is "ludicrous." (*Id.*). From a more reasonable perspective, it is an understandable aspect of the law. After all, we are dealing here with a law that was written in completely vague terms by a Congress that did not (so far as anyone has ever been able to demonstrate) ever contemplate its application to campaign contributions. If a proper interpretation of the law leaves it hard to prosecute most campaign contributions as bribes, that is not "ludicrous"; it is instead a welcome recognition that prosecutors should not find it easy to expand the reach of the criminal laws.

The Government also says that what matters is not whether the *payment* or contribution was reported, but whether "the bribery offer or agreement underlying the payment is revealed to the public." (Doc. 1852, p. 48). What this really means is that the Government wants the law to be interpreted in a way that places no burden at all on the Government to prove concealment – because nobody ever calls a press conference to say that he is being bribed. Some may think that should be the law. But it is not clearly established as the law, and certainly was not clearly established as the law during the time periods at issue in this case. It would not be appropriate to make it the law for our District and Circuit, now, retroactively in this criminal case.

Double Jeopardy

The acquittal of Mr. McGregor on Counts 29 and 33 operates as a Double Jeopardy bar to prosecution of all remaining counts, or at least of all remaining "honest services" counts against him, as shown in Doc. 1804.

Fundamentally, the Government's argument is incorrect on the law, because the Government ignores a settled principle in binding caselaw. That is, a defendant does *not* have to prove that there is one and only one ground upon which the jury could have rationally based its acquittal. Instead, if the defendant shows that the acquittal must have been based on one *out of a set* of grounds, and if each one of those grounds would bar further charges, that is enough.

> The State argues that *Ashe* applies only where one issue is in question in both trials.
>
> We disagree with the State. Application of the rule depends upon whether some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial. ... Thus the fact that either identity or intent could have been the basis for the first jury's decision does not foreclose the application of Ashe v. Swenson, because *both* factors would have to be proven in order to convict at the second trial. Where a determination of innocence on one of two issues was the cause of an acquittal and a determination of guilt on *both* issues is necessary for a subsequent conviction, the State is estopped from bringing the action.

Johnson v. Estelle, 506 F.2d 347, 350 (5th Cir. 1975); see also *Humphries v. Wainwright*, 584 F.2d 702 (5th Cir. 1978) (explained in our previous brief, Doc. 1804, pp. 49-50). These cases are binding precedent, yet the Government ignores their lessons.

So, when the Government argues that there are all sorts of things that Mr. McGregor argued that could have been the basis for decision (Doc. 1852, p. 61 n. 14), the Government misses the mark. Each of those points, in the passage of Mr. McGregor's closing argument that the Government cites, was simply another way of getting at the core of the case: Mr. McGregor simply was not involved in any bribery. Even if one can differentiate among those ways of framing the point, still the fact remains that each of the

framings covers *all* the counts, rather than just covering some of them. So, to say that the jury could have rested its acquittal on any one of them (as the Government says) does nothing to detract from the Double Jeopardy point. Under *Johnson v. Estelle* and *Humphries v. Wainwright*, it is enough to narrow the rational bases for the jury's decision down to a set, if each member of the set would bar remaining charges.

The Government also postulates (Doc. 1852, pp. 59-60) that maybe there was something unique about the call in Count 29, that would have led the jury to acquit on that count, based on the "in furtherance" element of wire fraud that would have no preclusive effect on any other count. But that is not a rational possibility, given (1) the nature of the call underlying Count 29, (2) the nature of the other calls on which other counts were premised, (3) the way the Court instructed the jury (which did not suggest to the jury any standard for differentiating among the calls that would be a rational basis for a verdict), and (4) the way the case was argued (which did not include *any* argument to the jury by Mr. McGregor on this "in furtherance" issue).[7] The Government does not point to anything substantive about the various calls, that would allow such differentiation. As noted in Doc. 1804, *United States v. Coughlin*, 610 F.3d 89, 98-99 (D.C. Cir. 2010), is analogous on this point; given its instructions and given the facts, it is not rational to suggest that the jury was making some incredibly fine-tuned appraisal of

[7] In Doc. 1804, Mr. McGregor cited then-available "real time" transcript of closing arguments. Doc. 1804, p. 54 n.18 and p. 56 n.19. The quoted portions are now available in Doc. 1832, Transcript of August 3, at page 166 lines 4 to 18 (Government argument), and page 232 line 14 to page 233 line 1 (McGregor argument).

the content of particular calls, under the "in furtherance" element. All "honest services" charges are certainly barred by Double Jeopardy.

The Government contends (Doc. 1852, p. 59) that perhaps the acquittal on "honest services" counts was based on the lack of deception or intent to deceive; in this way, the Government seeks at least to keep the Double Jeopardy preclusion from spreading to the § 666-based counts as well. But as we showed in Doc. 1804, that argument cannot prevail given the way the Court instructed the jury about the deception elements in "honest services." The Court's instructions told the jury that bribery, in and of itself, was enough. *See* Doc. 1640, p. 32, *quoted in* Doc. 1804, p. 58. Mr. McGregor disagreed with that view of the law, and still disagrees with it as seen above; but that is what the jury was instructed, and the Court must presume that the jury followed instructions. Under the Court's instructions, the jury could not rationally have believed that there was bribery yet acquitted based on lack of deception. The jury could not rationally have based its acquittal on a "deception" element that was unique to "honest services" as contrasted with § 666. The one rational conclusion is that the jury's acquittal of Mr. McGregor on some counts creates issue preclusion that bars all remaining counts.

Conclusion

For the reasons stated herein and in prior briefs, the Court should reject the Government's mischaracterization of the evidence, should reject the Government's reliance on mere allegations without evidence, and should reject the Government's dangerous efforts to muddy the line between constitutionally protected political activity

on the one hand, and crime on the other. The Court should enter a judgment of acquittal on all remaining charges against Mr. McGregor.

Respectfully submitted,

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