UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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

QUINTON T. ROSS, JR.'S REQUESTED JURY INSTRUCTIONS

Quinton T. Ross, Jr., respectfully requests that the following Jury Instructions be given to the jury in this matter.

Respectfully submitted,

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INTRODUCTORY NOTE TO PROPOSED INSTRUCTIONS #A1-A23

The following set of instructions conveys the concepts and elements that fall generally under the overall heading of "what bribery is," especially but not only in situations involving campaign contributions. In other words, these instructions concern what the Government must prove in terms of *quid pro quo* (explicit, specific, etc.), agreement, intent, corruption, etc., under all of the charges against Mr. Ross (whether § 666, "honest services" under §§ 1341/1343/1346, or conspiracy).

These instructions in this category will then be appropriate to add to other instructions (proposed elsewhere in this document) about the basic elements of each offense.

Mr. Ross does not anticipate that the Court will hold, or that the Government will argue, that the requirements discussed in this part are different under § 666 (including the conspiracy to violate § 666) than they are under "honest services" (§§ 1341/1343/1346). If the Court does so hold, Mr. Ross requests these instructions for each statute and count separately, as well as for all of them.

Many of the following instructions are framed in terms of the requirement of proof of a corrupt "agreement." That framing is directly supported by *United States v. Siegelman*, as explained in the notes to the instructions including quotations from *Siegelman*. That framing also makes the most sense and will avoid jury confusion, given the nature of the Government's allegations (which are not based on allegations of un-accepted offers on Mr. Ross's part). If the Court

declines to instruct the jury that proof of a *quid pro quo* "agreement" is required, and that acts short of an "agreement" (such as the explicit offering of an agreement) will make out a crime, Mr. Ross requests the opportunity to suggest alternative wording. However, because *Siegelman* so clearly and so repeatedly speaks of an "agreement" as the crucial element, Mr. Ross does not anticipate any dispute in that regard.

As Mr. Ross noted in his May 13 filing regarding the impact of *Siegelman*, it is true that the *Siegelman* opinion does not definitively hold that the *McCormick* standard (and associated aspects of *quid pro quo* doctrine) apply to § 666 and "honest services." But the opinion cites approvingly the rationale for applying that standard to the other statutes involved here, and gives no reason to doubt its applicability. Therefore, it certainly cannot be said that the law was clear enough to put anyone on notice that there can be conviction under § 666 or "honest services" bribery without the *quid pro quo* and *McCormick* standards. The explanation of these proposed instructions will not further belabor that point, but will cite caselaw under *McCormick*, including *Siegelman* itself, as authority for the requested instructions.

Pursuant to the Court's Order, Mr. Ross may propose more fact-specific "theory of defense" charges that pertain to this set of issues as well, in light of the evidence at trial and in light of Mr. Ross's theories of defense.

PROPOSED JURY INSTRUCTION #A-1 -

FIRST AMENDMENT AND NEED FOR CAUTION

Some of the charges in this case are based on campaign contributions or other sorts of campaign or election support. As such, these charges impact the First Amendment's core values - protection of free political speech and the right to support issues of great public importance. You cannot convict any defendant for his exercise of either of these constitutionally protected activities. Since our political system is based on raising private contributions for campaigns for public office, you must be careful not to convict any defendant for his political speech -- including contributing to campaigns or soliciting contributions to campaigns or other electoral support, based on the views of the elected official or candidate and what he intends to do or has done -- or for supporting an issue that he believes to be of great public importance.

Explanation and Authority: The jury should be instructed that campaign contributions (and other election-related support) are different from personal enrichment, in the eyes of the law, and that campaign contributions (and the like), which involve legitimate interests of both the donor and the recipient, are ordinarily protected by the First Amendment. In order to convey this point, Mr. Ross requests the preceding instruction, which is closely adapted from a passage in *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, *17-18 (11th Cir. 2011):

> Siegelman and Scrushy's bribery convictions in this case were based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such, the convictions impact the First Amendment's core values - protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. In a political

> system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

The specific reference to an elected official or candidate soliciting contributions or other electoral support based on his views and what he intends to do or has done is closely adapted from *United States v. McCormick*, 500 U.S. 257, 272 (1991) ("Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done.").

If the Court declines to give the instruction in this form, Mr. Ross requests the opportunity to discuss alternate formulations that would convey the point.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED INSTRUCTION #A-2
FURTHER INSTRUCTION REGARDING
LEGITIMACY OF CAMPAIGN CONTRIBUTIONS

Campaign contributions and fundraising are an important, unavoidable, lawful and legitimate part of the American system of privately-financed elections. The law recognizes that virtually every campaign contribution is given to an elected public official because the giver supports the acts done or to be done by the elected official.

The Supreme Court of the United States has recognized that legitimate, lawful, campaign contributions are given to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future. Indeed, "almost all lawful contributions are given to influence future legislative or executive actions"[1] and "in our … system of private campaign financing, large contributions are commonly given in expectation of favorable official action."[2]

Lobbyists and others often donate to the political campaigns of public officials and there is nothing illegal about this practice. Official acts that advance the interest of a contributor or of the contributor's clients, taken shortly before or after campaign contributions are solicited or received from the contributor or lobbyist, can, depending on the circumstances, be perfectly legal and appropriate.

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[1] *United States v. Abbey*, 560 F.3d 513, 516 (6th Cir. 2009).
[2] *United States v. Inzunza*, 580 F.3d 894, 900 (9th Cir. 2009).

Authority and Explanation: Other than the added sentence footnoted above, this is a very lightly edited version of pertinent parts of an instruction given, as recounted and quoted in *United States v. Ring*, 2011 U.S. Dist. LEXIS 24889, *5 (D.D.C. 2011).

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED INSTRUCTION #A-3
FURTHER INSTRUCTION REGARDING
LEGITIMACY OF CAMPAIGN CONTRIBUTIONS

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, legislators do not commit a crime when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, including acts taken shortly before or after campaign contributions are solicited and received from those beneficiaries.

Explanation and Authority: This is a lightly edited passage from *United States v. McCormick*, 500 U.S. 257, 272 (1991):

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #A-4
CAMPAIGN CONTRIBUTIONS CATEGORICALLY NOT "BRIBES"

Under the laws at issue in this case, as to all federal programs bribery and "honest services" fraud charges against Mr. Ross, campaign contributions and similar electoral support are not covered under these charges. They are not bribes, and cannot be the basis of any conviction. Therefore, in order to obtain a conviction on any count against Mr. Ross, the Government must prove beyond a reasonable doubt that the payment in question was not a campaign contribution and was not electoral support.

Argument and Explanation: This instruction is requested consistent with the argument, which Mr. Ross has made in motions to dismiss, that § 666 and "honest services" do not cover "campaign contributions" or similar things. (It is framed in a way that excludes "extortion" charges, since there are no such charges against Mr. Ross.) It is supported by the reasoning and authorities that Mr. Ross has explained in, e.g., Docs. 928 and 929. Further requested instructions herein, which are based on the assumption for purposes of argument that the Court disagrees with this view of the law, are made without waiver of this contention.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-5
CONSITUTIONAL CONCERNS, YIELDING REQUIREMENT OF PROOF OF CORRUPT AGREEMENT

Campaign donations are protected First Amendment activity and, indeed, the normal course of politics in this country. Unless there is an explicit agreement to buy a legislator's vote, there is nothing inherently corrupt about a donation followed by the legislator's vote in favor of the position that the contributor supports. It is only when there is proof beyond a reasonable doubt of a corrupt agreement – that is, an explicit agreement to buy a legislator's vote -- that there is a crime. There must be proof beyond a reasonable doubt of an explicit agreement to swap money for vote, that is, proof that the legislator explicitly sold to the campaign contributor the legislator's duty and authority to vote. A First Amendment protected campaign contribution, followed by a favorable vote by a grateful legislator, is not a crime without proof beyond a reasonable doubt of a corrupt agreement.

Explanation and Authority: This conveys the point that, because of constitutional considerations, it is only a particular sort of corrupt agreement that makes a campaign contribution into a crime. This proposed instruction is closely adapted from footnote 21 in *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, *29-31 ("a campaign donation … is protected First Amendment activity and, indeed, the normal course of politics in this country, …. Absent an explicit agreement to 'buy an appointment' there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime. … In *McCormick*, … the Court protected both the First and the Fifth Amendments by reading the statute to require an agreement to swap money for office, … The official's duty to provide honest services… would be violated only by an agreement to exchange an appointment for a campaign donation. Such an agreement would amount to the official's 'selling' to the appointee the official's duty and authority to make appointments.") If the Court declines to give the

instruction in this form, Mr. Ross requests the opportunity to discuss alternate formulations that would convey the point.

