UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	**UNDER SEAL**
QUINTON T. ROSS, JR.	)	

QUINTON T. ROSS, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE

Quinton T. Ross, Jr., moves for entry of a judgment of acquittal on all counts against him at the close of the Government's case-in-chief pursuant to Fed. R. Crim. P. 29.

I. Introduction: The Indictment and Charges Against Senator Ross

The indictment in this case contains thirty-nine counts arising out of alleged conspiracy and bribery to influence legislation in the Alabama Legislature pertaining to electronic bingo. Senator Ross is charged in sixteen of the thirty-nine counts.

Senator Ross is charged, along with all other defendants and one additional alleged co-conspirator, Lobbyist A or Jennifer Pouncy, in Count One's alleged conspiracy to commit federal programs bribery, in violation of 18 U.S.C. §371. He also is charged with two substantive counts of federal programs bribery and aiding and abetting (Counts Eleven and Twelve), in violation of 18 U.S.C. sections 666(a)(1)(B), 666(a)(2), and 2; two counts of Hobbs Act extortion under color of official right and aiding and abetting (Counts Seventeen and Eighteen), in violation of 18 U.S.C. sections 1951 and 2; and eleven counts of

honest services wire and mail fraud and aiding and abetting (Counts Twenty-Three through Thirty-Three), in violation of 18 U.S.C. sections 1341, 1343, 1346, and 2.

As it applies to Senator Ross, this case is a "pure" campaign contribution case. That is, the only conduct the indictment charges against Senator Ross is that he requested and accepted campaign contributions from persons said to have financial or other interests in the outcome of a legislative vote, i.e., the vote on SB380, or other asserted pro-gambling legislation.

Unlike some of the broader charges asserted against others here, Senator Ross is ***not*** accused of requesting, being offered, accepting, or agreeing to accept ***anything other than*** "pure" campaign contributions – no fundraising help, no campaign appearances by country music stars, no political polls, no media buys, no offers to pay money to any candidate opposing him to withdraw from the race, no promises of business patronage, no other "thing of value" or benefit of any kind. And, there is no evidence that Senator Ross received any "thing of value" or benefit of any kind other than campaign contributions.

The Government has asserted repeatedly that this is a "tapes case," relying heavily on consensual recordings made by individuals who were cooperating with the Government, and on recordings of communications (telephone calls and text messages) intercepted by wiretaps installed in response to three court orders authorizing electronic surveillance. Of the over twelve thousand calls and text messages intercepted by those wiretaps, Senator Ross participated (as caller or as recipient of the call) in ten or fewer of those calls.

The Government has offered limited evidence of 1) a few conversations in which Senator Ross requested, or discussed a previous request for, campaign contributions from certain co-defendants, including Mr. McGregor; 2) certain campaign contributions Senator Ross received in late 2009 and 2010, including the dates, amounts, and sources of those contributions; 3) Senator Ross' vote in favor of SB380, a bill to submit to the Alabama electorate a proposed constitutional amendment to regulate and tax electronic bingo; and 4) circumstances that the Government contend show that Senator Ross voted for SB380 in exchange for certain campaign contributions from specified co-defendants.

II. Senator Ross Is Entitled to Judgment of Acquittal on Each Offense Charged Against Him.

The Court has decided adversely to Senator Ross the various arguments that the federal programs bribery and honest services fraud statutes do not cover, or cannot constitutionally cover, the conduct charged against Senator Ross. Senator Ross does not waive any issue raised in any of the motions filed to date.

A. Count One -- Conspiracy to Commit Federal Programs Bribery (18 U.S.C. §371)

1. Allegations

Count One alleges that all defendants conspired "to commit federal programs bribery" in that (A) the defendants and others "corruptly gave, offered, and agreed to give money and other things of value to Alabama state legislators and legislative staff … with the intent to influence and reward them in connection

with pro-gambling legislation," and correspondingly (B) "Alabama State legislators and legislative staff … corruptly solicited, demanded, accepted and agreed to accept money and things of value from defendants and others, intending to be influenced and rewarded in connection with" such legislation. (Indictment, ¶ 28). The alleged conspiracy started in or about February 2009, and continued through in or about August 2010. (*Id.*)

Purposes or objects alleged for the conspiracy were for (a) defendants McGregor and Gilley to provide "payments and campaign contributions," (b) legislators, including Senator Ross, and staff to accept those "payments and campaign contributions," and (c) the lobbyist defendants (and defendant Senator Smith) to assist McGregor and Gilley in making such "payments and campaign contributions" to legislators, including Senator Ross, in a way to conceal that McGregor and Gilley were the source, "in return for their favorable votes on and support of pro-gambling legislation." (¶ 29-31).

2. **Applicable Law**

18 U.S.C. §371 provides: "If two or more persons conspire … to commit any offense against the United States … and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States.]" The federal offense that the indictment charges all defendants with conspiring to commit is federal programs bribery, by agreeing to exchange campaign contributions or "other things of value" in return for favorable votes on "pro-gambling legislation." The specific official act alleged on the part of

Senator Ross is voting in favor of SB380; the Government accordingly is bound to that theory.

"A conspiracy is an agreement between two or more persons to accomplish an unlawful plan." *United States v. Chandler*, 388 F.3d 796, 805 (11th Cir. 2004). "The essence of the conspiracy is this agreement to commit an unlawful act." *Id.* "It is essential that the object of the agreement must be illegal." *United States v. Hansen*, 262 F.3d 1217, 1246 (11th Cir. 2001) (quotations omitted). Stated differently, the completed act that the agreement concerns must constitute a criminal offense. Here, Senator Ross contends that in order for his solicitation or receipt of campaign contributions to qualify as federal programs bribery, the Government must prove the existence of an explicit quid pro quo between Senator Ross' receipt of such contributions and his vote in favor of SB380.

To obtain a conviction under 18 U.S.C. §371, the government must show: "(1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy." *Id.* (quotations omitted); *accord, e.g., United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998). "The government must prove an agreement between at least two conspirators to pursue jointly an illegal objective. The government must also prove beyond a reasonable doubt that each defendant had a 'deliberate, knowing, specific intent to join the conspiracy.'" *Adkinson*, 158 F.3d at 1153 (citations omitted).

Further, because the defendants in this indictment are people who normally communicate with each other in the furtherance of their entirely legal endeavors and occupations, there is a danger that the jury will infer guilt by association – especially in light of the guilty pleas that have already been entered in this case. But, mere presence, guilty knowledge, and even sympathetic observation have all been held by the Eleventh Circuit to fall short of the proof required to support a conspiracy conviction. A showing of knowing participation is required. *E.g., United States v. Lyons*, 53 F.3d 1198, 1201 (11th Cir. 1995); *United States v. Sullivan*, 763 F.2d 1215, 1218 (11th Cir. 1985).

Accordingly, Senator Ross can be found guilty of the charged conspiracy only if the Government proves all of the following facts beyond a reasonable doubt:

> (1) (a) two or more of the alleged conspirators in some way (b) agreed to try to accomplish (c) a shared and (d) unlawful plan to commit federal programs bribery, specifically involving as to Senator Ross an explicit promise by Senator Ross to vote for SB380 in return for his receipt of specific campaign contributions from identified co-defendants who would benefit financially from passage of the legislation, both as specified in the indictment;
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> (2) (a) Senator Ross (b) knew (c) the unlawful purpose of the plan and (d) willfully (e) joined in it;
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> (3) (a) during the conspiracy, (b) one of the conspirators (c) knowingly engaged (d) in at least one overt act as described in the indictment; and
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> (4) (a) the overt act was committed at or about the time alleged and (b) with the purpose of carrying out or accomplishing (c) some object of the conspiracy.

