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.	)	

PROPOSED JURY INSTRUCTIONS

Milton McGregor submits the following proposed changes to the Court's jury instructions (Doc. 1640). Pursuant to discussion with the Court (Transcript of September 7, sealed, pp. 19-20), Mr. McGregor understands that it is not necessary or appropriate for this document to include every proposed jury instruction that he submitted previously, or every prior objection that he made. Mr. McGregor understands the Court's ruling to be that all prior requests and objections are considered as preserved.

Introductory instructions

The paragraph on page 7,[1] dealing with mistakenly distributed documents, should be omitted (unless it becomes applicable again).

On page 11, after the instruction about the testimony of those who testify under plea and cooperation agreements, the Court should give a "missing witness" instruction if

[1] This page reference, and other page references herein, are to the Court's written instructions in the first trial, Doc. 1640.

the Government fails to call Agent McEachern, or any of the persons who pleaded and cooperated (Mr. Gilley, Mr. Massey, or Ms. Pouncey), or any of those who worked with the FBI in generating "consensual" recordings (Senator Beason, Rep. Mask, or Judge Lewis). All of those witnesses are "unavailable" to the defense in the practical sense discussed in, *e.g.*, *Jones v. Otis Elevator*, 861 F.2d 655, 659 (11th Cir. 1988). The Court should give the following instruction, which was upheld in *Jones*:

> If a party fails to call a person who possesses knowledge about the facts in issue and who is reasonably available to him and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called that witness and did not do so.

The Court should further instruct the jury as to the identity of the uncalled witnesses who fall into this category.

Conspiracy instructions

The first paragraph on page 13 should be changed to delete reference to Mr. Geddie and Senator Ross. The overall number of counts, and the listing of the counts, should also be changed after the Court determines which counts will go to the jury. Even now, it is clear that the overall number of counts will be less than before, as Counts 2, 7, 10-12, 17-22, 29 and 39 are no longer before the jury.

The final paragraph that begins on page 13 should be changed to omit Mr. Geddie and Senator Ross. It should also be changed to omit reference to counts 2, 7, and 10-12. (That is, the prior instructions refer to "Counts 2, 4 through 12, and 14"; but several of those counts are no longer in the case.) Just as the Court's instructions in the first trial

did not mention Count 3 (because the Court had granted a judgment of acquittal on that count), the Court's instructions in this trial should not mention counts that do not remain in the case.

Mr. McGregor proposes some additional instruction on the conspiracy charge, that would be appropriate especially in light of the fact that the first jury had a question about what really was at issue in this count. (*See* Transcript of August 7, Doc. 1836). To avoid the possibility of similar confusion this time, Mr. McGregor proposes that the Court add the following, before the "overt act" definition paragraph at the bottom of page 15:

> The Government must prove beyond a reasonable doubt that there was an agreement to commit the crime referred to as federal programs bribery, as alleged in paragraph 28 of the indictment, including subparts A and B.
>
> In determining whether the Government has proven such a conspiracy beyond a reasonable doubt, you will also have to apply the instructions I will give you in a few moments about the definition and elements of federal programs bribery, as they relate to campaign contributions and to other things. Those instructions will apply to your consideration of Count 1, because under the law, a conspiracy is an agreement to commit unlawful acts. If a defendant did not agree to violate the law under those definitions that I will give you, then the defendant was not involved in a conspiracy in the legal sense.

We recognize that the second paragraph may seem obvious to the Court and to counsel, and that the Government may see it as already covered in the first paragraph of the conspiracy instructions (pp. 13-14). But we respectfully submit that it would be too easy for a person not trained in the law to overlook these fundamental points, especially when the instructions about conspiracy are given before the instructions about the § 666 charges.

Section 666(a)(2) campaign-contribution instructions

In the title on page 17, for the section regarding the § 666(a)(2) charges having to do with campaign contributions, reference to counts 2 and 10 should be deleted. Similarly, at the top of page 18, references to those counts should be deleted.

On page 19, the paragraph beginning "As to the first element" should likewise be changed, to remove the reference to count 2. The paragraph could now say, "As to the first element, the one-year period would be May 1, 2009 through April 30, 2010."

To revisit (with caselaw decided after the first trial) one issue that was previously addressed, we ask the Court to instruct the jury that one aspect of the required proof of "*quid pro quo*" (both for campaign contributions and for other things) is that the Government must prove that the offer or agreement was to *alter* the official's conduct. The Court could convey this point by adding the following on page 22 of Doc. 1640, just after the sentence that ends the paragraph in the middle of the page (ending with "is not enough to establish an illegal agreement.")

> Furthermore, the Government must also prove beyond a reasonable doubt that the agreement was to alter, that is, to change or affect, the official's action.