To the extent this instruction may go beyond *Siegelman*, by not only requiring an explicit agreement, but also providing that an agreement merely implied from the official's words and actions is insufficient, *see Siegelman*, 2011 U.S. App. LEXIS 9503, *25 ("an explicit agreement may be 'implied from [the official's] words and actions'") (quoting *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring), it is not only consistent with, but indeed required by, the Supreme Court's decision in *McCormick*, the Eleventh Circuit's decision in *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994); and the Eleventh Circuit's "prior precedent rule."

The *Siegelman* court rejected defendants' argument that "explicit" means "explicit" in the sense of requiring "express words of promise," holding that "explicit … does not mean express." *Id*., at *22. Instead, the court found that the "explicit promise" required by *McCormick* (as necessary to satisfy First Amendment and due process concerns) "may be 'implied from [the official's] words and actions.'" Id., at *24-25 (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring)). The Eleventh Circuit reached that conclusion by reading McCormick's clear "explicit quid pro quo" and "explicit promise" standard in light of the jury instruction the Supreme Court approved in *Evans*. See 2011 U.S. App. LEXIS 9503, at *22-23.

But, to the extent the Siege*l*man court uses *Evans* to modify, or place an interpretive gloss on, *McCormick's* explicit quid pro quo requirement, *Siegelman* conflicts with the earlier Eleventh Circuit decision in *Martinez*.

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 criminal 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 holding 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 *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), which here is *Martinez*.

Under *Martinez*, the *McCormick* standard – without any purported modification by the ***non***-campaign contribution case of *Evans* (or more specifically, Justice Kennedy's single Justice concurrence, which was not part of the majority opinion or reasoning) 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.[3] 500 U.S. at 273.

In sum, in determining the proper standard for proof of the explicit quid pro quo required by *McCormick* in a campaign contribution extortion or bribery case, the *Siegelman* holdings that "explicit … does not mean express" and the required "explicit agreement may be implied from the official's words and actions" do ***not*** apply. The jury instead should be instructed as to require an explicit *quid pro quo* based on an explicit promise, which logically cannot be implied from a defendant's non-express words or actions.

Granted _____ _____

United States District Judge

Modified _____

Denied _____

[3] Indeed, Justice Scalia, a member of the six Justice majority, in a separate concurrence, explicitly (as in expressly) asserted that extortion under color of official right "should not [] be interpreted to cover campaign contributions with *anticipation* of favorable future action, as opposed to campaign contributions *in exchange for an explicit promise* of favorable future action." 500 U.S. at 276 (Scalia, J., concurring) (emphasis added).

PROPOSED JURY INSTRUCTION #A-6
REQUIREMENT OF PROOF OF CORRUPT AGREEMENT

Unless there is proof of an explicit agreement to buy a legislator's vote, there is nothing criminal about a donation followed by the legislator's vote in favor of the position that the contributor supports. It is only when there is proof beyond a reasonable doubt of a corrupt agreement, that there is a crime. There must be proof beyond a reasonable doubt of an explicit agreement to swap money for vote, that is, proof that the legislator explicitly sold to the campaign contributor the legislator's duty and authority to vote. An agreement that is merely implied from the official's words and actions, is not an explicit agreement as is necessary to constitute one element of a crime. A campaign contribution, and a later favorable vote by a grateful legislator, is not a crime without proof beyond a reasonable doubt of a corrupt agreement.

Explanation and Authority: As a less-favored (because less instructive and less complete) alternative to #A-5 above, Mr. Ross proposes this instruction to introduce the requirement of proof of a corrupt agreement, without discussion of the constitutional concerns that give rise to this legal requirement. Like #A-5 above, it is closely adapted from footnote 21 in *Siegelman*, but modified as to the proof necessary to show the required "explicit agreement" based on *McCormick*, *Martinez*, and the Eleventh Circuit's prior precedent rule.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-7
QUID PRO QUO FOR ALL ASPECTS OF ALL CHARGES

For all charges, whether based on campaign contributions or otherwise, the Government must prove the type of agreement that is called a "*quid pro quo*." This phrase, which comes from Latin, means an agreement to exchange something for something – in this case, an agreement to exchange the campaign contribution or other thing of value, for action by the official.

Argument and Explanation: Mr. Ross understands from the May 5 argument that the Government now concedes the propriety of a charge requiring proof of a "*quid pro quo*" in all respects, whether campaign contribution or otherwise.

As to campaign contributions and the like, this proposed instruction is supported by *McCormick* and by *Siegelman*. *See Siegelman*, 2011 U.S. App. LEXIS 9503, *23 (referring to "the *quid pro quo* requirement of *McCormick*," citing *Evans*); *41 (emphasizing that "*quid pro quo*" includes not only the quid and the quo but also the "pro - the corrupt agreement to make a specific exchange.")

As to matters other than campaign contributions, *see*, *e.g.*, *United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("The 'with intent to be influenced' language prohibits a bribe, which involves a quid pro quo."); *id.* ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994) (holding that there is a "*quid pro quo*" requirement under Hobbs Act even outside campaign contributions, though modified by *Evans* in that category of cases outside campaign contributions). *See also* Doc. 1018 (Government concedes that *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010) does not do away with a "*quid pro quo*" requirement, and that instead it speaks to the explicitness/specificity of the required *quid pro quo*).

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-8
QUID PRO QUO AGREEMENT MUST INVOLVE EXPLICIT PROMISE

The Government must prove beyond a reasonable doubt not just that there was a *quid pro quo* agreement, but beyond that must prove that the *quid pro quo* agreement was explicit, specifically that a payment was "'made in return for an **explicit** promise or undertaking by the official to perform or not to perform an official act.'"

Argument and Explanation

The Court should, at least, give this instruction modified to include (at the beginning) the instruction that it applies "As to all matters based on campaign contributions or similar electoral-related things of value, …" (The extension of this principle beyond strict campaign contributions, to other electoral-related things, was discussed and agreed at the May 5 argument.) On these matters, the instruction is supported by, *e.g.*, *Siegelman*, 2011 U.S. App. LEXIS 9503, *22 ("*McCormick* uses the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions."); *25 (speaking of "*McCormick*'s requirement for an explicit agreement involving a *quid pro quo*."); *30 ("Absent an explicit agreement to 'buy an appointment' there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime.") The quoted language is taken from *Siegelman*, 2011 U.S. App. LEXIS 9503, *20 (quoting *McCormick*, 500 U.S. at 273).

As discussed at the May 5 hearing, this instruction should not be limited to campaign contributions and other electoral matters, but should include the entire case. This would help avoid jury confusion that might arise from differentiation between campaign and non-campaign related aspects of the case.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #A-9
DEFINITION OF "EXPLICIT"

The word "explicit," in defining the sort of *quid pro quo* agreement that the Government must prove beyond a reasonable doubt, means that the agreement must be "stated clearly and in detail, leaving no room for confusion or doubt."

Explanation and Authority: the quoted definition of "explicit" is from the Oxford English Dictionary online, at http://oxforddictionaries.com/view/entry/m_en_us1245655#m_en_us1245655.

The Government may argue that under *United States v. Siegelman*, the word "explicit" has no content other than the *quid pro quo* agreement must be for a "specific" action. Mr. Ross disagrees. The word "explicit" still must have meaning, even if the Eleventh Circuit sees some daylight between the word "explicit" and the word "express." If the Court reads *United States v. Siegelman* as adopting a definition of "explicit" that means nothing more than that the *quid pro quo* agreement must be for a "specific" action, Mr. Ross nonetheless preserves the point.

Mr. Ross recognizes that the convictions in *Siegelman* were affirmed without an instruction on this definition. That, in itself, certainly does not mean that the instruction is wrong, or that the Court should decline to give it. Without a definition of "explicit," the jury will simply be left to guess at what it means; and that is an intolerable result. If the Court concludes that "explicit" has some other definition in this context, Mr. Ross requests an instruction on the meaning of the word, and requests opportunity to propose an instruction after knowing what alternative meanings have been suggested.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-10
EXPLICIT = EXPRESS, NOT IMPLIED

The word "explicit," in describing the Government's burden of proving beyond a reasonable doubt that there was an "explicit *quid pro quo* agreement," means that the agreement must have been express. It cannot have been an implied agreement. An agreement that is merely implied from the official's words and actions, is not an explicit agreement as is necessary to constitute one element of a crime.

Argument and Explanation: This instruction is requested in order to preserve the contention that *Siegelman* was incorrect in indicating that "explicit" does not mean "express," and in its apparent reference to the possibility of an "implied" explicit agreement. The argument is supported by, *e.g.*, *United States v. Ganim*, 510 F.3d 134 (2nd Cir. 2007) (Sotomayor, J.) Mr. Ross maintains his position, as previously argued, that *Evans* did not in fact modify the *McCormick* "explicit *quid pro quo*" standard for cases based on campaign contributions.