The elements of federal programs bribery are set forth in the next section.

3. **Grounds for Acquittal as to the Charged Conspiracy**

The Government has failed to offer evidence sufficient to allow the jury to find Senator Ross guilty beyond a reasonable doubt, and Senator Ross is therefore entitled to entry of a judgment of acquittal, as to the charged conspiracy for each of the following reasons:

(A) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross entered into an agreement with anyone to do anything – much less an agreement to commit an unlawful act, or an agreement to pursue a lawful end by illegal means -- with respect to Senate Bill 380 ("SB380");

(B) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any agreement or plan to commit federal programs bribery, and specifically any agreement or plan to exchange a vote in favor of SB380 for campaign contributions or other thing(s) of value;

(C) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any overarching agreement or plan (as charged) to commit federal programs bribery, and specifically any agreement or plan to explicitly exchange sufficient votes for campaign contributions as to ensure passage of SB380 and its companion bill in the Alabama House;

(D) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any agreement to enter into an explicit quid pro quo involving the receipt of campaign contributions and the specific official act of voting in favor of SB380, that is, the contributions are made

in return for an explicit promise or undertaking by the official to vote for SB380, such that the recipient is asserting that his or her official act of voting for SB380 will be controlled by the terms of his or her promise or undertaking;

(E) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross joined any agreement or plan to commit federal programs bribery, specifically to explicitly exchange a vote in favor of SB380 for campaign contributions or other thing(s) of value;

(F) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross joined any overarching agreement or plan (as charged) to commit federal programs bribery, and specifically any agreement or plan to explicitly exchange sufficient votes for campaign contributions as to ensure passage of SB380 and its companion bill in the Alabama House;

(G) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that any joinder by Senator Ross in any such agreement or plan to exchange a vote in favor of SB380 for campaign contributions or other thing(s) of value was knowing, willful, and voluntary;

(H) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross or any alleged conspirator with Senator Ross committed an overt act with the purpose of carrying out one or more of the objects of the overarching charged conspiracy to corrupt the Alabama Legislature by exchanging sufficient votes for campaign contributions as to ensure passage of SB380 and its companion bill in the Alabama House.

In support of its contention that Senator Ross willingly participated in the "conspiracy to pass pro-gambling legislation," on the Gilley side of the alleged conspiracy, the Government purports to rely in part on "testimony from Pouncy, Gilley, and Massey … that in the months and days leading up to a vote on SB380 defendant Ross actively solicited campaign contributions **in connection with** such legislation." United States' Submission to the Court Regarding the Sufficiency of the Evidence as to Count One of the Indictment ("Government's Submission"), doc. 1521, at 14 (emphasis added). Gilley, however, testified that he had at most three encounters with Ross (none of which involved campaign contributions) and that he left any handling of Ross to Massey.

Pouncy's communications with Ross concerning fundraising were focused almost exclusively in November and December 2009, consisting of several telephone calls and some in-person meetings to deliver or exchange either contribution or refund checks. Their initial telephone conversation, in which Ross made a campaign contribution request to convey to Massey, occurred in November 2009; Pouncy characterized the conversation as "friendly." The following series of calls between Pouncy and Ross in December 2009 all involved discussions about either a campaign contribution check being ready, the need to swap out a campaign contribution check incorrectly written on the Mantra Governmental corporate account for a check written on an appropriate account, and the logistics of delivering or exchanging checks. According to Massey, Massey gave Ross two campaign contributions totaling $10,000[1] during 2009

[1] Massey originally included the returned Mantra Governmental corporate check for $5,000, along with the replacement check for the same amount he wrote from his

The Government also offered conflicting evidence (if believed) that in mid-March of 2010, Ross asked Pouncy or Massey or both for a further contribution of somewhere in the neighborhood of $15,000 or $25,000. In surprise testimony at trial, Pouncy and Massey also testified, not entirely consistently, that on March 30, 2010, the day of the vote on SB380, Ross was looking for Massey at the State House; Ross wanted to see Massey about a contribution; and Massey, upon meeting up with Ross by the State House elevator, told Ross he could not give him a contribution then, but would give him a contribution at an unspecified later date. It is undisputed that Ross did not receive any contribution from Massey, Gilley, or Pouncy during 2010 (or after the December 27, 2009 check written on Massey's personal joint account).

None of Ross' fundraising activity with Massey or Pouncy (or, for that matter, McGregor, which is discussed below) was improper or inappropriate in any way, much less a solicitation of a bribe or extortion of a contribution. At the time of Ross' conversations with Pouncy in 2009, the legislature was not in session; SB 380, which was not introduced until February 2010, was not in existence; and there was no electronic bingo or other "pro-gaming" bill pending in the Alabama Legislature. Pouncy, Steve French, and other Government witnesses acknowledged that both the second half of 2009, and the period during the legislative session and thereafter in 2010, fell within the time frame during which candidates for office (including Senator Ross, who stood for re-election in November 2010) were permitted to solicit and accept campaign contributions.

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personal joint account, in the amount he claimed he contributed to Ross. Massey modified his initial $15,000 contribution figure (as asserted on direct) to $10,000 on re-direct.

Various government witnesses, including Senator Scott Beason, Representative Barry Mask, and others, testified there was nothing improper about soliciting and accepting – and it was accepted practice to solicit and accept -- contributions from corporations, political action committees, lobbyists, and other parties with proposed legislation pending before the Legislature or who had interests that could be affected by pending legislative actions. Although Senator Ross disputes the Government's claim that Ross was unopposed for re-election at all times during the 2010 election cycle, Government witness Barry Mask testified it is permissible, and accepted practice, for a candidate to raise funds even when he has no opponent; and that there are various legitimate reasons for continuing to fundraise even in that event -- as he did when he ran unopposed in his most recent re-election campaign. And, numerous Government witnesses from the Government's first witness (Beason) to one of its last (French) agreed it is accepted and common practice to "support those who support you," including, e.g., for a candidate to solicit and accept contributions from those individuals or groups whose interests the candidate has supported in the past and asserts he or she will support in the future.

Even crediting Pouncy's testimony in the light most favorable to the Government (as the Court must at this stage), Senator Ross' "demand" for a campaign contribution in late 2009, "claiming that he was not 'feeling the love' after sponsoring pro-gambling legislation during the 2009 legislative session," Government's Submission (doc. 1521), at 14, is neither a violation of law nor proof of "willing participation in the conspiracy to pass pro-gambling legislation."

Id. The same is true of Pouncy's shifting claims that Ross grew increasingly "adamant and demanding" in his contribution requests over the series of calls in December 2009 – even as she acknowledged Ross was not directing any of it at her, he never threatened her, he didn't curse her, he seemed primarily frustrated that Massey was not returning his calls, etc.[2] Seeking a contribution based on what the candidate did in the past is considered "well within the law," *McCormick v. United States*, 500 U.S. 257, 272 (1991), and in the absence of "the use of force, violence, or fear" -- none of which any Government witness claims Senator Ross ever used – persistent, aggressive fundraising is permissible (and common practice). *Id*., at 273.

