

Although the Government's supplemental submission as to Ross thus arguably is unauthorized (and subject to being struck), Senator Ross chooses instead to address the Government's mischaracterization of the defense evidence, not simply as to the conspiracy count (which, as noted above, the supplemental submission does not address), but also as to Ross' renewed motion for judgment of acquittal at the close of all evidence (at which the supplemental submission, as to Ross, is exclusively aimed).

Rather than "serv[ing] primarily to buttress the government's case," Government's Supp. Submission, at 7, the testimony of Mr. Whitaker in fact further demonstrates that:

1) the Alabama Medical Association PAC ("ALAPAC") contributed to Senator Ross' campaign in May of 2010 (Gov't Ex. 1185) for legitimate reasons having nothing to do with a) gambling, b) Senator Ross' vote on SB380, c) any improper influence on Coker's part, or d) any agreement (conspiratorial or otherwise) among Ross, McGregor, and/or Coker;

2) Senator Ross committed no crime in soliciting (unsuccessfully) a contribution from Mr. McGregor on what turned out to be the day before and the day of the final vote on SB380;

3) Mr. McGregor committed no crime in turning down Ross for a contribution and volunteering **only – without any** other commitment on his part, or any commitment or agreement whatsoever **in exchange** on Ross' part as to his vote on SB380/ electronic bingo legislation in 2010¹ -- to contact others, such

¹ As noted during oral argument on Ross' motion for judgment of acquittal at the end of the Government's case-in-chief, the evidence shows that **everyone** – specifically

as Mr. Coker, to ask whether they had other clients who might contribute to Senator Ross' campaign;

4) Mr. McGregor committed no crime in asking Mr. Coker, the day *after* passage of SB380 in the Senate (and thus after Senator Ross' vote for the bill) "[i]f [Coker] can say anything to any other clients about helping Quinton," i.e., by giving Ross a campaign contribution; and Mr. Coker committed no crime in saying "I'm gonna give him [Ross] a, a good uh, check from the medical association ..."²; and

including Gilley, Massey, and Pouncy -- *always* expected Ross, beginning well before any of the campaign contributions at issue, to support and vote in favor of electronic bingo legislation (in 2009 and early 2010, before SB380 had been introduced), and ultimately SB380. Indeed, Gilley, Massey, and Pouncy all testified they knew that Ross historically had consistently supported pro-gaming legislation; Massey and Pouncy also were aware specifically that Ross had voted uniformly in favor of pro-gaming legislation since his election to the Alabama Senate in 2002.

² Although conspicuously omitted from the Government's examination of Mr. Whitaker, the full exchange goes on to explain why the Medical Association would contribute to Senator Ross' campaign:

1 Coker: Yeah. I've got uh, I'm, I'm gonna give
2 him a, a good uh, check from the uh,
3 medical association and from the soft
4 drink folks and...

5

6 McGregor: Good.

7

8 Coker: ...uh, and so uh, uh, he's, he's been
9 real helpful uh to me on two or three
10 things uh, dealing with the medical
11 folk cause he's on the health committee
12 and Linda Coleman's hard to deal with.

13

14 McGregor: Right.

15

16 Coker: And it's better to let him deal with
17 her since he's black...

18

19 McGregor: Mmm-hmm.

20

21 Coker: ...and he can make unsta..., he can say

5) Senator Ross entered into **no** agreement at all with Mr. McGregor, much less Mr. Coker; and Mr. McGregor and Mr. Coker entered into **no** agreement to do anything **unlawful**, much less to conspire to commit federal programs bribery as to Senator Ross' vote on SB380.

II. Applicable Legal Principles

To place the evidence as to Senator Ross, including the testimony of Mr. Whitaker in the defense part of the case, in context, it is important to recap certain fact-specific applications of the explicit *quid pro quo* standard under either the *McCormick*³ formulation (which we contend should be strictly applied) or the less stringent *Siegelman II*⁴ interpretation of *McCormick*.

As a threshold matter, as applied to Senator Ross (who is accused of soliciting and accepting campaign contributions only), we read *McCormick* and its progeny as providing that an elected official or candidate for election violates the law in soliciting or accepting a campaign contribution **only if** he or she explicitly promises or agrees or undertakes to perform or not to perform a specific official act in return for a specific contribution. *McCormick*, 500 U.S. at 273; see *Siegelman II*, 640 F.3d at 1170. That promise or agreement or undertaking to perform or not to perform a specific official act in return for a specific contribution

22 things that I can't say to her.