Indeed, that position is supported by *United States v. Martinez*, 14 F.3d 545, 553 (11th Cir. 1994), earlier Circuit precedent with which *Siegelman* conflicts as to the applicability of *Evans* (and Justice Kennedy's solo concurring opinion, from which comes *Siegelman*'s notion that the required agreement may be implied from the official's words and actions) to campaign contribution cases. As argued above (see proposed instruction #A-5), *Martinez* cannot be harmonized with or fairly distinguished by *Siegelman* as to the watering down of *McCormick*'s "explicit promise" or "explicit quid pro quo" requirement in prosecutions involving campaign contributions. Accordingly, under the Eleventh Circuit's "prior precedent" rule, *e.g., Cohen v. Office Depot*, 204 F.3d 1069, 1076 (11th Cir. 2000). The *Martinez* holding – and thus an undiluted *McCormick* "explicit promise" requirement – governs here.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-11
QUID PRO QUO MUST BE FOR SPECIFIC ACTION

The Government must also prove beyond a reasonable doubt that the *quid pro quo* agreement was for a specific official action. The official must agree to take or forego some specific action in order for the doing of it to be criminal. A contributor's general expectation of some unspecified future favorable action by the official does not satisfy the "specific future act" requirement. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

Argument and Explanation: *See Siegelman*, 2011 U.S. App. LEXIS 9503, *23 ("No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.")

Mr. Ross requests this instruction for all aspects of the case against him. If the Court will not give it as to all aspects of the case, Mr. Ross then requests that the Court give this instruction with the introductory phrase, "As to all matters based on campaign contributions or similar electoral-related things of value, …"

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-12
SPECIFIC – AS FRAMED IN INDICTMENT

In addition to proof that the quid pro agreement was in return for some specific future official act, the Government must prove, beyond a reasonable doubt, that the *quid pro quo* agreement was that the officials in question would take *the specific future acts alleged in the Indictment*, in exchange for the campaign contributions and other things alleged in the Indictment.

For all charges pertaining to Legislators, therefore, the Government must prove beyond a reasonable doubt that the *quid pro quo* agreement was in exchange for the Legislator's vote on "an upcoming vote on … [specified] legislation," that is, Senate Bill 380.

For the charges pertaining to Mr. Crosby, the Government must prove beyond a reasonable doubt that the *quid pro quo* agreement was in exchange for "his official acts as they pertained to drafting gambling legislation, including SB380."

Argument and Explanation: It should go without saying that the Government must prove the central allegation as framed in the Indictment, not some other crime. *See*, *e.g.*, Fifth Circuit Pattern Instruction 1.19 ("You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment.") This instruction, therefore, should be given based on the allegation that each Legislator was allegedly bribed "in connection with an upcoming vote on pro- gambling legislation." (Indictment, ¶¶ 194, 196, 198, 204, 208). The only reasonable reading of this allegation, given the indictment as a whole, is that it refers to SB380. Indeed, the handful of overt acts alleged as to Mr. Ross refer repeatedly to the vote, or his vote, on SB380. (¶¶ 125, 128-131), As to Mr. Crosby, the indictment alleges that he was bribed "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." (¶ 218). *See also* Doc. 1018, p. 3 (Government

argues that the Indictment "alleged an explicit agreement to exchange benefits (campaign contributions) for specific official action (votes in favor of pro-gambling legislation).")

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED INSTRUCTION #A-13
"SPECIFIC" AS CONTRASTED WITH ONGOING POLITICAL ALLIANCE

Because the laws at issue prohibit only a "*quid pro quo*" agreement in exchange for specific action [in exchange for campaign contributions or other electoral support], it is not a crime to offer, give or agree to give [something/campaign contributions or other electoral support] in furtherance of an existing, or future, ongoing political alliance or relationship.

Argument and Explanation: This instruction will help the jury understand, on a matter that is very important to some charges, the meaning of the "specific" *quid pro quo* requirement. The correctness of the instruction follows, logically, from the "specific" requirement as explained above. Mr. Ross requests this instruction as to all aspects of the case; but if the Court held that the "specific" requirement does not apply outside of campaign contributions and electoral support, Mr. Ross requests at least that the Court give the instruction with the bracketed material about campaign contributions included.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-14
BRIBE AS REQUIRING PROOF OF ALTERING/CHANGING OFFICIAL ACTION

In addition to the other aspects of the required proof of a *quid pro quo* agreement that I have explained to you, there is a further requirement. The Government must prove that the agreement was to affect the official's action.

What this means more particularly is that the Government must prove beyond a reasonable doubt that the agreement was made to *alter* the official's action from what it otherwise would have been – that is, to cause the official to change an official position that he otherwise would have taken, or to take official action that he would not have taken but for the agreement. If the official would have taken (or refrained from) the same official action or taken the same position **without** the payment or agreement, then any payment or agreement was **not** made to alter or affect the official's action.

Explanation and Authority: This instruction is necessary, in order to convey the concept that part of the definition of a bribe is that it must be designed to *alter*, *affect*, *change* the official's action. Mr. Ross requests each of the above paragraphs; if the Court will not give both, Mr. Ross requests each separately. If the Court sees some fault in the detail of the phrasing, Mr. Ross requests other wording (to be discussed with the Court) to convey the point. This instruction is supported by, *e.g.*, *United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); *Siegelman*, 2011 U.S. App. LEXIS 9503 *22 ("The government's initial brief on appeal states that, as to Counts 8 and 9, 'the jury had to find that Scrushy and Siegelman intended to deprive the public of their right to honest services and intended to deceive the public, and that Siegelman intended to alter his official actions as a result of Scrushy's purported campaign contributions.'"); *United States v. Urciuoli*, 613 F.3d 11, 15 (1st Cir. 2010) (affirming, and quoting jury instruction that required the government to "prove beyond a reasonable doubt the [the defendant] intended the payment to cause [the named legislator] to change an official position that he would otherwise have

taken or to take official actions that he would not have taken but for the payment"); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("This court has held that 'payments to a public official for acts that would have been performed in any event … are probably illegal gratuities rather than bribes'").

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-15
BRIBE AS PRIME MOVER OF ACTION

The Government must prove beyond a reasonable doubt that the payment, which is alleged to have been a bribe, was the prime mover or producer of the official act.

Explanation and Authority: This instruction adds the concept of the alleged bribe as the "prime mover," which is necessary both in order to differentiate between a bribe and a gratuity, and in order to differentiate between a briber and a victim. It is supported by *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) ("We have laid emphasis under the bribery section on "corruptly . . . in return for being influenced" as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act.") and cases following *Brewster* in this respect. *Brewster* was a case under 18 U.S.C. § 201, but the same concept should apply under both § 666 and "honest services," given (a) the fact that 18 U.S.C. § 666 was designed after § 201 to a significant extent, and (b) the fact that the Supreme Court in *Skilling* cited § 201 as guidance for the concept of "bribery" in "honest services."

This instruction too is supported, albeit less directly, by *Siegelman*, where the court addressed an instruction that allowed conviction for self-dealing honest services fraud based on the official "intend[ing] to alter" his official action "as a result of" the political donation. In rejecting the instruction, the Eleventh Circuit held that expressing the requisite causal connection or nexus in terms of "as a result of," "fails adequately to require the pro – the corrupt agreement to make a specific exchange." 2011 U.S. App. LEXIS 9503, *41 n. 26. This suggests that a "but for" or mixed-motive or other potential multiple concurring cause standard would not suffice to show the causal connection or nexus required for conviction here.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #A-16
PERSONAL BENEFIT

A campaign contribution or other election-related support cannot be a bribe unless it amounts to a personal enrichment of, or personal benefit to, the official.

Argument and Explanation: This proposition of law was recognized by Judge Capel as correct, in Doc. 863, pp. 8-9. Even if the Government questions the correctness of it, still this limitation must be adopted under "rule of lenity" and "fair warning" principles since the law is not (and was not, at the times in question in this case) clearly to the contrary. Judge Capel's discussion of this proposition came in discussion of "honest services." If the Court will not give this instruction as to § 666 and conspiracy charges as well, Mr. Ross requests that it be given with specific reference to the "honest services" counts.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-17
"CORRUPT"

In addition to the other requirements that I have explained, the Government must prove beyond a reasonable doubt that there was an agreement that was "corrupt."