The Government's assertion that Senator Ross solicited contributions from the Gilley side of the alleged conspiracy "in connection with" SB 380 is unsupported by any evidence, as is any claim that Senator Ross entered into any quid pro quo, whether express or implied, to exchange his vote on SB380 for campaign contributions. As noted above, when Ross was seeking contributions in 2009, the Legislature was between sessions; SB380 had not been drafted, much less introduced in the Legislature; and no electronic gaming legislation was pending (all unpassed bills from the previous, 2009 session having died with the end of the session). Accordingly, Ross' contribution requests during 2009 could not have been made in connection with his vote on the yet-to-be-born SB380.

Equally, if not more, important, Senator Ross' campaign contribution solicitations of the "Gilley folks" (as testified to by them), whether in 2009 or

[2] This contrasts with Pouncy forgetting to mention, until testifying from her 302 on redirect, that she had told Government investigators of Ross' "veiled threat" implying he would not vote for the bill if he did not get a contribution.

2010[3], bear **none** of the signs of a quid pro quo. Both Pouncy and Massey, the two Government witnesses who testified to such solicitations, agreed that during those conversations, there was no discussion of SB380; there was no discussion of Senator Ross' vote; neither of them asked Senator Ross for his vote; neither of them asked Senator Ross to do any official act; Senator Ross did not promise to vote for the bill or do any other official act if he received a contribution; and Senator Ross did not threaten to vote against the bill if he did not receive a contribution.[4] Indeed, Massey volunteered he did ***not*** feel like he "had a gun to [his] head" when he contributed to Senator Ross' campaign, and further acknowledged that his contribution(s) to Senator Ross' campaign were made ***not*** in connection with SB380 but instead in recognition of Ross' sponsorship of the electronic bingo bill during the previous, 2009 session and his support of gaming issues generally.

Gilley, Massey, and Pouncy all understood that Senator Ross historically had been a strong supporter of gaming in Alabama; and Massey and Pouncy were aware that Ross had consistently voted in favor of each gaming initiative that had come up since his election to the Senate in 2002. Massey and Pouncy (and other Government witnesses) knew of Ross as a strong advocate of education and adequate funding for public schools, and a close supporter of the

[3] In discussing the substance of the testimony of the Government's witnesses, Senator Ross is not conceding its truth.

[4] Even if (as the Government cites, *see* Government's Submission, at 14) Pouncy believed that she had conspired with Ross to commit bribery, her understanding of ***her*** intent is neither dispositive of, nor even relevant to, whether Ross had the same unlawful intent. Regardless, Pouncy's alleged belief (as she testified on direct) that she conspired with Ross to commit bribery conflicts with her admissions as set out in the text immediately preceding this note.

Alabama Education Association, on whose behalf Ross had sponsored SB471 (the first electronic bingo bill to be dubbed the "Sweet Home Alabama" bill) during the spring 2009 legislative session, and who had sponsored the electronic bingo "summit" that Massey testified about. They also were aware that the 2009 electronic bingo bill and SB380 in 2010, if passed, would have taxed gross bingo revenue for the first time, 75 percent of which taxes would be earmarked for the Alabama Education Trust Fund – generating potentially hundreds of millions of dollars of new revenue for public education in Alabama.

Ross was ***not*** one of the senators that Massey identified, either during the legislative session or to law enforcement after his arrest and indictment, as being "in play" (i.e, undecided as to his vote on SB380). Both Massey and Pouncy always regarded Ross as a vote in favor of SB380. And, none of the three doubted – even when they hinted that he was trying to leverage his vote into a further contribution -- that Ross would vote in favor of SB380 in the end. (Indeed, Ross already had voted in favor of the original, unsuccessful budget isolation, or BIR, in early March 2010 before he is said to have requested $15,000 to $25,000 more in contributions in mid-March.)

As to the McGregor side of the alleged conspiracy, the only evidence the Government cites as supporting Senator Ross' alleged "willing participation in the conspiracy to pass pro-gambling legislation" or "his willingness to participate in a conspiracy to commit bribery in an effort to secure the passage of pro-gambling legislation" Government's Submission, at 14, 15, is (1) the simple assertion (apparently based on a wiretapped call between Gilley and Massey), without

more, that Senator Ross sought campaign contributions from defendant Tom Coker, a lobbyist for McGregor; and (2) two recorded telephone conversations between Ross and McGregor.

The first call was made on March 29, 2010, the day before the vote on SB380 finally occurred (after the conversations of those closest to the bill – including defendants in recorded conversations -- and Massey in his testimony at trial made clear the ever-shifting predictions as to when the bill would come to a vote were, in Massey's words at trial, "100 percent speculation"). In that call Ross asked McGregor whether he had the 21 votes necessary to pass the bill, and in later in the call both thanked McGregor for past contributions and asked for further such support. J-159.

In the second, a follow-up call on the following day, Ross and McGregor further discussed the possibility of McGregor making an additional contribution, and McGregor contacting others about making a contribution to Ross. The Government emphasizes Ross' comments that "we're just getting down to the wire" and "we know the window is closing on us fast and I'm just trying to do everything I can to … make sure I can raise [funds]," J-161, at 5, and McGregor offering and then promising to make calls on Ross' behalf. *Id.*, at 3-4, 6.

As a threshold matter, the Government, including its case agent John McEachern, misconstrues the import of Ross' comments about "down to the wire" and "the window is closing on us fast" during the March 30, 2010 call. Indeed, immediately after those comments -- within the next half-page of transcript – McGregor asks whether Ross has an opponent, and they discuss

that "Friday is the deadline" – a clear reference to Friday, April 2, the deadline in 2010 for candidates to qualify to run in the party primaries. It is that deadline – and not the vote on SB380 that eventually occurred that evening, or the end of the session, or some other deadline – that Ross and McGregor were talking about.

Even apart from that distortion or misinterpretation by the Government, the close proximity of Senator Ross' requests for contributions to the date of the final vote on SB380 does not make those requests illegal, or even probative of participation in the alleged illegal conspiracy. The Supreme Court in McCormick refused to construe extortion under the Hobbs Act to include legislators "act[ing] for the benefit of constituents or support[ing] legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries." 500 U.S. at 272. Indeed, the Court not only refused to criminalize such conduct, but indeed termed such conduct as "long been thought to be well within the law [and] …in a very real sense … unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* As at least one Government witness acknowledged (we believe Senator Beason), McGregor is a constituent of Senator Ross, with both his corporate office and his residence in the Senator's district; many of Ross' other constituents work at or are otherwise economically connected to McGregor's VictoryLand facility in neighboring Macon County; and the public schools in Ross'

district stood to benefit from any revenues generated by the taxation of gross bingo revenues under SB380, if it passed.

Of greater legal (as opposed to political) importance, as the two calls on which the Government relies make clear, and as acknowledged by the Government's co-case agent McEachern, during the discussion of possible contributions there was no discussion of Senator Ross' vote on SB380; McGregor never asked for Ross' vote on SB380, or for any other official act; Ross never promised to vote for SB380 or to perform any other official act; and Ross never said or otherwise indicated he would not vote for SB380 if he did not receive any further contribution. And, the Government has offered no evidence whatsoever, from any other conversations involving contributions from McGregor to Ross, that any such discussion or communication took place at any other time. In short, there is zero evidence to support finding the quid pro quo (especially an explicit quid pro quo, involving an explicit promise to do or not do an official act, between a contribution and the specific official act of voting for SB380) necessary to convert a lawful campaign contribution into an unlawful bribe.

