IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	CR. NO. 2:10cr186-MHT
MILTON E. MCGREGOR,	)	
THOMAS E. COKER,	)	
LARRY P. MEANS,	)	
JAMES E. PREUITT,	)	
HARRI ANNE H. SMITH,	)	
JARRELL W. WALKER, JR.,	)	
and	)	
JOSEPH R. CROSBY,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' PROPOSED CHANGES TO THE JURY INSTRUCTION

Pursuant to the Court's September 8, 2011 Scheduling Order, the United States of America, through undersigned counsel, respectfully submits the Government's proposed changes to the jury instruction. In addition to the below proposed changes, the United States renews, and incorporates herein by reference, all other jury instructions the Government proposed prior to the first trial. Further, the Government reserves the right to propose additional jury instructions based on any evidence, argument, or circumstance presented at the re-trial of this matter.

I. Mixed-Motive Jury Instruction

With respect to the definition of "quid pro quo" as it applies to the federal program bribery and honest services fraud charges, the Government respectfully requests that the Court include the following language:

> Because people rarely act for a single purpose, the payor need not have offered or provided the thing of value only in exchange for

> specific official actions, and the agent or official need not have solicited or accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that the payor offered or provided a thing of value in exchange for the performance of official action, then it makes no difference that the payor may also have had another lawful motive for providing a thing of value. Likewise, if you find beyond a reasonable doubt that an agent or official solicited or received a thing of value in exchange for the performance of official action, then it makes no difference that the agent or official may also have had another lawful motive for soliciting or accepting the thing of value.
>
> Therefore, it is not a defense to claim that an agent or official would have lawfully performed the official action in question even without having accepted a thing of value. In other words, it is not a defense that the offer or promise of anything of value was made to the agent or official in exchange for an official action that is actually lawful, desirable, or even beneficial to the public. The offenses are not concerned with the wisdom or results of the agent or official's decisions, but rather with the manner in which the agent or official makes his or her decisions.

Such language is appropriate because whether the defendant knew that federal law would be violated by giving a thing of value to a public official with the intent of influencing or rewarding that official is not relevant to the jury's inquiry. Likewise, the fact that the defendant may have had a dual purpose in giving the thing of value – for example, to express affection in addition to influencing or rewarding that person – is not relevant to the jury's analysis. See United States v. Coyne, 4 F.3d 100, 113 (2d Cir. 1993) ("[A] valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability" and that such an instruction was appropriate where the defendant argued that "he was motivated by friendship."); cf. Anderson v. United States, 417 U.S. 211, 226 (1974) (holding that a conspiracy "may have several purposes, but if one of them – whether primary or secondary – be the violation of a federal law, the conspiracy is unlawful under federal law."). The relevant

inquiry for the jury is simply whether the action was taken for the purpose of influencing or rewarding that person and it is not relevant whether the defendant had a mixed or dual motive. Cf. United States v. Woodward, 149 F.3d 46, 71 (1st Cir. 1998) (holding that a defendant can be found guilty of deprivation of honest services "if he is found to have intended a lawful and unlawful purpose to some degree.").

II. Definition of "Willfully"

With respect to the term "willfully," as it applies to the false statement charge, the Government respectfully requests that the Court provide the following definition:

> A person acts "willfully," as that term is used in these instructions, when that person acts deliberately, voluntarily and intentionally.

United States v. Safavian, No. 05-CR-370 (D.D.C. June 13, 2006). At the first trial, consistent with the general definition found in the Eleventh Circuit Criminal Pattern Jury Instructions, the Court instructed the jury that the term "willfully" means that "the act was committed … with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." See Pattern Crim. Jury Instr. 11th Cir. 9.1A (2010). The Comments to the Pattern Jury Instructions, however, provide that: "Although this definition has been useful as a general description that encompasses many different aspects of the legal concept of 'willfullness' in a concise and straightforward manner, the Committee has concluded, along with every other Circuit Pattern Instruction Committee that has considered the issue, that the definition is not accurate in every situation." Id. (emphasis added).

Indeed, "[a]s the Supreme Court has observed, the term 'willfully' has "'many meanings,' and 'its construction [is] often … influenced by its context.'" United States v. Phillips, 19 F.3d 1565, 1576 (11th Cir. 1994) (quoting Ratzlaf v. United States, 510 U.S.

135 (1994)). Thus, "the interpretation of willfully 'turns on [each statute's] own peculiar facts.'" Id. (quoting Screws v. United States, 325 U.S. 91, 101 (1945)). For instance, in some cases, courts have interpreted "willfully" as meaning "the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidently or mistakenly." Phillips, 19 F.3d at 1576 (citing Browder v. United States, 312 U.S. 335, 341 (1941) (interpreting 22 U.S.C. § 220, which provides punishment for a person who knowingly and willfully uses any passport secured by the making of a false statement)).

This interpretation of "willfully" applies here. See United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999) (interpreting "willfully" in false statement prosecution). To prove a violation of 18 U.S.C. § 1001, the Government must prove that the defendant actually intended to do the act that the law proscribes, *i.e.*, to make a false statement. Id. The Government, however, need not prove that the defendant intended to violate the law. Id.

Rather, the Government may show the necessary mens rea by proof that the defendant knew that the statement made was false and that the defendant intentionally caused such statement to be made. Id. Accordingly, the language found in the Pattern Instruction's general definition of "willfully" (*i.e.*, "with bad purpose either to disobey or disregard the law") is not applicable here. Cf. Cheek v. United States, 498 U.S. 192, 200 (1991) (applying a heightened, knowing violation of law willfulness standard in the context of federal tax statutes due to the complexity of the tax laws); United States v. Curran, 20 F.3d 560, 566-567 (3d Cir. 1994).[1]

[1] In Curran, the Third Circuit applied this heightened standard to a § 1001 charge because (1) the false statement involved federal election law which, as with federal tax

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the Court include the language proposed above in the final jury instruction in this case.

DATED: December 19, 2011
Washington, D.C.

Respectfully submitted,

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law, requires a heightened standard of intent, and (2) the prosecution was based on section 2(b) liability – that is, the defendant's culpability was based, not on his own communications with the Federal Election Commission, but on information furnished to the agency by an intermediary. The Curran court's rationale is not applicable here as the false statement charge in this case does not involve federal election law and is not based on section 2(b) liability but rather a direct violation of section 1001. It is also worth noting that other circuits that have addressed this issue have rejected the rationale in Curran. See United States v. Hopkins, 916 F.2d 207, 214-215 (5th Cir. 1990) (government may prove that a false representation, based on section 2(b) liability, is made "knowingly and willfully" by proof that the defendant acted deliberately and with knowledge that the representation was false).

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on December 19, 2011, I electronically transmitted the foregoing pleading to all lead counsel of record.

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