Argument and Explanation: The additional element of "corruptness" is reflected in, *e.g.*, *Siegelman,* 2011 U.S. App. LEXIS 9503, *30 ("corrupt agreement"); *41 (emphasizing that "*quid pro quo*" includes not only the quid and the quo but also the "pro - the corrupt agreement to make a specific exchange.") Section 666 on its face requires the element of "corruptly." That requirement also inheres in "honest services," especially by virtue of the discussion in *Skilling* about § 666 as a statute that gives further notice of the nature of what a *Skilling* "bribe" is.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-18
DEFINITION OF "CORRUPT"/"CORRUPTLY"

As to campaign contributions, an agreement of the type that I have explained to you is "corrupt" only if it is made for the sake of private benefit to the contributor, and not because of the contributor's belief that the vote in question would be beneficial to the public.

Explanation and Authority: This instruction is an effort to avoid the problem of sometimes-used definitions of "corrupt" or "corruptly" that are entirely circular and conclusory. For instance, some definitions of corrupt are circular in that they are defined in terms of what is "unlawful." That is hopelessly circular. Other definitions are conclusory in that they are defined in terms of what is "wrongful." That is hopelessly conclusory, and merely invites the jury to rely on private moral and ethical intuitions rather than on a definable legal standard. This instruction avoids those problems, and also protects against the criminalization of good-faith support of politicians on account of their campaign promises. The definition of corruptness in terms of private benefit is supported by the discussion in *United States v. Popkin*, 943 F.2d 1535, 1539-40 (11th Cir. 1991), although that case was decided under a different statute:

> In *[United States v.] Reeves* [, 752 F.2d 995 (5th Cir. 1985),] the district court had defined "corruptly" as meaning done "with motive or bad or evil purpose." Id. at 997. The court of appeals disagreed, and reversed on this ground. Reasoning that to define "corruptly" in this way would render the "key word" redundant and could potentially raise questions of overbreadth and vagueness, the court concluded that "corruptly" is used for the purpose of "forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." Id. at 1001.
> …
> We agree with the definition adopted in Reeves.

It is also supported by the following from *United States v. North*, 910 F.2d 843, 881-82 (D.C. Cir. 1990): "A 'corrupt' intent may also be defined as 'the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others.' Ballentine's Law Dictionary 276 (3d ed. 1969) (definition of 'corruptly')." While some authorities (including *North*, in passing) mention bribery as an example of what is "corrupt," still there must be

this definition in order to avoid the problem of circularity. The question is, what is a bribe, where bribery includes the element of corruptness.

This proposed instruction is related to, and supported by, the argument that Mr. Ross has made on motions to dismiss, about the absurd overbreadth that would follow from the Government's reading of the definition of "bribery" under § 666 and "honest services." The Government reads these laws to cover not only personal enrichment but (a) campaign contributions and (b) "intangibles" as bribes. That reading, if taken seriously, would mean that a Governor violates those laws by engaging in political horse-trading with legislators: I will support you on this (e.g., roads in your district) if you support me on that (i.e., anti-gaming votes). This surely cannot be the law. And it is not, in fact, the law – by virtue of the word "corrupt" among other required elements. *See*, *e.g.*, *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) ("Legislative logrolling [--] Senator A tells Senator B 'I'll vote for your bill if you vote for a bailout of Corporation C' [--] isn't corrupt, unless A owns a chunk of C."); *id.* at 892 (majority opinion) ("We have no quarrel with the dissent's very eloquent explanation of the law of bribery.") But what is it that differentiates that, from a citizen's effort to combat that sort of opposition-through-logrolling? It certainly can't be that juries are given the opportunity to apply their own sense of right and wrong, to make the distinction. (As Judge Kozinski explained in footnote 5, *id.*, "Nor can 'corruptness' be a question of fact for the jury to decide. A jury isn't free to conclude logrolling is bad and the senators in the example above are acting 'corruptly.' What's legal and what's not is for courts to decide.") And it can't be just that legislators are given some implicit, judge-created, exemption from crimes like bribery; in other words, it can't be that legislators and Governors are free to make whatever deals they want, no matter how explicit and specific, yet citizens are barred. A definition of "corrupt" that excludes acts motivated by honestly-held opinions about the public good, such as we have proposed, is the only way, or certainly the best way for the Court to resolve this problem.

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-19
SUPPLEMENTAL OR ALTERNATIVE DEFINITION OF "CORRUPT"

Furthermore, the Government must prove that any agreement was "corrupt" in the sense that it was wrongful, immoral, depraved or evil.

Argument and Explanation: *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("'Corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil. See Black's 371; Webster's 3d 512; Am. Hert. 299-300.")

Mr. Ross will also request the pattern instruction on § 666, modified in some respects, as reflected elsewhere in this set of proposals. That pattern instruction includes the following: "To act 'corruptly' means 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." The definition in terms of "voluntarily, deliberately, and dishonestly" is useful and important, and should be given. The remainder, though, is entirely circular since it is premised on "unlawful," which begs the question. Thus the necessity for further definitions as offered herein, to supplement the pattern instruction.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-20
GOOD FAITH/*BONA FIDE*

A campaign contribution or other payment is not a crime, under the statutes at issue in this case [as to Mr. Ross], if it was done in good faith.

The Government must prove that any payment made or offered was not "bona fide (that is, good faith) salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

Argument and Explanation: The concept of "good faith" is part of the law of both "honest services" and § 666. As to "honest services," *see*, *e.g.*, *United States v. Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996) (affirming, and quoting instruction given: "Now, in this case good faith is a complete defense … because good faith on the part of the defendants is inconsistent with the intent to defraud or willfulness, which is an essential part of the charges."); *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981) ("Good faith is a complete defense to the charge of intent to defraud under the mail fraud statute."). The second sentence is taken directly from § 666(c) (with the added explanation that "bona fide" means "good faith," which is a correct definition/translation of the term.) By virtue of *Skilling*'s discussion of § 666 as a guide to what "bribery" is under "honest services," the same principle should apply under "honest services."

Mr. Ross requests both of these sentences, and requests each separately if the Court declines to use both.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-21
BRIBERY AS DIFFERENT FROM CURRYING FAVOR OR GOODWILL

Giving a campaign contribution or giving a thing of value to a legislator or official is not a bribe if it is a mere attempt to curry favor, or a generalized attempt to build goodwill.

Argument and Explanation: This is supported by cases as such as *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) ("[B]ribery may not be founded on a mere attempt to curry favor, ... there is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill.") Recognizing that the failure to give a somewhat similar instruction was rejected as an argument for reversal in *McNair*, 605 F.3d at 1194-95, this does not mean that refusing the instruction is the best decision. This instruction would help to clarify the law for the jury. Although the trial judge in *McNair* said in the context of that case that giving the instruction requested in that case might "carr[y] with it some sort of suggestion that I'm adopting that idea that that's what these payments were," *id.*, the instruction requested herein does not ask the Court to tell or hint to the jury the Court's own views in this regard.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #A-22
REWARD IS NOT A BRIBE

In this case, you may not convict [Mr. Ross/any defendant] on the theory that payments or campaign contributions were offered to, or solicited by, Legislators or others in order to reward them for their past actions. Instead, the Government must prove beyond a reasonable doubt that payments were offered or solicited in exchange for the official's explicit promise in regard to specified future actions by the official, under the rules and definitions that I have explained to you.

Argument and Explanation: This distinction between reward for past actions, and influence/*quid pro quo* agreement regarding future actions, is required both by the law and by the framing of the Indictment. All of the § 666 charges are framed in the Indictment, explicitly, as bribery, not gratuities (for instance, in the title of each § 666 count). And "honest services" covers (insofar as pertinent to this case) only bribery, which is again the way the Indictment is framed. A reward for a past act that is offered only after the act is, at most, a gratuity rather than a bribe. *E.g.*, *Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action--a quid pro quo.") (emphasis, on future tense "will," supplied); *McNair*, 605 F.3d at 1191 (quoting *Sun-Diamond*, which distinguishes gratuities and bribes on this basis among others); *United States v. Frega*, 179 F.3d 793, 807 n.17 (9th Cir. 1999) (quoting instruction given: "Nor does giving a judge something as a reward for an official act on his part that he has already undertaken constitute a bribe unless there was an understanding prior to the act being taken that the judge would be so rewarded."). (The fact that § 666 includes the word "reward" indicates only at most the possibility that *some* § 666 cases might be brought as "reward" cases based on past actions, in which case it would constitute a gratuity case rather than a bribe case. The Government has brought this case, explicitly as stated in the Indictment, as a bribe case as to all payments allegedly made by Mr. Ross.)

At the very least, this instruction should be given as to all campaign contributions and the like, because the concept of criminal liability for a

campaign contribution as reward for past action is incompatible with *McCormick*.

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #A-23
CLOSE-IN-TIME DISCUSSION OF CONTRIBUTION AND ACTION

It is not a crime to discuss – including offering or soliciting -- campaign contributions near in time to, or even in the same conversation as, discussing an official's vote. Nor is it a crime to discuss – including offering or soliciting -- campaign contributions close-in-time to that vote. It is only when the discussion rises to the level of an explicit agreement, and when it meets the other requirements that I have explained to you, that the laws at issue in this case are implicated.