As it has at all stages since (and indeed, including) the indictment, the Government seeks to transmute lawful campaign fundraising activity by Senator Ross, consistent with practice accepted at all levels of American government up to the U.S. Supreme Court, into criminal misconduct. As for the alleged conspiracy, the Government has offered no evidence whatsoever to indicate any awareness at all on Senator Ross' part that any of the "kingpins" were allegedly offering money for votes of other senators – in short, no evidence that he had

any inkling of what was being done by or on behalf of any senator other than himself. The discussion above applies to all sections below.

4. **Failure to Prove Senator Ross Joined Either the Overarching Alleged Conspiracy or Any Potential Smaller Conspiracy**

In Count One, the Government claims a single, massive conspiracy in which all alleged conspirators, named and unnamed, conspired together to corrupt the Alabama Legislature. The evidence is insufficient to allow the jury to find such a single overarching conspiracy existed. If the Court finds any conspiracy exists, the allegations of the indictment and the evidence in the Government's case-in-chief suggest at most smaller distinct, even unrelated or unconnected conspiracies in which certain groupings of co-conspirators are alleged to have conspired together to corrupt certain individual Alabama legislators and staff, or no conspiracies at all. Even so, the Government's evidence is insufficient for the jury to find that Senator Ross is part of even a smaller, unconnected conspiracy.

The gravamen, and an essential element, of any conspiracy is an agreement to commit an unlawful act. *E.g. Chandler*, 388 F.3d at 805-06. "[T]he government must prove the existence of an **agreement** to achieve an unlawful objective and the defendant's **knowing** participation in that agreement." *Id.* at 806 (emphasis in original). "[P]roof of **knowledge** of the overall scheme is critical to a finding of conspiratorial intent." *Id.* (emphasis in original). "Proof of a true agreement is the only way to prevent individuals who are not actually members of the group from being swept into the conspiratorial net." *Id.*

To show a single, overarching conspiracy, as opposed to several, similar, even broadly related conspiracies, there must be proof that the alleged conspirators shared the overarching common goal. And, with a wheel conspiracy as alleged here (where not every co-conspirator is alleged to have worked with all their co-conspirators), *see id.* at 807 (discussing the differences between "hub-and-spoke" and "rimless wheel" conspiracies), there must be proof that each individual defendant knew of the existence of other participants (besides himself and the "hub" or key central conspirators) in such an overall scheme, and that Senator Ross knew of an agreed to join in that scheme. *Id.*

The Government has failed to offer evidence sufficient to allow the jury to find Senator Ross joined in any smaller conspiracy, and Senator Ross is therefore entitled to entry of a judgment of acquittal as to any conspiracy, for each of the following reasons:

(A) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any alleged agreement to illegally exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(B) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any alleged agreement or plan to expressly exchange or promise to exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(C) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross participated in any alleged agreement to illegally exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(D) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross participated in any alleged agreement to expressly exchange or promise to exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(E) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knowingly participated in any alleged agreement to illegally exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(F) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knowingly participated in any alleged agreement to expressly exchange a vote or promise to exchange a vote in favor of SB380 for a campaign contribution or other "thing of value" that involved any other member of the Alabama Senate specifically or the Alabama Legislature generally;

(G) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross agreed to illegally exchange his own vote in

favor of SB380 for a campaign contribution or other "thing of value" from either Milton McGregor, Ronnie Gilley, or any person working on behalf of either;

(H) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross explicitly exchanged or promised to exchange his own vote in favor of SB380 for a campaign contribution or other "thing of value" from either Milton McGregor, Ronnie Gilley, or any person working on behalf of either.

B. Counts Eleven and Twelve -- Federal Programs Bribery and Aiding and Abetting Federal Programs Bribery (18 U.S.C. §§ 666(a)(1)(B) and 2)

1. **Allegations**

Counts Eleven and Twelve state the §666 or federal programs bribery charges against Senator Ross in general terms. Counts Eleven and Twelve allege that Senator Ross agreed to accept "campaign contributions," "of at least $20,000 from Gilley, Massey, and Lobbyist A" [Pouncy] (Count Eleven) and "an unspecified amount of campaign contributions from McGregor and Coker" (Count Twelve), "intending to be influenced and rewarded in connection with an upcoming vote on pro-gambling legislation." (¶¶210, 212).

2. **Applicable Law**

Section 666(a)(1)(B) criminalizes a covered person's "'corruptly' soliciting or accepting a bribe."[5] *United States v. McNair*, 605 F.3d 1152, 1185 (11th Cir.

[5] Numerous nuances of the elements of federal programs bribery have been addressed by various extensive motions to dismiss (and accompanying oral arguments) and will be subject to upcoming proposed jury instructions and trial motions. Mr. Ross relies on these previously-filed pleadings and those pleadings to be filed that have addressed and will address directly these issues. But, in summary, these related issues include but are not limited to: 1) the allegations of the Indictment relate to speech (i.e., campaign

2010). The section's statutory language "intending to be influenced" has been held in other, analogous statutes to "prohibit[] a bribe, which involves a quid pro quo." *United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996). If section 666 can ever properly be construed, either as a matter of statutory interpretation or consistent with constitutional requirements, as covering campaign contributions, Senator Ross contends that, as applied to such contributions, the *McCormick v. United States* standard, requiring proof of an **explicit** *quid pro quo* in order to convict a public official based on his or her solicitation or receipt of a campaign contribution, 500 U.S. 257, 273 (1991), applies equally to prosecutions for federal programs bribery.[6]

Although not expressly so holding, the United States Court of Appeals for the Eleventh Circuit in *United States v. Siegelman*, no. 07-13163, 2011 U.S. App. LEXIS 9503 (11th Cir. May 10, 2011), **approved applying the *McCormick*[7] *quid pro quo* standard to §666 and honest services fraud bribery prosecutions based on a campaign contribution.**

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contributions) that is specially protected by the First Amendment; 2) an explicit quid pro quo must be proven (*see McCormick v. United States*, 500 U.S. 257, 273 (1991)); 3) whether the term "corruptly" is unconstitutionally vague when applied to campaign contributions; 4) whether "in connection with any business, transaction or series of transactions" covers state legislators and legislative employees in their non-commercial roles of voting on and drafting legislation; 5) whether the allegations in the indictment (and the application of §666) impermissibly encroach on State sovereignty and violate the Tenth Amendment; 6) whether campaign contributions constitute "a thing of value"; 7) whether the allegations, interpretation, and application by the Government violates due process, especially in light of the rule of lenity; 8) whether the Government has properly alleged and proved the valuation element ($5000) and the program element ($10,000); and 9) whether a legislator is an "agent" of the State.

[6] The reasons supporting this contention are set out in further detail in Senator Ross' brief in support of his motion to dismiss the federal programs bribery charges against him, *see* doc. no. 467, at, e.g., 28-29, and his objection to the Magistrate Judge's recommendation regarding the federal programs bribery charges, *see* doc. no. 928, at, e.g., 17-19, 26-29, which we adopt and incorporate by reference herein.

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

In *Siegelman* the defendants' bribery convictions were based upon the contribution defendant Scrushy gave to Gov. Siegelman's education lottery campaign. "As such the convictions impact the First Amendment's core values – protection of free political speech and the rights to support issues of great public importance." *Siegelman*, 2011 U.S. App. LEXIS 9503, at *17.

Noting the "particularly dangerous legal error" of "instruct[ing] a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities," *id.*, at *18, the Court of Appeals explained that

> [t]he Supreme Court has guarded against this possibility by interpreting federal law to require more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor.

Id., at *18-19 (citing generally *McCormick*, *supra*).