Similarly, in clause (1) at the bottom of page 22, the Court should state:

> (1) it must be a promise or solicitation conditioned on altering the performance of a specific official action as I explained that phrase in the preceding paragraph;

This framing in terms of *altering* the official's action is supported by *United States v. Bryant*, 655 F.3d 232 (3rd Cir. 2011), which recognizes that this concept of altering is contained in the statutory term "influence." *See id.* at 245 & n.14. The Court in *Bryant*

did uphold jury instructions that omitted the word "alter," because the instructions framed in terms of "influence" conveyed the point clearly enough. But that reasoning will not work in this case. The Government, even while admitting that § 666 does speak in terms of "influence," nonetheless has insisted that "altering" is not required. This demonstrates that, at least under the circumstances of this case, the word "influence" is not enough to convey the true meaning to some people; some people believe themselves to perceive a difference between the two terms, under the circumstances of this case. The jury should be instructed clearly that "altering" is required, so that the jury will not think that there is a crime if the official would have taken the same action regardless.[2]

Section 666(a)(1)(B) campaign-contribution instructions

While Mr. McGregor is not charged under any of the § 666(a)(1)(B) counts (which are against the legislator defendants), all references on page 24 to counts 7, 11, and 12 should be removed, along with all references to Senator Ross. Near the bottom on page 25, the references to counts 2 and 10 should be removed.

[2] *See also 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."); *United States v. Siegelman*, 640 F.3d 1159, 1177 (11th Cir. 2011) ("The evidence that Adams intended to alter his official actions as a result of the receipt of benefits from Scrushy is insufficient, and Scrushy's convictions on Counts 8 and 9 must be reversed.") We note the existence of two Eleventh Circuit decisions, rendered at or after the end of the first trial, that touch upon § 666. We do not believe that either of them weighs against us on the question raised here. *United States v. White*, ___ F.3d ___, 2011 U.S. App. LEXIS 23737 (11th Cir. 2011); *United States v. Langford*, 647 F.3d 1309 (11th Cir. 2011).

Section 666(a)(2) non-campaign-contribution instructions

With regard to the non-campaign-contribution § 666 counts, the concept of "altering" official acts should be included as explained above citing *Bryant*. This would be accomplished by adding the following, to the second line at the top of page 28:

> This includes the requirement that the Government must prove beyond a reasonable doubt that the payments were made or offered to alter the official's conduct from what it otherwise would have been.

Section 1951 instructions

The Court should delete all instructions on Section 1951 extortion, pp. 28-30, because no such count remains.

"Honest services" instructions

In the introduction to the "honest services" instructions on p. 31, references to Geddie, Means, Preuitt, Ross and Walker should be removed, as should all reference to Count 29 (on which all defendants were acquitted). The remaining defendants in the "honest services" counts are McGregor, Coker and Smith. Further, the Court should explain – either in these instructions or by reference to the verdict forms – that each of these three defendants in charged only in certain of these counts and not others. Senator Smith is charged, now, only in Counts 26 and 33. Mr. Coker is charged only in Count 31. Mr. McGregor is not charged anymore in Count 29 (which no longer exists as to any remaining defendant), or in Count 33. The Court could handle the matter by changing the first paragraph of this section on page 31 to say:

> It is a federal crime to use the United States mail or a commercial interstate carrier, or interstate wire communications to carry out a scheme to fraudulently deprive someone else of a right to honest services. Counts 23 through 27 charge some defendants with committing Honest Services Mail Fraud, in violation of 18 U.S.C. §§ 1341 and 1346, and Aiding and Abetting. Counts 28, and 30 through 33 charge some defendants with committing Honest Services Wire Fraud, in violation of 18 U.S.C. §§ 1343 and 1346. You will have verdict forms, indicating which defendants are charged in which counts.

In the final paragraph on page 37, references to counts 2 and 10 should be removed.

Under *United States v. Langford*, 647 F.3d 1309 (11th Cir. 2011), we request that the Court add the following sentence at the end of the paragraph defining "intent to defraud" on page 34:

> To prove that a person acted with intent to defraud, the Government must also prove beyond a reasonable doubt that the person intended that the payment in question would not be disclosed.

While *Langford* may be subject to differing interpretations, the sentence above represents the best interpretation. *Langford*, 647 F.3d at 1321 ("Thus, in order to prove that Langford defrauded the public of his honest services, the government had to prove beyond a reasonable doubt that Langford was in fact a public official and that he accepted bribes that he did not disclose to the public."); *id.* at 1321 n.7 ("in honest services cases, the scheme to defraud the public of honest services can be proven when a public official accepts a bribe and fails to disclose it to the public"). Mr. McGregor also requests, similarly, that the Court delete the words "or the public official's implicit false pretense

to his governmental employer and the public that the public official remains loyal to their interest."