23

24 McGregor: That's right. That's right.

25

26 Coker: Yeah. Yeah. Well the, I, I think

27 everybody I know of's gonna help

28 Quinton.

J-167 (3/31/10 telephone call between McGregor and Coker), at 3.

³ *McCormick v. United States*, 500 U.S. 257 (1991).

⁴ *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011).

must be **explicit**. That is, for a promise or agreement or undertaking to be explicit, the existence of the promise or agreement or undertaking cannot simply be implied from the surrounding acts and circumstances, but instead must be shown by direct evidence. *McCormick*, 500 U.S. at 273.⁵

Whether one accepts the strict (and, we believe, correct) reading of *McCormick*, or the less stringent test of *Siegelman II*, the following applications that are fact-specific to the legislator defendants in this case generally, and Senator Ross specifically, flow logically from the requirement of an explicit *quid pro quo* (as interpreted in light of the Due Process clear statement and fair notice and First Amendment political speech principles undergirding *McCormick* and *Siegelman II*⁶), as well as Alabama law.⁷

It is **not** a crime (or evidence of a crime), without more, for an elected official or candidate for public office in Alabama:

- To seek and accept campaign contributions from persons, corporations, organizations, political action committees (PACs), or others, so long as the amount contributed does not exceed the maximum amount allowed by Alabama law.⁸
- To request and accept campaign contributions within a year before either a primary or general election.⁹

⁵ As we argued again in Senator Ross' motion for judgment of acquittal at the close of the Government's case-in-chief, Doc. 1548, at 26-27, we believe the assertion in *Siegelman II* that "explicit does not mean express," -- i.e., that the explicit *quid pro quo* required by *McCormick* can be implied from the surrounding facts and circumstances -- is foreclosed by the Eleventh Circuit's earlier decision in *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994), and the Circuit's "prior precedent rule."

⁶ See, e.g., *McCormick*, 500 U.S. at 272-73; *Siegelman II*, 640 F.3d at 1169-70, 1174 n. 21.

⁷ These principles are set out in Senator Ross' supplemental proposed jury instructions (doc. no. 1595), as part of his requested "theory of defense" instructions.

⁸ See Code of Alabama §§17-5-2(a)(8) (definition of "person"), 17-5-8. There is no contention and no evidence that Senator Ross sought or accepted any amount from any contributor or potential contributor that exceeded the maximum allowed by Alabama law.

⁹ Code of Ala. §17-5-7(b)(2).

- To request and accept campaign contributions during an Alabama legislative session in an election year such as 2010, within 120 days of any primary, runoff, or general election.¹⁰
- To solicit and accept campaign contributions even if the elected official or candidate has no announced opponent or no opponent ever qualifies to run against the official or candidate.¹¹
- To solicit and accept campaign contributions from a person, corporation, organization, PAC, or other entity that has or may have business before the Legislature.¹²
- To solicit and accept campaign contributions during a legislative session from a person or business or other entity whose interests may benefit from a vote or other official action taken (or to be taken) by the elected official during that session.¹³
- To solicit and accept campaign contributions during a legislative session from a person or business or other entity whose interests may benefit from a vote or other official action taken (or to be taken) by the elected official during that session. This is true even as to contributions solicited and accepted either shortly before or shortly after that official votes or takes other official action that benefits the contributor. Stated differently, it is not a crime for an elected official to cast a vote or take other official action that may benefit a contributor, even shortly before or shortly after that official solicits and accepts a contribution from the contributor.¹⁴

¹⁰ *Id.* There is no contention and there is no evidence that Senator Ross solicited or accepted campaign contributions other than during periods in which Alabama law permitted him to do so.

¹¹ See, e.g., Code of Alabama §17-5-8(a)(1) (Fair Campaign Practices Act; reporting requirements apply to candidates running unopposed); cf. *Roper v. Rhodes*, 988 So.2d 471, 481 n. 11 (Ala.2008) (Bolin, J., concurring specially) (noting that unopposed candidate's name must appear on general election ballot and stand for election, "because a write-in candidate could conceivably win the election by receiving more votes than did a party nominee or independent candidate whose name appears on the ballot.").