More specifically, following quotation of *McCormick's* lengthy discussion of the practical truths regarding a) campaign fundraising, b) seeking and claiming political and financial support based on past or future acts or positions, and c) acting for the benefit of constituents, (d) in a system of privately-financed election campaigns – and that such practices not only had "'long been thought to be well within the law but also … unavoidable,'" 2011 U.S. App. LEXIS 9503, at *19-20 (quoting *McCormick*, 500 U.S. at 272), the Court of Appeals acknowledged the *McCormick* Court allowed prosecution of campaign contributions "only if 'payments are made in return for an *explicit* promise or undertaking by the official to perform or not perform an official act.'" 2011 U.S. App. LEXIS 9503, at *20 (quoting *McCormick*, 500 U.S. at 273) (emphasis in *Siegelman*).

The *Siegelman* court noted the Supreme Court had not yet considered whether the *quid pro quo*[8] required to convict a public official for receipt of a campaign contribution under the Hobbs Act was likewise required under the federal funds bribery, conspiracy, or honest services mail fraud statutes. 2011 U.S. App. LEXIS 9503, at *20-21. And, the Court of Appeals found it unnecessary to decide that question for either federal programs bribery or honest

[8] The Court of Appeals, in its "honest services" discussion, variously referred to this *McCormick* "explicit promise," that "transforms the exchange from a First Amendment protected campaign contribution and a subsequent [specific official act] … into an unprotected crime," 2011 U.S. App. LEXIS 9503, at *28 n. 21, as "an explicit agreement to 'buy' [a specific official act]," a "corrupt agreement," "corruptly agree[ing] to a specific exchange," "an agreement to swap money for [specific official act]," "the agreement to exchange a campaign donation for [a specific official act],""an agreement to exchange [a specific official act] for a campaign donation" as "would amount to the official's 'selling' to the [campaign contributor] the official's duty and authority to [perform the specific official act]," *id.*, and "the corrupt agreement to make a specific exchange." *Id.*, at *41 n. 26.

The court issued each such characterization of the required "explicit promise" or *quid pro quo* as part of acknowledging that "[s]ince a campaign donation – unlike bags of cash delivered to the official himself – is protected First Amendment activity and, *indeed the normal course of politics in this country*, due process requires that the potential campaign donor [and, Senator Ross would add, candidate or potential recipient] have notice of what sort of conduct is prohibited." *Id*. (emphasis added).

Even assuming *arguendo* that a campaign contribution, in some strictly limited circumstances, may as a matter of statutory interpretation be subject to prosecution as federal programs bribery or honest services fraud (as to which we have argued it may ***not***), Senator Ross respectfully submits that a standard based on an agreement being "corrupt" or entered into "corruptly" is too vague to provide the required advance (i.e., pre-prosecution and pre-conduct) fair warning or fair notice required by due process. Senator Ross further urges that a standard allowing conviction based on an "agreement," without requiring that the prohibited agreement be "explicit" in (what we believe to be) the *McCormick* sense of "express," as opposed to the *Siegelman* sense of merely capable of being "implied from the official's words and actions," 2011 U.S. App. LEXIS 9503, at *24 (quotations omitted), is both too vague as to satisfy due process and overly broad.

Indeed, the latter allows the official to be convicted – contrary to the *Siegelman* court's supposition – for engaging in protected core First Amendment activity (of soliciting and accepting campaign contributions, expressing political positions to educate and to seek support, and voting or taking other official action) based on a mere "close-in-time relationship between the donation and the act," *id.*, at *23; or worse, mere receipt "of a campaign donation followed by an act favorable toward the donor." *Id.*, at *19. This is so regardless of the lack of causal connection between the contribution and the official act, or the myriad other motives or factors that inform the official act.

services fraud. *Id.*, at *25 (federal programs bribery counts) ("even assuming a quid pro quo instruction is required …"), *28 (honest services counts 6 and 7) ("Without deciding whether a *qui pro quo* must be proved in an honest services bribery prosecution …"). In both instances the appellate court found that even if such a quid pro quo instruction were required, the jury was adequately instructed that an "agree[ment] that the official will take specific action in exchange for the thing of value" was required for conviction, as set forth by *McCormick*; and found no reversible error as to the instructions for either set of counts.[9] *Id.*, at *21, 25-26 (federal programs bribery), 28 (honest services).

But, the Court of Appeals did note that,

> as the defendants point out, … several district courts, in unpublished opinions, have extended the McCormick rationale to the bribery and honest services statutes. The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions.

Id., at *21 n. 14. And, as to the applicability of the *McCormick* "explicit promise" standard to federal programs bribery, honest services, and conspiracy charges, the appellate court cited with approval the Seventh Circuit's observation that "extortion and bribery are but 'different sides of the same coin.'"[10] *Id.*, at *21 (quoting *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)).

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[9] The opinion suggests that the quoted instruction was given specifically as to the federal programs bribery counts (counts 3 and 4), but that the instructions (including the quoted language) "may be read in tandem" in determining their sufficiency for the honest services bribery counts based on the same "pay to play" scheme (counts 6 and 7). 2011 U.S. App. LEXIS 9503, at *28-29.

[10] Assuming arguendo that the honest services statute can properly be construed as extending to prosecutions based on campaign contributions, which we believe and have consistently argued it cannot, further support for the application of the *McCormick* standard to that statute in particular is found in the *Siegelman* court's later observation, also in dictum, that "[a]fter *Skilling [v. United States*, 561 U.S. ____, 130 S.Ct. 2896

The *Siegelman* court did assert that an "explicit [promise or agreement], however, does not mean *express,*" 2011 U.S. App. LEXIS 9503, at *22; and that an explicit agreement – even in the alleged bribery-by-campaign-contribution context – "may be 'implied from [the official's] words and actions.'" *Id.*, at *24-25 (quoting *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)). But, we have shown previously[11] that such a conclusion conflicts with the Eleventh Circuit's earlier decision in *United States v. Martinez*, which requires proof of an explicit, in the *McCormick* sense of express as opposed to implied, *quid pro quo* to convict a public official for solicitation or receipt of a campaign contribution.[12] 14 F.3d 543, 553 (11th Cir. 1994). The explicitness of

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(2010)], it may well be that the honest services statute, like the extortion statute in *McCormick*, requires a *quid pro quo* in a campaign donation case." We address the rationale of that aspect of *Siegelman* in greater detail in section 3, *infra*. We cite it here simply as further support for applying the *McCormick* standard to the honest services charges.

[11] Quinton T. Ross, Jr.'s Supplemental Brief Regarding Impact of *Siegelman* Decision, filed May 14, 2011, at 11-15 (doc. no. 1103).

[12] In *Martinez*, the court addressed the interplay between the *McCormick* explicit *quid pro quo* standard and *Evans* as applied to a Hobbs Act prosecution *not* involving campaign contributions. The Eleventh Circuit first held that *McCormick's* explicit *quid pro quo* standard – i.e., that liability for receipt of contributions is made out "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," 500 U.S. at 272 – applies to prosecutions based on campaign contributions, 14 F.3d at 553; *accord, e.g., United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992), *reh'g granted & modified o.g.*, 30 F.3d 108 (11th Cir. 1994); but that the Supreme Court in *McCormick* "explicitly limited its holding to the context of campaign contributions." 14 F.3d at 553.

In turn, in addressing defendant's argument that the *McCormick* standard applied to a non-campaign contribution case, the *Martinez* court -- contrary to the *Siegelman* panel's reading of *Evans* -- viewed the Supreme Court in *Evans* as "consider[ing] whether a quid pro quo was required ***outside*** the context of campaign contributions." *Id.* (emphasis added). The *Martinez* court further read *Evans* "as adopting the *quid pro quo* requirement of *McCormick*" and "modif[ying] this [*McCormick*] standard for ***non***-campaign contribution cases …." *Id.* (emphasis added).