Because the Court entered judgment of acquittal for Mr. Crosby on all the "honest services" counts, the necessary meaning of that ruling is that the "scheme" at issue did not include a scheme to deprive the State or public of Mr. Crosby's "honest services." In essence, there was no proof of a scheme involving Mr. Crosby or his "honest services." (Had his "honest services" been proven to be part of the "scheme" at issue, he would have been a proper defendant, at least as to the counts that were premised on mailings to him.) If Mr. Crosby did not take part in an "honest services" scheme by receiving the mailings (as the Court concluded he did not), then it follows that Mr. McGregor did not take part in any "honest services" scheme *with regard to Mr. Crosby's "honest services," at least*, in those mailings either. The collateral estoppel component of Double Jeopardy would preclude the Government from taking a second bite at that apple. Therefore (and especially because the jury could otherwise be confused by the reference to Counts 15 and 16 at the bottom of page 37, as those counts do relate to Mr. Crosby), the Court should give the following instruction, which could be inserted at the bottom of page 37:

> Counts 23, 24, 25 and 27 allege mailings to defendant Crosby. However, you will also note that Mr. Crosby is not charged in any of these counts. What this means for your purposes is that, in these counts, the Government must prove beyond a reasonable doubt that the mailings to Mr. Crosby were in furtherance of a scheme to deprive the public of the honest services of someone else other than Mr. Crosby.

Other charges

The instructions on money laundering and false statement counts (pp. 39-44) are not pertinent to Mr. McGregor; but we note that the reference to "Counts 2, 14 and 21" at the bottom of page 41 will likely change because of the acquittals on Counts 2 and 21.

Instructions on obstruction (pp. 44-46) should be deleted as that charge pertained only to Mr. Geddie.

Further instructions

We request that the Court delete the paragraph on page 49 that states (with emphasis in the original):

> Where the word "and" is used in the indictment to charge a defendant with different means by which the crime was committed, the government need only prove one of those means beyond a reasonable doubt to convict the defendant. For example, in Count 14, the government need only prove beyond a reasonable doubt that Smith corruptly solicited or demanded or accepted or agreed to accept at least $ 400,000 for her campaign from Gilley, intending to be influenced or rewarded in connection with an upcoming vote on pro-gambling legislation, even though the indictment uses the word "and" instead of "or" in that count.

This paragraph should be deleted because, in some instances at least, the word "and" in the indictment must not be taken to mean "or"; and this paragraph will likely lead the jury to a mistaken understanding of the law in that respect. For instance, the § 666(a)(2) counts all allege that things were done "knowingly and corruptly." *See, e.g.*, Indictment, Doc. 3, ¶ 196, p. 42; ¶ 198, p. 43; ¶ 204, p. 46; ¶ 218, p. 51. That "and" must mean "and," and cannot mean "or" in the sense that either "knowingly" or "corruptly" will do; because "corruptly" is absolutely required under § 666(a)(2). As another example, the word "and"

must mean "and," not "or," in the indictment's allegation of "honest services," ¶ 234 p. 58: "through bribery and concealment of material information." "Or" would be incorrect as a matter of law, since it would allow "concealment of material information" to stand alone as an honest services violation, which is contrary to *Skilling v. United States*, 130 S.Ct. 2896, 2927-28 (2010).[3]

If the Court does not delete this paragraph, the Court should append a sentence to it, at the end, that states:

> But in these instructions about the law, including my instructions about what the Government must prove beyond a reasonable doubt, the word "and" must truly be understood to mean "and," not "or."

That addition to the instruction would avoid the likely result that the jury would take the "and=or" rule as a guide to interpreting the instructions as well as the indictment. This is very important, because in the instructions, the Court has often used the word "and" really to mean "and."[4]

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[3] Counsel and the Court, who are used to legal terminology, might be comfortable in thinking that the indictment's allegation of "knowingly and corruptly" is unaffected by the Court's "and=or" instruction, since the instruction has to do with "means" rather than "mental state." *See* Doc. 1640, p. 49 ("Where the word 'and' is used in the indictment to charge a defendant with different means by which the crime was committed …") It is not probable that the jury would understand that distinction. Moreover, the example given above about the allegation of "honest services" in the indictment – "through bribery and concealment of material information" – does have to do with "means"; and so the "and=or" instruction would lead the jury astray.

[4] For instance (as a non-exhaustive list), "and" truly does require proof of both conjoined things, rather than just one, in the following:
* page 15, second element of conspiracy: "the defendant knew the unlawful purpose of the plan and willfully joined in it";
* page 19, definition of "corruptly": "To act "corruptly" means to act voluntarily, deliberately, and dishonestly"
* page 34, elements of "honest services: "To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive"

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* page 47, aiding and abetting: "before any defendant can be held criminally responsible for the conduct of others it is necessary that the defendant willfully associate in some way with the crime, and willfully participate in it."

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CERTIFICATE OF SERVICE

I hereby certify that on December 19th, 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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