Argument and Explanation: This instruction gives a specific point that would likely otherwise be missed, and that the Government may try to obscure. (The Government has, heretofore, tried to obscure it both in the Indictment and in oral argument on motions to dismiss.) The point is supported by *Siegelman*, *McCormick*, and the other authorities cited earlier in this document.

The argument may be made, against this proposal, that the point is "adequately covered" by other instructions requiring proof of an explicit, specific, corrupt *quid pro quo* agreement. Even if the Court gives all of the other instructions requested herein, adding this short additional instruction would still be useful. It would take extremely little time to give it. It would enlighten rather than confuse the jury. There is no general principle to the effect that, after a trial that has taken weeks or months, the Court should give jury instructions that are edited severely in order to be brief. There is no good reason why the Court should decline to give this correct instruction.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

INTRODUCTORY NOTE TO PROPOSED JURY INSTRUCTIONS #B1 to B7

This set of instructions concerns the charges under 18 U.S.C. § 666(a)(2). It begins with an edited version of Eleventh Circuit Pattern Jury Instruction 24.2 (from the "Offense" instructions in the pattern instruction set). The pattern instruction is written regarding a charge against an "official" rather than a private citizen, i.e., a charge under § 666(a)(1)(B). This proposed instruction is revised to fit § 666(a)(2), and contains other changes designed to lead in to additional proposed instructions concerning the elements. The proposed instruction is also tailored specifically to the charges in the Indictment – for instance in the Indictment's allegation of what entity the alleged agents were agents of, and the 12-month period in which receipt of federal assistance is calculated. This set of proposed instructions then contains further proposed instructions suited to this case.

Mr. Ross does not contend or admit that these instructions are sufficient to cover the elements of § 666. They are not sufficient in themselves. In order to be sufficient, they must be given along with proposed instructions #A-1 *et seq.* Those instructions further elucidate the concept of the *quid pro quo*, the agreement, the explicitness and specificity, the definition of "corruptly," and related issues.

Proposal of these jury instructions, of course, does not constitute a waiver of Mr. Ross's arguments that the statute is inapplicable under the circumstances of this case.

PROPOSED JURY INSTRUCTION #B-1
EDITED PATTERN INSTRUCTION FOR § 666

It's a Federal crime, under some circumstances, for anyone to corruptly give, offer, or agree to give anything of value to a person who is an agent of a State government receiving significant benefits under a Federal assistance program, when the person intends to influence or reward the government agent in connection with certain transactions of the government, or agency.

This definition that I have just given to you cannot be taken on its own. It has to be applied according to further instructions I am about to give you, and also according to other instructions I [have given you]/[will give you] about the definition of what constitutes an illegal bribe in this respect. You must apply those instructions as well as the ones I am about to give right now.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the person to whom the Defendant corruptly gave, offered, or agreed to give things of value was an agent of the State of Alabama;

(2) During the one-year period from May 1, 2009, to April 30, 2010, the State of Alabama received benefits greater than $10,000 under a Federal program involving some form of Federal assistance;

(3) The defendant intended to influence the person in connection with business, a transaction, or a series of transactions of the State of Alabama

involving something worth $5,000 or more. Again I remind you that I [have given]/[will give] further instructions explaining to you what this element means, as applied to this case; and

(4) the Defendant acted corruptly.

To act "corruptly" means 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.

An "agent" is any employee, officer, or director of the State of Alabama, subject to the further explanation of that term that I will give you.

Explanation: edited version of pattern instruction, as explained above.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTIONS #B-2
AGENT OF THE ENTITY CHARGED, NOT SOME OTHER ENTITY

For each count, you must consider the person to whom things were allegedly offered or given, and consider whether that person was an "agent" of the State of Alabama. A person might be an agent of some *other* entity, including an entity that is part of the State government but is not the State itself; but that itself would not make the person an agent of the State itself. The Government must prove beyond a reasonable doubt, as to each count, that the person involved was an agent of the State. This means that the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State itself.

Argument and Explanation: This instruction is supported by the fact that the Indictment explicitly and solely charges each person as an agent of the State, and by *United States v. Langston*, 590 F.3d 1226, 1233-35 (11th Cir. 2009) (reversing convictions on this basis). *E.g.*, *id.* at 1233 ("These cases reach the common-sense conclusion that an employee of an agency entity cannot be an agent of the principal entity unless the legal construct establishes such a relationship."); *id.* at 1234 ("We must necessarily scrutinize that which purports to create the employment relationship with the agency to determine if the employee is authorized to act on the principal entity's behalf.").

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #B-3
AGENT: CONTROL OVER FUNDS

In order to show that the person in question was an "agent" of the State of Alabama, the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State of Alabama with respect to its funds.

The Government must prove, further, that the acts that are at issue in this case involved the person's role as an agent of the State in that sense.

Argument and Explanation: This instruction is supported by, *e.g.*, *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) ("In *United States v. Phillips*, we held that for 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.' 219 F.3d 404, 411 (5th Cir. 2000)."); *id.* at 345-46 (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).

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #B-4
BUSINESS, TRANSACTION OR SERIES/PUBLIC FUNDS

As I have mentioned, the Government must prove beyond a reasonable doubt that the Defendant offered or gave something in order to influence an agent of the State in connection with some business, transaction, or series of transactions of the State. A "transaction" in this context connotes or implies a concluded business agreement of the State. "Business" in this context includes the dealings of a government official in connection with a discrete transaction. The "business, transaction, or series of transactions" must be those of the State, not those of any of the Defendants. These words include the requirement that the decision, in which the agent was to be influenced, concerned an aspect of how the State would spend or apply public funds.

The Government must prove beyond a reasonable doubt that the Defendant converted public spending into unearned private gain.

Argument and Explanation: This proposed instruction makes sense of the words "business, transaction, or series of transactions," in light of the fact that § 666 was spending-clause legislation. The definitions of "transaction" and "business" are taken almost verbatim from *United States v. Bonito*, 57 F.3d 167, 173 (2nd Cir. 1995). Sections 666(a)(1)(B), 666(a)(2), and 666(b) themselves indicate the business or transactions are those of the entity that receives the federal funds

The second paragraph is based on the Supreme Court's explanation: "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain," *Sabri v. United States*, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947 (2004) (emphasis supplied).

If the Court will not give both paragraphs, Mr. Ross requests each paragraph.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #B-5
18 U.S.C. § 666(c)

The law does not prohibit the offering, giving, or agreeing to give *bona fide* salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

It would not be a violation of this law, for a person to pay an agent for doing things other than his official duties as an agent of the State.

Authority and Explanation: 18 U.S.C. § 666(c). Just as the Congress found it necessary and appropriate to make this explicit in the statute, it should be explicit in the instructions.

The second paragraph particularizes and explains the first. *Cf. Collier v. State*, 55 Ala. 125 (1877) (not criminal for prosecutor to receive fee for giving legal advice outside his official duties), cited *in Evans v. United States*, 504 U.S. 255, 268 n.20, 112 S.Ct. 1881, 1889 n.20 (1992) If the Court will not give both paragraphs, Mr. Ross requests that the Court give at least the first paragraph.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #B-6
FOCUS ON WHAT "INFLUENCE" MUST BE

It is not a crime to influence how legislation is written, nor is it a crime to influence how legislators vote on legislation. There are types of influence that are legal, because it is legitimate and lawful for people to try to influence legislation. That is part of the legitimate functioning of democracy. You must focus on whether the Government has proven, beyond a reasonable doubt, the particular type of influence that the law covers, as I have explained it to you: corrupt influence consisting of bribery, as I [have explained]/[will explain] the rules of what constitutes unlawful bribery.

Argument and Explanation: This instruction is necessary and appropriate in order to help ensure that the jury does not convict any defendant based on constitutionally-protected "lobbying" or advocacy-type conduct, and that the jury focuses on the narrower definition of the offense.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #B-7
INDIVIDUAL'S OWN CONDUCT (INCLUDING AVOIDANCE OF PROBLEM OF "DUPLICITOUS" CHARGES)

In considering the charges [against Mr. Ross] under this statute, you must understand that the pending charges relate specifically to each defendant's individual conduct.

No defendant is charged, or can be convicted, based on promises allegedly made by other defendants, or by other persons including any who pleaded guilty to similar charges.

No defendant is charged with responsibility for any other person's conduct; each person's responsibility, if any, is only for conduct that he is proven beyond a reasonable doubt to have engaged in.