The *Siegelman* panel's application of *Evans* to modify the *McCormick* explicit *quid pro quo* standard for a campaign contribution case conflicts with the *Martinez* court's view that *Evans* applied only outside the campaign contribution context. *Siegelman* did not attempt to distinguish *Martinez*, and in fact did not even cite *Martinez*.

the *quid pro quo* refers to the explicitness of the promise (the *quid*), as opposed to the specificity of the agreed-upon official act (the *quo*). Under the Eleventh Circuit's prior precedent rule, the court's holding in the earlier *Martinez* case – requiring an explicit *quid pro quo*, as opposed to one that can be implied from the circumstances – controls.

Regardless of its construction of "explicit," the *Siegelman* court does view *McCormick*, as assertedly construed by *Evans*, as requiring, at minimum, *some* type of *quid pro quo* for a Hobbs Act extortion conviction. And, *Siegelman*, at least in dictum, supports applying the *McCormick* standard to campaign contribution-based prosecutions under the federal programs bribery, honest services, and conspiracy statutes, as we have consistently argued in this case.

Section 666(a)(1)(B) provides in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> …
>
> (B) corruptly solicits or demands for the benefit of any person,

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The *Martinez* interpretation of *Evans* in fact cannot be distinguished from that in *Siegelman*, and the two cases cannot be harmonized on that point. Under the Eleventh Circuit's prior precedent rule, this Court is obligated to follow the earlier of the two conflicting panel decisions, *e.g., Cohen v. Office Depot*, 204 F.3d 1069, 1076 (11th Cir. 2000), here *Martinez*.

Under *Martinez*, the *McCormick* standard – without any purported modification by the ***non***-campaign contribution case of *Evans* (more specifically, Justice Kennedy's single Justice concurrence, which was not part of the majority opinion) to allow the explicit promise of the explicit *quid pro quo* to be implied from the official's words and actions – applies to our campaign contribution case here. In fact, the *Siegelman* panel's view that the *quid pro quo* required in a campaign contribution case may be implied from the official's words and actions was urged by the dissent in *McCormick*, *see* 500 U.S. at 282 (Stevens, J., dissenting), but rejected by the *McCormick* majority. [12] 500 U.S. at 273.

> or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> …
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(emphasis supplied). The statute defines "agent" in Section 666(d)(1): "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."

A defendant such as Senator Ross can be found guilty of federal programs bribery only if the Government proves all the following facts beyond a reasonable doubt:

> (1) the defendant was an agent of an entity that received the requisite amount of federal funds in a one-year period[13];
>
> (2) during that one-year period, the entity received benefits greater than $10,000 under a Federal program involving some form of Federal assistance;

[13] "[F]or an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.'" *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (quoting *United States v. Phillips*, 219 F.3d 404, 411 (5th Cir. 2000)) (reversing convictions under §666 because even if the defendants were agents of the entity alleged, their challenged and allegedly corrupt conduct did not pertain to their role as agent of that entity).

> (3) during that period the defendant solicited or demanded, or accepted or agreed to accept, a thing of value as specified in the indictment from a person or persons as identified in the indictment;
>
> (4) in return for the acceptance or agreement, the defendant intended to be influenced or rewarded in connection with any business, transaction, or series of transactions of the entity involving anything of value of $5,000 or more; and in ***this*** instance,
>
> (5) there was an explicit *quid pro quo* between the campaign contribution(s) Senator Ross received and his specific official act of voting in favor of SB380, that is, the contributions are made in return for an explicit promise or undertaking by Senator Ross to vote for SB380, such that he is asserting that his official act of voting for SB380 will be controlled by the terms of his promise or undertaking.[14]

E.g., McNair, 605 F.3d at 1185 and nn. 36, 38 (elements 1-4); *McCormick*, 500 U.S. at 273 (element 5).

To convict of aiding and abetting, the Government must prove: 1) "a substantive offense was committed," 2) "the defendant associated himself with the criminal venture," 3) "he committed some act which furthered the crime," and 4) "the defendant shared the same unlawful intent as the actual perpetrator." *Hansen*, 262 F.3d at 1262.

3. **Grounds for Acquittal as to Federal Programs Bribery**

[14] Section 666 defines the requisite intent as acting "corruptly," which the Eleventh Circuit's pattern jury instruction defines as meaning "to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result." Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Offense Instruction 24.1, at 187-88 (2010); *see also, e.g., United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195, 1213 (11th Cir. 2009) (in case involving charges of bribery in the awarding of sewer and wastewater treatment contracts, finding no plain error in similar definition of acting "corruptly"). For reasons explained in greater detail in our brief in support of the motion to dismiss the federal programs bribery charges, doc. no. 467, at 21-22, defining the required intent as applied to soliciting and receiving campaign contributions in terms of acting "corruptly," is unconstitutionally vague and improperly sweeps in legitimate, protected First Amendment campaign contribution activity.

(A) There is no evidence that the Alabama Legislature, as opposed to other state agencies in the Executive and Judicial branches of Alabama government, received the requisite amount of federal funds;

(B) There is no evidence that Senator Ross is an agent of an entity that received the requisite amount of state funds;

(C) There is no evidence that Senator Ross was authorized to act on behalf of the Executive or Judicial branches with respect to the federal funds they received;

(D) There is no evidence that Senator Ross was authorized to act on behalf of the Legislative branch with respect to its funds;

(E) The Government has failed to identify the entity for which Senator Ross is allegedly an agent with respect to its funds;

(F) The Government has not shown how Senator Ross' alleged corrupt conduct relates to his role as agent of some state entity with respect to its funds;

(G) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution or set of contributions that Senator Ross received, agreed to accept, or solicited and any specific official act;

(H) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to the particular contribution(s) Ross received from Gilley, Massey,

and/or Pouncy in 2009 or solicited in 2010 (count 11), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(I) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions attributed to McGregor and Coker (count 12), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(J) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution of set of contributions that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(K) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to the particular contribution(s) Ross received from Gilley, Massey, and/or Pouncy in 2009 or solicited in 2010 (count 11), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro

quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(L) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions attributed to McGregor and Coker (count 12), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(M) There is no evidence that Senator Ross received any personal benefit from or was enriched personally by any campaign contribution or other payment.

As to the charge of aiding and abetting:

(N) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that federal programs bribery was committed as alleged in the indictment;

(O) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross associated himself with some such alleged criminal venture;

(P) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross committed any act that furthered any such offense;

(Q) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross shared the required unlawful intent.

The evidence at trial has shown that the Government has taken out of context Senator Ross' communications relating to solicitation of campaign contributions, and embellished his connection to any actions that may have been taken, or agreements that may have been entered into, by any of the other defendants. The evidence in the Government's case-in-chief shows that Senator Ross solicited, was offered, and received lawful campaign contributions only. The Government's evidence has failed to prove beyond a reasonable doubt the existence of an explicit *quid pro quo* between such lawful contributions and Senator Ross' vote on SB380 or other official act, or generally that Senator Ross committed federal programs bribery.

The Government's evidence in its case-in-chief failed to prove beyond a reasonable doubt that federal programs bribery was committed as alleged in the indictment, Senator Ross associated himself with some such alleged criminal venture and committed some act that furthered any such offense, and Senator Ross shared the required unlawful intent.

