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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

MOTION TO DISMISS BASED ON GRAND JURY INSTRUCTIONS

Milton McGregor moves to dismiss the charges against him, on the grounds that the grand jury was not instructed on the required element of "*quid pro quo*," including the required element of "explicit *quid pro quo*" for charges based on campaign contributions (or other election-related support) as alleged bribes. This motion is made in response to the Court's discussion in Doc. 1190, pp. 4-6, declining to consider the argument without a specific motion of this sort. If the Government disputes that the grand jury was uninstructed or misinstructed on the law, then Mr. McGregor also moves that the Court require the Government to disclose what instructions, if any, were given to the grand jury about the elements of the offenses charged.

We recognize that Courts do not often dismiss a case based on flaws in the legal instructions given to the grand jury. Such action is not often appropriate, because usually there is no reason to question whether the grand jury was correctly told about the elements of the crime. This case, however, presents an unusual and important situation,

that warrants such relief. The prosecutors have demonstrated by their own filings that they were, up until very recently, basing this prosecution on an incorrect understanding of the law. They were pursuing an incorrect vision of the law that jeopardizes First Amendment rights. There is very good reason to believe that the prosecutors never told the grand jury about the elements that must be proven, because the prosecutors did not believe that those elements had to be proven. And there is grave doubt as to whether a properly instructed grand jury would have brought an indictment.

1. The prosecutors have pursued this case based on incorrect views of the law, and so it is more than reasonable to infer that the grand jury was not properly instructed.

The Government has pursued this case based on incorrect views of the law. Even as to alleged "bribery" not based on campaign contributions, the prosecutors were pursuing an incorrect view of the law up until April 26, when they filed Doc. 1018. The prosecutors had contended, before then, that there was no *quid pro quo* requirement at all. In Doc. 1018, the prosecutors conceded that their former position was inconsistent with the Solicitor General's position. Thus, the prosecutors were basing the prosecution on an incorrect view of the law in this regard, up until their concession in Doc. 1018.

As to alleged "bribery" based on campaign contributions, the prosecutors were pursuing an incorrect view of the law up until oral argument on May 5; they were denying that the *McCormick* "explicit *quid pro quo*" standard applies under "honest services" and § 666. *See* Doc. 1004-1, p. 6. (As will be discussed below, at one point early in the case they conceded that the standard did apply to "honest services," but then they backed away from that concession). Even now they do not actually commit to the proposition that the

McCormick standard applies; they merely say that they are willing to have the jury so instructed. But a correct understanding of the law would certainly apply the *McCormick* standard to § 666 and to "honest services," for reasons that Mr. McGregor has discussed at length in other filings.

It is thus established that, until late April and early May, the prosecutors in this case were proceeding based on incorrect understandings of the elements of the charged offenses. It is more than reasonable, therefore, to infer that the prosecutors did not give the grand jury a correct understanding of the elements of the charged offenses, either.

This sort of problem does not ordinarily happen, because criminal prosecutions are supposed to involve law that is well settled in advance of the prosecution. The problem in this case is that there is no clarity in the law. This lack of clarity in the law is particularly dangerous, where an incorrect application of the law regarding campaign contributions will trample on First Amendment freedoms. This is no run-of-the-mill case. In this case, unlike most, there is reason to believe that the grand jury was ignorant about the elements of the crimes charged.

2. Dismissal of an indictment based on incorrect grand-jury instructions is appropriate in circumstances such as these.

The general standard for dismissal of an indictment based on errors in grand jury proceedings was stated by the Supreme Court in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 2373 (1988): "[A]s a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." Furthermore, the Court defined the "prejudice" inquiry as

follows: "[A]t least where dismissal is sought for nonconstitutional error, … dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.*, 487 U.S. at 256, 108 S.Ct. at 2375.

Under this standard, a court can dismiss an indictment when the grand jury was given erroneous instructions about the law governing the offenses. *See United States v. Stevens*, 2011 U.S. Dist. LEXIS 30107 (D. Md. 2011) (dismissing indictment); *id.* *24-25 ("where a prosecutor's legal instruction to the grand jury seriously misstates the applicable law, the indictment is subject to dismissal if the misstatement casts "grave doubt that the decision to indict was free from the substantial influence" of the erroneous instruction."). *See also United States v. Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989):

> "Erroneous grand jury instructions do not automatically invalidate an otherwise proper grand jury indictment." Wright, 667 F.2d at 796 (citing United States v. Linetsky, 533 F.2d 192, 200-201 (5th Cir. 1976)). Appellants must show the conduct of the prosecutor was so "flagrant" it deceived the grand jury in a significant way infringing on their ability to exercise independent judgment. Id. at 796.