Argument and Explanation: In its opposition to the motions to dismiss some counts based on duplicitousness (Doc. 609), the Government recognized (p. 5) the propriety of a jury instruction designed to get at this point. The first paragraph, above, adapts language from the Government's filing (Doc. 609, p. 5): "the United States has confirmed on the record, here and in Count One of the Indictment, that the pending charges relate specifically to the defendants' individual conduct." As to the second paragraph, see Doc. 609, p. 3 (Government: "Both defendants McGregor and Coker claim that, as currently pled, they are in jeopardy of being tried under Counts Five and Ten for promises allegedly made by other defendants. This is simply not the case.") The third paragraph is suggested in order to make the same point clear.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

INTRODUCTORY NOTE TO PROPOSED INSTRUCTIONS #C1 to C-7

This set of jury instructions pertains to the "honest services" charges. It begins with an edited version of the pattern instruction – edited in order to fit the allegations of the Indictment, as well as to keep "honest services" within its post-*Skilling* boundaries.

As with § 666, this set of proposed instructions is not sufficient in itself; it is designed to be used in conjunction with proposed instructions #A1 *et seq.* As with § 666, proposal of these jury instructions does not constitute a waiver of Mr. Ross' arguments that the "honest services" doctrine is inapplicable under the circumstances of this case.

PROPOSED JURY INSTRUCTION #C-1
PORTIONS OF PATTERN INSTRUCTION ADAPTED IN LIGHT OF INDICTMENT AND *SKILLING*

It's a Federal crime to use the United States mail, or to use interstate wire, radio, or television communications, to carry out a scheme to fraudulently deprive the public of a right to honest services.[4]

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the intangible right of honest services;

(2) the Defendant did so with an intent to defraud; and

(3) the Defendant used the United States Postal Service by mailing or by causing to be mailed, some matter or thing to carry out the scheme to defraud; or that the Defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.[5]

A "scheme" includes any plan or course of action intended to deceive or cheat someone.[6]

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[4] Combined from first paragraph of pattern instructions 50.2 and 51, and tailored specifically to public-sector "honest services" (i.e., depriving *the public*).

[5] Combined from second paragraph of pattern instructions 50.2 and 51.

[6] Pattern instruction 50.2

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.[7]

To "deprive someone else of the intangible right of honest services" is to violate, or to cause a public official or employee to violate, a duty to provide honest services to the public.[8]

More particularly, the duty to provide honest services is violated only by bribery. I [have explained]/[will explain] to you, more particularly, various aspects of what "bribery" means, in the law applicable to this case.[9]

The Government must prove that the Defendant intended to breach that duty and foresaw, or should have foreseen, that the State would suffer a loss as a result of the breach.[10]

The Government must prove beyond a reasonable doubt that the Defendant specifically intended to defraud. "To defraud" means to perpetrate a fraud. This includes the requirement that it must be proven beyond a reasonable

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[7] Pattern instruction 50.2.

[8] Lightly edited from Pattern instruction 50.2.

[9] Necessary in light of *Skilling* (and in recognition that while *Skilling* narrowed "honest services" to bribes and kickbacks, this case involves charges of bribery and not of kickbacks).

[10] From Pattern Instruction 50.2 (substituting "the State" for "the employer").

doubt that the Defendant intended that there would be a fraudulent statement or representation.[11]

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.[12]

A “material fact” is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is “material” if it has the capacity or natural tendency to influence a person’s decision. It doesn’t matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.[13]

To "cause" the mail to be used is to do an act knowing that the use of the mail will follow in the ordinary course of business or where that use can

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[11] This introduces the requirement of *fraud* and of *materiality*, which is incorrectly omitted from Pattern Instruction 50.2. “Honest services” fraud is still a form of fraud, and thus requires the element of materiality. *See*, *e.g.*, *United States v. DeVegter*, 198 F.3d 1324, 1328 n.4 (11th Cir. 1999). “Honest services,” in other words, simply substitutes for the “money or property” element in traditional fraud; it is the *object*, or the *thing deprived*. It does not displace the other elements of the offense, including fraud and materiality.

[12] From 50.1.

[13] From 50.1.

reasonably be expected to follow.[14] To "use" interstate wire communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.[15]

Argument and Explanation: This instruction is adapted from Eleventh Circuit Pattern Instruction 50.1, 50.2, and 51. Pattern instruction 50.2, which is designed specifically for "honest services," cannot be used by itself. The pattern instruction, for instance, incorrectly omits "materiality" as an element in "honest services" fraud, and it was written to cover the pre-*Skilling* broader definition of "honest services." This proposed instruction corrects those problems. Additional instructions, below, are further necessary to elucidate other points not adequately covered in the pattern instruction, even as edited herein.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

[14] From 50.2.

[15] From 51.

PROPOSED JURY INSTRUCTION #C-2
NON-DISCLOSURE REQUIRES DUTY

As I have explained, a "scheme to defraud" requires fraud. In this case, the Government's burden is to prove a type of fraud based on concealment of material information. The Government must prove beyond a reasonable doubt that the Defendant had a duty, explicit or implicit, to disclose specific material information; that the Defendant intentionally did not disclose the material information; and that the Defendant thereby intended to create a false and fraudulent representation.

Authority and Explanation: The fact that this case is charged by the Government based on concealment of material information is directly shown by paragraph 234 of the Indictment (Doc. 3, p. 58).

The definition is taken from *United States v. Browne*, 505 F.3d 1229, 1265 (11th Cir. 2007) ("a defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation may constitute a violation of the mail fraud statute where the defendant had a duty, explicit or implicit, to disclose material information.")

This instruction naturally raises the question of where the Government will claim to have identified the source of a duty to disclose. The Government has not done so, to date. (The Government finally identified, this month, a handful of mostly non-specific instances of the alleged concealment of material information, which provides the Government's basis for this aspect of the "fraud" charges, in oral argument on May 5. *See* Doc. 1089, Transcript of May 5, p. 118 lines 12-21. The Government must not be allowed to change its theory on that, as the case proceeds further. And, even after the Government identified instances of alleged concealment, it remains unclear as to what specific information was allegedly concealed that the Government contends is or was material.). It will likely be appropriate, in the end, for the Court to grant judgment of acquittal on the "honest services" counts for this reason. If the Government ever identifies its view as to the source of a duty to disclose the information allegedly concealed, Mr. Ross would like the opportunity to address that and propose further appropriate instructions.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #C-3
GOOD FAITH

"Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness cannot establish fraudulent intent.

A failure to disclose material information cannot be fraudulent intent if the Defendant honestly, even if mistakenly, believed that no disclosure was required or that any required disclosures would be made.

Authority: The first two paragraphs are from Eleventh Circuit Pattern Instruction Special Instruction #17 (excerpted to include pertinent part). The third paragraph speaks in the same terms, specifically as to non-disclosure (which is, as noted above, the type of fraud alleged by the Government in this case). Mr. Ross requests all paragraphs above, and requests them separately if the Court will not use all of them.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #C-4
PERSONAL KNOWLEDGE/INVOLVEMENT -- SCHEME TO DEFRAUD

No Defendant can be held criminally liable because of another person's conduct, under these mail- and wire-related charges, unless he was a knowing party to a scheme to defraud that included that other person's conduct. The Government must prove beyond a reasonable doubt that the Defendant knew of the scheme and the scope of the scheme, agreed to that scheme, participated in that scheme, and that the Defendant's participation in the scheme was knowing.

Authority and Explanation: *See United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, *33 ("Siegelman may be held criminally liable for Scrushy's conduct on the Board only if he was a knowing party to a scheme that included that conduct. United States v. Toney, 598 F.2d 1349, 1355 (5th Cir. 1979)."); *id*., *33-37 (noting the insufficiency of the evidence that Siegelman knew of a "broader self-dealing scheme," agreed to such a scheme, or participated in such a scheme, "much less [that he] knowing[ly] participat[ed]" in such a scheme).

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #C-5
UNANIMITY

You cannot convict any defendant on any of the mail or wire-based fraud charges, unless you unanimously agree on certain particulars as to such a charge.

You may not convict any defendant for any particular mailing or wiring unless you are all in unanimous agreement not only that the mailing or wiring was in furtherance of a scheme to defraud the public of honest services, but also unless if you are in unanimous agreement as to which official's honest services were at stake, if any, such that the mailing or wiring was in furtherance of the deprivation of that person's honest services.

Also, you may not convict any defendant for any mailing or wiring unless you are in unanimous agreement as to what material information, if any, was fraudulently concealed.

Authority and Explanation: *See United States v. Atkinson*, 135 F.3d 1363, 1377-78 (11th Cir. 1998) (explaining requirement of jury unanimity on the acts constituting the scheme to defraud). If the Court finds any particular problem with the phrasing of this requested instruction, Mr. Ross requests the opportunity to discuss and propose an alternative phrasing that adequately conveys the unanimity requirement.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #C-6
SCHEME SUBSTANTIALLY AS CHARGED IN THE INDICTMENT

The Government must prove beyond a reasonable doubt that there was a scheme that is substantially the same as the one charged in the Indictment. This includes the requirement that the Government must prove that the participants in the scheme were substantially the same as charged in the Indictment. If the Government has not met this requirement, you may not convict any defendant on any of Counts 23 through 33.