C. Counts Seventeen and Eighteen – Extortion under Color of Official Right (Hobbs Act) and Aiding and Abetting Extortion under Color of Official Right
(18 U.S.C. §§ 1951 and 2)

1. **Allegations**

Counts Seventeen and Eighteen (the Hobbs Act charges against Senator Ross) assert that Senator Ross, "aided and abetted by others known and unknown to the Grand Jury, did knowingly attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by

extortion, as those terms are defined by" 18 U.S.C. §1951. (Indictment, ¶¶222, 224).

Count Seventeen alleges only that "in or about March 2010," Senator Ross, "while serving as a member of the Alabama Senate, engaged in a course of conduct, whereby Ross solicited and, directly and through others, pressured [co-defendants Milton] McGregor and [Thomas] Coker, under the color of official right, to consent to provide an unspecified amount of campaign contributions for the benefit of Ross, which money was not due to Ross." (¶222).

The allegations in Count Eighteen differ only as to time period ("in or about December 2009 through in or about March 2010"), the persons Senator Ross "solicited and … pressured" for campaign contributions (defendants Gilley and Massey and Lobbyist A [Pouncy]), and the amount Senator Ross "solicited and … pressured" them "to consent to provide" ("approximately $25,000 in campaign contributions."). (¶224).

2. **Applicable Law**

The Hobbs Act criminalizes interference with interstate commerce by extortion (along with attempts or conspiracies to do so), 18 U.S.C. §1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951(b)(2).

In addition to proof of "obstruct[ing], delay[ing] or affect[ing] commerce," 18 U.S.C. §1951(a), the Supreme Court and the Eleventh Circuit have made clear that, to convict a public official of ***any*** charge of extortion "under color of

official right" under the Hobbs Act, 18 U.S.C. §1951, the Government must prove a *quid pro quo*, i.e., the public official received payment in exchange for the official's promise to perform or not to perform a specific official act. *Evans v. United States*, 504 U.S. 255, 268 (1992); *McCormick*, 500 U.S. at 273; *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) (on petition for rehearing); *United States v. Martinez*, 14 F.3d 543, 553-54 (11th Cir. 1994). More important for present purposes, the Supreme Court has stressed that where an elected official receives a campaign contribution or campaign, conviction of the same charge requires proof that the quid pro quo is ***explicit***. That is, the Government must show that "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.

3. **Grounds for Acquittal as to Hobbs Act Extortion**

The Government has failed to offer evidence sufficient to allow the jury to find Senator Ross guilty beyond a reasonable doubt, and Senator Ross is therefore entitled to entry of a judgment of acquittal, as to the charges brought against him under the Hobbs Act for each of the following reasons:

(A) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution or set of contributions that Senator Ross solicited and pressured any contributor to provide and any specific official act;

(B) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to the particular contribution(s) Ross solicited and pressured Gilley, Massey, and/or Pouncy to provide in 2009 or 2010 (count 18), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(C) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions Ross solicited and pressured McGregor and Coker to provide in or about March 2010 (count 17), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(D) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution of set of contributions that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(E) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with

respect to the particular contribution(s) Ross solicited and pressured Gilley, Massey, and/or Pouncy to provide in 2009 or 2010 (count 18), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(F) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions Ross solicited and pressured McGregor and Coker to provide in or about March 2010 (count 17), i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(G) There is no evidence that Senator Ross received any personal benefit from or was enriched personally by any campaign contribution or other payment.

As to the charge of aiding and abetting:

(H) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that extortion under color of official right was committed as alleged in the indictment;

(I) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross associated himself with some such alleged criminal venture;

(J) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross committed any act that furthered any such offense;

(K) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross shared the required unlawful intent.

The evidence at trial shows that the Government has taken out of context Senator Ross' communications relating to solicitation of campaign contributions, and embellished his connection to any actions that may have been taken, or agreements that may have been entered into, by any of the other defendants. The evidence at trial has shown that Senator Ross solicited, was offered, and received lawful campaign contributions only. The Government's evidence failed to prove beyond a reasonable doubt the existence of an explicit *quid pro quo* between such lawful contributions and Senator Ross' vote on SB380 or other official act, or generally that Senator Ross committed extortion under color of official right.

As to aiding and abetting, the Government's evidence at trial failed to prove beyond a reasonable doubt that extortion under color of official right was committed as alleged in the indictment, Senator Ross associated himself with some such alleged criminal venture and committed some act that furthered any such offense, and Senator Ross shared the required unlawful intent.

D. Counts Twenty-Three through Thirty-Three – "Honest Services" Mail and Wire Fraud, and Aiding and Abetting
Honest Services Mail and Wire Fraud
(18 U.S.C. §§ 1341, 1343, 1346 and 2)

1. **Allegations**

The eleven "honest services" fraud charges (Counts Twenty-Three through Thirty-Three) are alleged to be governed by a scheme, in which Senator Ross and all other defendants, along with Lobbyist A, "knowingly devised and intended to devise a scheme and artifice to defraud and deprive" the State of Alabama and others of "their right to the honest services of elected members and employees of the Legislature" through "bribery and concealment of material information." (¶234) Paragraph 235 sets out five mailings of checks (comprising Counts 23 through 27) that Senator Ross and all other defendants, along with Lobbyist A [Pouncy], "aided and abetted by each other, and by others known and unknown to the Grand Jury," for the purpose of carrying out the above fraudulent scheme, "placed and caused to be placed" for delivery. Paragraph 236 lists six telephone calls (comprising Counts 28 through 33) that, again, Senator Ross and all other defendants, along with Lobbyist A [Pouncy], "aided and abetted by each other, and by others known and unknown to the Grand Jury," for the purpose of carrying out the above fraudulent scheme, "transmitted and caused to be transmitted by means of wire communication."

2. **Applicable Law**

The honest services mail and wire fraud statutes criminalize the use of the mails or wire communications to execute a scheme to defraud another of the right to a public official's honest services.[15] 18 U.S.C. §§ 1341, 1343, 1346. To

[15] As with the general bribery elements, numerous nuances of the elements of honest services fraud have been addressed by various extensive motions to dismiss (and accompanying oral arguments) and proposed jury instructions, and may be addressed by upcoming trial motions. Mr. Ross relies on these previously-filed pleadings and those

convict a defendant of honest services mail/wire fraud, the Government must prove beyond a reasonable doubt all of the following facts:

> (1) the defendant intentionally participated in a scheme to defraud;
>
> (2) the defendant used mail/wire communications to further that scheme;
>
> (3) there was a falsehood which was material;
>
> (4) the defendant acted willfully and with an intent to defraud; and
>
> (5) the identity of what the victim has been defrauded of (e.g., money, property, or the §1346 intangible right of honest services).

United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999); *United States v. Brown*, 40 F.3d 1218, 1221 (11th Cir. 1994); *see Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1841 (1999) (identifying materiality as an element).