Here, the problem is of constitutional dimension, because the grand jury's failure to know about the elements of the crimes goes to the very heart of whether the grand jury can properly fulfill its function of being a bulwark against prosecutorial overreaching under the Fifth and Sixth Amendments. (It is therefore not mere "nonconstitutional error" as mentioned in *Bank of Nova Scotia, supra*). *See United States v. Wayerski*, 624 F.3d 1342, 1349 (11th Cir. 2010) (referring to "the Fifth Amendment's assurance that a grand

jury will return an indictment only when it finds probable cause for all elements of the crime."). Ordinarily, as reflected in *Wayerski*, it is possible to "infer" (*id.*) from an indictment that the grand jury found the elements of the crime to be present (at least to a "probable cause" level). But where (as here) there is evidence affirmatively leading to the conclusion that the grand jury was not informed about the elements of the offenses, then it is not reasonable to make such an inference. The prosecutors did, in the words of the Ninth Circuit in *Larrazolo*, infringe on the grand jury's ability to exercise independent judgment under the law

3. There is doubt as to whether a properly-instructed grand jury would have brought these charges.

In this case as in *Stevens*, *supra*, there is "grave doubt" whether a properly-instructed grand jury would have brought charges. Mr. McGregor's burden is not to show that this particular grand jury *would have* balked at bringing the charges had it known the proper contours of the law. The burden is substantially less than that, under the "grave doubt" standard. (Mr. McGregor also contends that the standard should be something less than "grave doubt," since as noted above the "grave doubt" standard was adopted in *Bank of Nova Scotia* for cases about grand jury errors that are *not* of constitutional dimension.)

A properly-instructed grand jury would be sensitive to the First Amendment implications of any prosecution that seeks to portray campaign contributions as bribes. A properly-instructed grand jury, therefore, would act just as the Constitution envisions: it would be wary of the possibility that prosecutors were overreaching, and that the

prosecutors were indulging in unreasonable interpretations of words or actions. A properly-instructed grand jury, knowing of the "explicit *quid pro quo*" standard for campaign contributions, may well have declined to indict based on the acts as alleged in this indictment. The question here is not whether some people, or even most people, would find these acts sufficient to amount to probable cause. Some reasonable people, if sitting as grand jurors, would have demanded more, in terms of explicit exchange, before bringing an indictment. Similarly, as to those aspects of the case not involving campaign contributions, some grand jurors would have demanded more indication of a *quid pro quo* exchange. There is certainly room for "grave doubt" in this case about whether a grand jury would have brought these charges if it had been instructed on the law of *quid pro quo* by prosecutors who understood and accepted the concept of that element.

4. The timeliness of this motion.

In anticipation of a possible objection, Mr. McGregor notes that this motion is timely and procedurally appropriate at this point.

The Government may argue that this motion should have been made by the general motions cutoff of February 4, but any such contention would be wrong. Mr. McGregor had no sufficient basis, by that time, to assert that the grand jury instructions were probably flawed. Had Mr. McGregor filed such a motion by early February, it would have been speculative. (*See* Sealed Doc. 637, filed by Government in response to a motion by Mr. Gilley).

Indeed, the Government's representations about the law, before the February 4 motions cutoff, suggested that there was no problem. That is, in response to Mr.

McGregor's November 12 motion to dismiss the "honest services" charges [Doc. 208], the Government responded on November 22 [Doc. 237], affirmatively *asserting* that the *McCormick* standard does apply to the "honest services" law. [Doc. 237, p. 10 n.6 (discussing the *McCormick* standard and asserting "[t]hat *Skilling* incorporated this heightened showing for campaign contribution bribe payments …")]. So not only did Mr. McGregor have no basis at that time for asserting that the grand jury instructions omitted the "explicit *quid pro quo*" element; more than that, the Government affirmatively led Mr. McGregor to believe that the Government agreed that such element was required. Had the Government said at that time that its view of the law was the opposite – had the Government expressed the view that "explicit *quid pro quo*" was inapplicable as a matter of law – *then* Mr. McGregor perhaps could have filed a grand-jury-instruction motion to dismiss by February 4, and could have pointed out that the Government's position implied that the grand jury must not have been instructed on the point. But the Government did not say such a thing.

It was only later that the Government said different things about the law, thereby giving rise to a strong basis for believing that the grand jury was not told about "explicit *quid pro quo*." The Government filed Doc. 1004-1, on April 25, stating:

> the defendants also fail to cite any binding authority extending the *McCormick* standard beyond application in the context of the Hobbs Act prosecution to prosecutions under the honest services and federal program bribery statutes. Again, there is no such case law in the Eleventh Circuit. Indeed, *Evans* makes clear that the Hobbs Act's quid pro quo requirement derives from the common-law history and understanding of that particular statute.

At oral argument on May 5, the Government further made clear that the Government was not agreeing, as a legal principle, that the *McCormick* standard applied. [Transcript of May 5, p. 9 lines 13-16]. And the Court further elucidated, in questioning Government counsel, that the grand jury presentation and the Indictment were not formulated or presented in terms of "*quid pro quo*." [Transcript of May 5, p. 74 line 3 to p. 78 line 9].

By virtue of those facts, Mr. McGregor now had what he had not had, at the time of the February 4 motion cutoff: a sound basis for asking the Court to infer that it was highly likely that the grand jury was given no instruction about the "explicit *quid pro quo*" requirement. So Mr. McGregor argued the point orally [May 5 transcript, p. 50 line 23 to p. 53 line 6], and followed that up with a further written filing at the Court's direction, including caselaw authority that directly supported the Court's authority to dismiss on this basis. [Doc. 1070].

Under these circumstances, there is no basis for contending that Mr. McGregor should have raised the grand-jury-instruction argument explicitly by the February 4 cutoff or by some other earlier point.

Respectfully submitted,

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I hereby certify that on June 1, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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