Authority and Explanation: *See* First Circuit Pattern Instruction # 4.18.1341 ("First, that there was a scheme, substantially as charged in the indictment, …"); "But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment."); Fifth Circuit Pattern Instruction 2.59 ("… a scheme to defraud that was substantially the same as the one alleged in the indictment …")

The second sentence of the proposed instruction (regarding substantial identity of participants) is a logical consequence of the basic principle. If the Court declines to include the second sentence, Mr. Ross requests the remainder.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #C-7
WILLFUL PARTICIPATION

The Government must prove beyond a reasonable doubt that the Defendant willfully participated in the scheme.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if a defendant acted in good faith, he cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Explanation and Authority: Taken from (and, in the first paragraph, slightly adapted from) First Circuit Pattern Instruction 4.18.1341.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

INTRODUCTORY NOTE TO PROPOSED JURY INSTRUCTIONS #D-1 to D-6

This set of instructions concerns Count 1, the "conspiracy" charge. Mr. McGregor suggests that it would make most sense, in terms of giving the jury a logical flow of concepts, to instruct the jury on conspiracy *after* having given the substantive instructions on § 666 (including instructions on *quid pro quo*, agreement, explicit, campaign contributions, etc., as set forth in #A-1 *et seq.*). This would allow the jury to understand what must be proven as to the object of the conspiracy (i.e., the substantive offense conspired about).

PROPOSED JURY INSTRUCTION #D-1
BASIC INSTRUCTION

The Defendants are accused of conspiring to commit a federal crime—specifically, the crime of 18 U.S.C. § 666 bribery, as I have explained that offense to you. It is against federal law to conspire with someone to commit this crime.

For you to find a defendant guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to commit the crime of bribery under 18 U.S.C. § 666; and

Second, that the defendant willfully joined in that agreement; and

Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details.

But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere

similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before a defendant can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that a defendant willfully joined in the agreement must be based upon evidence of his or her own words and/or actions. You need not find that a defendant agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that he or she participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that he or she knew the essential features and general aims of the venture. Even if a defendant was not part of the agreement at the very start, he or she can be found guilty of conspiracy if the government proves that he or she willfully joined the agreement later. On the other hand, a person who has no

knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven.

Authority and Explanation: This is based closely on First Circuit Pattern Instruction
4.18.371(1). The First Circuit Instruction is much more fair and complete than the Eleventh Circuit pattern instruction. The Eleventh Circuit instruction is taken up, to an excessive extent, with discussion about what the Government is not required to prove. Even to the extent such discussion may be legally correct, it is not nearly as helpful as a clear explanation of what the Government is required to prove, and (relatedly) what is not sufficient to constitute the crime. The First Circuit instruction is much more clear and balanced in this respect.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #D-2
CONSPIRACY = AGREEMENT TO COMMIT UNLAWFUL ACT

The Government must prove beyond a reasonable doubt that the defendants ***knowingly*** entered into an ***agreement*** to commit an ***unlawful*** act.

Authority and Explanation: This underscores and clarifies the crucial aspect of conspiracy law. It is not an agreement to work together to do something; it is an agreement to commit an unlawful act. "Under federal conspiracy law, the government must allege and prove that the defendants ***knowingly*** entered into an ***agreement*** to commit an ***unlawful*** act." United States v. Chandler, 388 F.3d 796, 800 (11th Cir. 2004) (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.* at 806. "To convict the defendants of this conspiracy, the government had to prove that the defendants knew of the 'essential nature of the plan' and agreed to it." *Id.*

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #D-3
REQUIREMENT OF PROOF OF KNOWLEDGE OF CONSPIRACY

In order to convict anyone of conspiracy, the Government must prove that the person knew of the overall scheme.

Authority and Explanation: "Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of ***knowledge*** of the overall scheme is critical to a finding of conspiratorial intent." *Chandler*, 388 F.3d at 806 (emphasis in original). "The government, therefore, must prove beyond a reasonable doubt that the conspiracy existed, that the defendant ***knew*** about it and that he voluntarily agreed to join it." *Id.* (emphasis in original).

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #D-4
SPECIFIC INTENT

The Government must prove beyond a reasonable doubt that each Defendant had a deliberate, knowing, specific intent to join the conspiracy.

Authority and Explanation: "The government must prove an agreement … to pursue jointly an illegal objective." *United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998). "The government must also prove beyond a reasonable doubt that each defendant had a 'deliberate, knowing, specific intent to join the conspiracy.'" *Id.* "The essence of the conspiracy is this agreement to commit an unlawful act. … The agreement itself remains the essential element of the crime. Thus the government must prove the existence of an ***agreement*** to achieve an unlawful objective and the defendant's ***knowing*** participation in that agreement." *Chandler*, 388 F.3d at 805-06 (quotations and citations omitted) (emphasis in original).

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #D-5
DEFENDANT'S OWN WORDS AND ACTIONS

Proof that a Defendant willfully joined in the agreement must be based upon evidence of his own words and/or actions.

Authority and Explanation: First Circuit Pattern Instruction 4.18.371(1).

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #D-6
SINGLE CONSPIRACY v. MULTIPLE CONSPIRACIES

Proof of several separate conspiracies isn't proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you find the Defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy – not the one charged – then you must find that Defendant not guilty.

So to find a Defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged – not a member of some other separate conspiracy.

Authority: Eleventh Circuit Pattern Instruction #13.3

Granted _____

Modified _____

Denied _____

_____
United States District Judge

INTRODUCTION TO PROPOSED JURY INSTRUCTIONS #E-1 to E-12

This set of instructions covers preliminary (pre-trial) instructions and introductory or general post-trial instructions (as contrasted with specific "offense"/"element" instructions).

Mr. Ross requests Eleventh Circuit Pattern Instructions on the following:

Preliminary, Nos. 1 and 2

Trial, Nos. 1 (if any 404(b) evidence is admitted) and 3 (if transcripts are admitted)

Basic, Nos. 1-12

Special, Nos. 1.2 or 1.3, 2.2, 4 (if any 404(b) evidence is admitted), 5, 7, 12 and 17.

As to some of those Pattern Instructions, a choice as to which variant to use will have to be made after evidence has been received. Mr. Ross also requests additional instructions as set forth herein.

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-1
INDICTMENT NOT EVIDENCE; DEFENDANTS NOT A GROUP

The charges against the Defendants are contained in the indictment. The indictment is simply the description of the charge against the Defendants; it is not evidence of anything. Each Defendant has pleaded not guilty to the charge and denies committing the crime. Each Defendant is presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven his or her guilt beyond a reasonable doubt.

The defendants are being tried together because the government has charged that they acted together. But you will have to give separate consideration to the case against each defendant. Do not think of the defendants as a group.

Authority: First Circuit Pattern Instruction 1.02. This instruction would be useful, as an addition to the Eleventh Circuit Pattern Instruction Preliminary #1, because it includes the concept of unanimity, the concept of the indictment as not being evidence (which is included in the Eleventh Circuit pattern instruction although not prominent enough to make any real impression), and the concept of not thinking of the defendants as a group. The latter point – "Do not think of the defendants as a group" – is also included in Fifth Circuit Pattern Instruction 1.01. It is important and should be included even if the Court declines to give the remainder of the instruction.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-2
DIRECT AND CIRCUMSTANTIAL EVIDENCE

Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find or infer another fact. You may consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Authority and Explanation: From First Circuit Pattern Instruction 1.05. While the concept of direct and circumstantial evidence is treated in Eleventh Circuit Pattern Instruction (Basic) #4, this adds the important point that while the law *permits* a jury to give equal weight to both types, the law does not *instruct* that the jury *should* do so. The Eleventh Circuit instruction is wrong in this regard in saying "You shouldn't be concerned about whether the evidence is direct or circumstantial," because the jury certainly *can* be concerned about that, especially in regard to particular evidence, if the jury believes that such concern is appropriate.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-3
MISSING WITNESS

If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if a witness, because of [his/her] relationship to the government, would normally be expected to support the government's version of events, the failure to call that witness may justify an inference that [his/her] testimony would in this instance be unfavorable to the government. You are not required to draw that inference, but you may do so. No such inference is justified if the witness is equally available to both parties, if the witness would normally not be expected to support the government's version of events, or if the testimony would merely repeat other evidence.