Beyond that, however, the honest services statute of section 1346 may constitutionally prohibit bribes and kickbacks ***only***. *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2931-33 (2010); *Siegelman*, 2011 U.S. App. LEXIS 9503, at *26-27, 28 n. 21. We have urged strenuously that honest services fraud can ***never*** properly be construed, either as a matter of statutory interpretation or consistent with constitutional requirements, as covering campaign contributions. *See, e.g., Siegelman*, 2011 U.S. App. LEXIS 9503, at *30-31 ("[a]lthough *Skilling*

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pleadings to be filed that have addressed and will address directly these issues. But, in addition to the various issues noted above in the bribery section (which apply herein assuming that the alleged scheme to defraud is a bribery scheme), further related issues include but are not limited to: 1) whether the Government must prove personal enrichment or a personal benefit to the offender; 2) whether the allegations of the indictment fall outside the parameters established by the Supreme Court in *Skilling* as being limited to the pre-*McNally* core of bribes and kickbacks; 3) whether an alleged payment or offer to pay must be made to influence a specific act (i.e., a specific quid pro quo); 4) whether the indictment sufficiently alleges the scheme to defraud; and 5) whether the allegations in these charges survives the constitutional concerns under the First, Fifth, and Tenth Amendments, especially in light of the rule of lenity.

refers us to the pre-*McNally* bribery cases as examples of the fact patterns that would supply notice of what constitutes an honest services bribery violation, none of these cases was a campaign donation case.").

Assuming arguendo that the honest services fraud statute can be so construed at least in some circumstances, Senator Ross contends that, as applied to such contributions, the *McCormick* standard, requiring proof of an **explicit** *quid pro quo* in order to convict a public official based on his or her solicitation or receipt of a campaign contribution, 500 U.S. at 273, applies equally to prosecutions for honest services fraud.[16] Indeed, the Eleventh Circuit in *Siegelman* suggested that "[a]fter *Skilling*, it may well be that the honest services statute, like the extortion statute in *McCormick*, requires a *quid pro quo* in a campaign donation case." 2011 U.S. App. LEXIS 9503, at *31. Under such a reading of the honest services statute, "section 1346 would criminalize only the *agreement* to exchange a campaign donation for [a specific official act]." *Id.* (emphasis in original). Stated another way, "[t]he official's duty to provide honest services … would be violated only by an agreement to exchange [a specific official act] for a campaign donation." *Id.*

3. **Grounds for Acquittal as to Honest Services Fraud**

The Government has failed to offer evidence sufficient to allow the jury to find Senator Ross guilty beyond a reasonable doubt, and Senator Ross is therefore entitled to entry of a judgment of acquittal, as to the charges brought

[16] The reasons supporting this conclusion are set out in Senator Ross' brief in support of his motion to dismiss the honest services charges against him, *see* doc. no. 472, at, e.g., 21-23, and his amended objection to the Magistrate Judge's recommendation regarding the honest services charges, *see* doc. no. 948, at, e.g., 16-19, which we adopt and incorporate by reference herein.

against him for honest services wire and mail fraud for each of the following reasons:

(A) The Government has failed to allege any false statement by any defendant as a predicate for any of the wire or mail fraud charges;

(B) The Government has failed to allege or offer evidence any false statement by Senator Ross as a predicate for any of the wire or mail fraud charges;

(C) To the extent the Government may contend Senator Ross or any other defendant concealed facts and thereby left a false impression by such nondisclosure, the Government has failed to allege facts or offered evidence that supports imposition of a duty to disclose the matter(s) concealed;

(D) The Government has failed to show that any alleged false statement (or any fact allegedly concealed) was material;

(E) As to each mailing or wire transmission comprising the specific counts of mail and wire fraud (counts 22 through 33), the evidence is insufficient to allow the jury to find beyond a reasonable doubt as to **each** specific mailing or wire transmission that Senator Ross **participated** in such mailing or wire transmission;

(F) As to each mailing or wire transmission comprising the specific counts of mail and wire fraud (counts 22 through 33), the evidence is insufficient to allow the jury to find beyond a reasonable doubt as to **any** specific mailing or wire transmission that Senator Ross **participated** in such mailing or wire transmission;

(G) As to each mailing or wire transmission comprising the specific counts of mail and wire fraud (counts 22 through 33), the evidence is insufficient to allow the jury to find beyond a reasonable doubt as to **each** specific mailing or wire transmission that Senator Ross **benefited** from such mailing or wire transmission;

(H) As to each mailing or wire transmission comprising the specific counts of mail and wire fraud (counts 22 through 33), the evidence is insufficient to allow the jury to find beyond a reasonable doubt as to **any** specific mailing or wire transmission that Senator Ross **benefited** from such mailing or wire transmission;

(I) As to the alleged scheme to defraud, the evidence is insufficient to allow the jury to find beyond a reasonable doubt that there existed any such overarching scheme to defraud involving the Alabama Senate or Alabama Legislature as a whole with respect to SB380;

(J) As to the alleged scheme to defraud, the evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any alleged such overarching scheme to defraud;

(K) As to the alleged scheme to defraud, the evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross knew of any alleged scheme to defraud that involved any other Senator;

(L) As to the alleged scheme to defraud, whether involving the Alabama Senate or some smaller scheme, the evidence is insufficient to allow the jury to

find beyond a reasonable doubt that Senator Ross knew that any such alleged scheme had an illegal objective;

(M) As to the alleged scheme, whether involving the Alabama Senate or some smaller scheme, the evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross joined the scheme;

(N) As to the alleged scheme, whether involving the Alabama Senate or some smaller scheme, the evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross participated in the scheme, and did so voluntarily and willfully;

(O) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution or set of contributions that Senator Ross received, agreed to accept, or solicited and any specific official act;

(P) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to the particular contribution(s) Ross received from Gilley, Massey, and/or Pouncy in 2009 or solicited in 2010, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(Q) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions attributed to McGregor and Coker, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and any specific official act;

(R) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to any particular contribution or set of contributions, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any particular contribution of set of contributions that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(S) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with respect to the particular contribution(s) Ross received from Gilley, Massey, and/or Pouncy in 2009 or solicited in 2010, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(T) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross possessed the requisite unlawful intent with

respect to any particular contribution or set of contributions attributed to McGregor and Coker, i.e., the evidence is insufficient to allow the jury to find beyond a reasonable doubt an explicit quid pro quo between any such contribution(s) that Senator Ross received, agreed to accept, or solicited and his specific official act of voting for SB380;

(U) There is no evidence that Senator Ross received any personal benefit from or was enriched personally by any campaign contribution or other payment.

As to the charge of aiding and abetting:

(V) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that honest services fraud was committed as alleged in the indictment;

(W) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross associated himself with some such alleged criminal venture;

(X) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross committed any act that furthered any such offense;

(Y) The evidence is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross shared the required unlawful intent.

The evidence at trial shows that the Government has taken out of context Senator Ross' communications relating to solicitation of campaign contributions, and embellished his connection to any actions that may have been taken, or agreements that may have been entered into, by any of the other defendants.

The evidence at trial has shown that Senator Ross solicited, was offered, and received lawful campaign contributions only. The Government's evidence will fail to prove beyond a reasonable doubt the existence of an explicit *quid pro quo* between such lawful contributions and Senator Ross' vote on SB380 or other official act, or generally that Senator Ross committed honest services wire or mail fraud.

As to aiding and abetting, the Government's evidence in its case-in-chief failed to prove beyond a reasonable doubt that honest services wire or mail fraud was committed as alleged in the indictment, Senator Ross associated himself with some such alleged criminal venture and committed some act that furthered any such offense, and Senator Ross shared the required unlawful intent.

Conclusion

The evidence in the Government's case-in-chief is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross is guilty of any of the charges against him. For all the foregoing reasons, Senator Ross's motion is due to be granted, and Senator Ross is entitled to entry of a judgment of acquittal against him on all charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2011, I have filed the foregoing with the Clerk of the Court by hand-delivery, and an electronic copy of the same has been sent by e-mail to the following:

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