Authority and Explanation: While we do not yet know whether this instruction will be needed, it is drawn from First Circuit Pattern Instruction 2.12

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-4
SPOLIATION

If you find that the Government destroyed or obliterated a document that it knew would be relevant to a contested issue in this case and knew at the time it did so that there was a potential for prosecution, then you may infer (but you are not required to infer) that the contents of the destroyed evidence were unfavorable to the Government.

Authority and Explanation: This instruction may become appropriate. It is drawn from First Circuit Pattern Instruction 2.13.

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-5
AMOUNT OF EVIDENCE

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other.

Authority and Explanation: This instruction is particularly appropriate in a long trial, to counteract the tendency to think that a long presentation of evidence is more impressive than a short one. The first paragraph is drawn from First Circuit Pattern Instruction 3.06, and the second from Fifth Circuit Pattern Instruction 1.08.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-6
INDICTMENT NOT EVIDENCE (TO BE GIVEN AT END OF TRIAL,
IF JURY RECEIVES COPY OF INDICTMENT)

The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that [defendant] has had an indictment filed against [him/her] is no evidence whatsoever of [his/her] guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

The indictment includes some passages, written by Government lawyers, which give the Government's position about what people were saying in certain conversations and what they meant by the words that they said. This, in particular, is not evidence. You should not assume or trust that the Government accurately wrote what the people said, or that the Government accurately described what they meant. You should rely on the evidence, and your recollection of it, not on the Government's description in the Indictment.

Authority and Explanation: The first paragraph is from First Circuit Pattern Instruction 3.08.

The second paragraph is included in case the jury is given a copy of the Indictment that includes the Government's purported selective transcripts and characterization of excerpts of recordings.

Granted _____ _____

United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-7
CONSIDER ONLY CRIMES CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendants are guilty of the crime charged. The defendants are not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

Authority and Explanation: Fifth Circuit Pattern Instruction No. 1.19

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-8
SUMMARIES AND CHARTS

Certain charts and summaries have been shown to you solely to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

Authority and Explanation: This may be appropriate depending on whether and how charts and/or summaries are used. It is from Fifth Circuit Pattern Instruction No. 1.43. If charts/summaries are allowed into evidence, Fifth Circuit Pattern Instruction No. 1.44 should be used ("Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.").

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-9
RIGHT NOT TO TESTIFY

Every defendant has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that a defendant or defendants did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

Authority and Explanation: First Circuit Pattern Instruction 3.03

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-10
WITNESS WHO TESTIFIES FALSELY

If you find that any witness has willfully testified falsely as to any material matter either before this Court or under oath elsewhere, you have the right to reject the testimony of that witness in its entirety.

Authority and Explanation: Black's Law Dictionary 491 (7th ed.1999) (describing maxim of *falsus in uno, falsus in omnibus* as "[t]he principle that if the jury believes that a witness's testimony on a material issue is intentionally deceitful, the jury may disregard all of that witness's testimony"); see also Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 15.06 (5th ed. 2000) (spelling out time-honored jury instruction that "[i]f a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters"); Edward J. Devitt et al., Federal Jury Practice and Instructions § 73.04 (4th ed. 1987) (spelling out similar jury instruction that "[i]f a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves").

Granted _____ _____
United States District Judge

Modified _____

Denied _____

PROPOSED JURY INSTRUCTION #E-11
JURY'S TASK AND PUBLIC REACTION

This case involves government, politics, campaigns, and campaign contributions. It is very important for each of you to understand and follow this very important instruction: Your task is to apply the law, as I explain it to you, to the facts. Your job is not to decide on how politics or campaigns ought to be run, nor is it your job to set ethical or legal standards.

You must also not approach your deliberations with any concern about how other people or the news media might react to a particular verdict. That must not matter to you at all.

Furthermore, you must not be motivated by a desire to "send a message" to public officials or to anyone else, or by a desire to change the system of politics or to set a standard of behavior for officials or for those who interact with them. That is not the purpose of a trial such as this, and those considerations must not be any part of your verdict.

Authority and Explanation: The temptation may be enormous for the jury in this case either to think of itself as "cleaning up" the political system, or as being expected by the public or the media to do that task. The proposed instruction would counteract that natural tendency, and focus the jury on its proper role.

With particular regard to the instruction that the jury should not think of itself as "sending a message" to anyone, the Court may note that in United States v. Siegelman, No. 2:05-cr-119-MEF, Mr. Feaga repeatedly asked the jury to think of itself as sending a message, through its verdict, to other non-party elected officials. See Transcript (Volume 31) p. 7353, p. 7405.

There is ample caselaw disapproving of similar arguments. *See*, *e.g.*, *United States v. Riley*, 621 F.3d 312 (3rd Cir. 2010).

> While the Government concedes that the prosecutor's "send a message" comment was improper, there was an immediate and sustained objection that cut off the prosecutor's remarks. Further, the District Court directly addressed the inappropriate nature of the "send a message" comment in its instructions to the jury. The District Court, in its curative jury instruction given the day after the prosecutor's comment, stated that
>
> > you must not think of your verdict as sending a message to anyone. Yesterday you heard me sustain an objection to [the prosecutor's] suggestion in summation that you should "send a message" by your verdict.
> >
> > I sustained the objection because this was an improper comment. You must reach your verdict in this case based solely on the evidence, on the facts as you determine them based on the law as I present it to you now, without concern for public opinion or anything else outside of this case. That is what the law requires.
>
> SA 1191:14. This jury instruction clearly addressed the improper comment …

Id. at 339. *See also United States v. Reliford*, 58 F.3d 247, 251 (6th Cir. 1995):

> As counsel for the Government well knows, every criminal defendant is entitled to be tried on the charges contained in the indictment, and only on those charges. The jury may convict the accused only if the evidence relating to those charges convinces them of the defendant's guilt beyond a reasonable doubt. <u>The jury may not convict the accused in order to send a message to the public or the community at large</u>; they may not hold the defendant responsible for the crimes of others.

(emphasis supplied). While the line as to what sort of argument in this vein is so improper that it will *require* judicial action is not perfectly clear, *see United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982), the better course would be for the Court to issue this sort of instruction – both in order to avoid potentially improper argument, and also in order to make sure that the jury itself understands the concept.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

PROPOSED JURY INSTRUCTION #E-12
CHARACTER EVIDENCE

Quinton Ross presented evidence to show that he enjoys a reputation for honesty and integrity.

Such evidence may indicate to you that it is improbable that a person of such character would commit the crimes charged, and, therefore, cause you to have a reasonable doubt as to his guilt.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

You should consider the evidence of Mr. Ross's good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of Mr. Ross's good character creates a reasonable doubt in your mind as to his guilt, you should find him not guilty.

You may conclude that the evidence of Mr. Ross's good character is enough, in itself, to cause you to have reasonable doubt.

Authority and Explanation: It is appropriate in this case to give the jury a better explanation of the relevance and potential effect of character evidence in this case, than in many other cases, because the evidence will have more direct

relevance in this case than in many cases. That is, in this case the elements of the charged offenses include concepts such as "corruptly," "intent to defraud," conspiratorial agreement, and other things requiring proof beyond a reasonable doubt of a criminal state of mind. So the relevance of character evidence in this case goes beyond the ordinary inference "it is unlikely that a person of such good character would have engaged in the conduct that is alleged," and includes also "it is unlikely that a person of such good character would have had the criminal state of mind upon which the Government's case depends."

The Eleventh Circuit pattern instruction is therefore inadequate, standing alone in this case, because it does not give the jury any understanding of how or why the character evidence might be useful in this case.

This proposed instruction is derived from parts of First Circuit Pattern Instruction 2.19 ("[Defendant] presented evidence to show that [he/she] enjoys a reputation for honesty, truthfulness and integrity in [his/her] community. Such evidence may indicate to you that it is improbable that a person of such character would commit the crime[s] charged, and, therefore, cause you to have a reasonable doubt as to [his/her] guilt. You should consider any evidence of [defendant]'s good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of [defendant]'s good character creates a reasonable doubt in your mind as to [his/her] guilt, you should find [him/her] not guilty.") and Fifth Circuit Pattern Instruction 1.09 ("Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.").

If the Court will not include both the second and third paragraphs, Mr. Ross requests each separately.

The final paragraph is supported by *United States v. Thomas*, 676 F.2d 531, 536 (5th Cir. 1982) (recognizing that "[a]s Thomas's requested instruction indicated, evidence of good character should be considered together with all the other evidence in a case and may of itself give rise to a reasonable doubt.") (emphasis supplied). This requested paragraph does not ask the jury to consider the evidence "standing alone" (a type of requested instruction that is often denied), but (in conjunction with the other paragraphs) informs the jury that while it should consider all the evidence it may find the character evidence to be enough in this regard. This point, which is correct under *Thomas*, would be lost on the jury if this requested paragraph is not given.

Granted _____

Modified _____

Denied _____

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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