¹² See *McCormick*, 500 U.S. at 272.

¹³ See *id.*

¹⁴ See *McCormick*, 500 U.S. at 272; *Siegelman II*, 640 F.3d at 1171 (as to the *quid pro quo* requirement, "[i]n the absence of such an agreement [to take or forego some] specific action, even a close-in-time relationship between the donation and the act will not suffice").

- To demand a campaign contribution, and, *a fortiori*, to solicit campaign contributions aggressively.¹⁵
- To solicit a campaign contribution and to discuss **pending legislation** that would or may benefit the contributor in the same conversation or communication, or to address both close in time to each other.¹⁶
- To solicit a campaign contribution and to discuss **a specific future official act** that would or may benefit the contributor in the same conversation or communication, or to address both close in time to each other.¹⁷
- In soliciting a campaign contribution, to seek to persuade or convince a contributor to make a contribution by discussing a) the official's views on issues; b) what the official has done in the past (including, for example, the official's sponsorship of particular legislation, or how the official voted on particular legislation); and/or c) what the official intends to do in the future; and to urge the contributor to make a contribution on any of those bases.¹⁸

When placed against the evidence regarding Senator Ross' actions, even viewed in the light most favorable to the Government, these logical, fact-specific applications of the explicit *quid pro quo* requirement -- whether as strictly construed by *McCormick*, or as less stringently interpreted by *Siegelman II* -- show that no reasonable jury could find Senator Ross guilty of any of the charges against him. Viewed generously, the Government is half-right when it says Mr. Whitaker's testimony buttresses its case -- Mr. Whitaker's testimony does buttress, but it buttresses the case of the defendants, specifically including

¹⁵ A campaign contribution violates the laws charged in this case **only if** the contribution is induced by the use of force, violence, or fear, **or if** the contribution involves an explicit *quid pro quo*, that is, a specific contribution is made in return for an explicit promise or undertaking by the official or candidate to perform or not perform a specific official act. *McCormick*, 500 U.S. at 273; see *Siegelman II*, 640 F.3d at 1170. There is no contention or evidence in this case that Senator Ross obtained or tried to obtain any contribution by the use of force, violence, or fear.

¹⁶ Again, an elected official or candidate violates the law in soliciting or accepting a campaign contribution **only if** he or she explicitly promises or undertakes to perform or not perform a specific official act in return for a specific contribution. *Id.*

¹⁷ See footnotes 14 and 15, *supra*.

¹⁸ *McCormick*, 500 U.S. at 272.

Senator Ross' showing that he properly should be acquitted by the Court in advance of submission of his case to the jury.

III. Richard Whitaker's Testimony Reinforces Sen. Ross' Entitlement to Acquittal

Senator Ross' motion for judgment of acquittal at the close of the Government's evidence summarizes in detail the evidence against Ross as to each of the charges against him, as well as showing the absence of any proof of any quid pro quo, either express or implied, between the campaign contributions made to him and his vote on SB380. See Motion for Judgment of Acquittal, at 9-17. To place Mr. Whitaker's testimony in context, a brief recap of the evidence regarding Senator Ross that preceded Mr. Whitaker's testimony is necessary.

A. The Evidence during the Government's Case-in-Chief

Counts eleven and eighteen, which charge that Senator Ross solicited and accepted bribes from the Gilley defendants (Ronald Gilley, Jarrod Massey, and Jennifer Pouncy) folks for his favorable vote on SB380, covered Ross' alleged solicitations of campaign contributions both in late 2009 and during the 2010 legislative session leading up to the March 30, 2010 final vote on SB380. Although Ross received (according to Massey) \$10,000 in campaign contributions in 2009, it is undisputed that Ross received no campaign contributions from the Gilley defendants after the end of 2009.

With respect to the 2009 contributions, Gilley testified that he had minimal dealings with Ross, whom he left to Massey to handle; in turn, Pouncy, who had no authority to write contribution checks and, in that regard, functioned primarily as a messenger for Massey, testified she ended up speaking with Ross on

several occasions during November and December of 2009, apparently because Massey would not return Ross' phone calls. For his part, Gilley noted that any contributions made to Ross on Gilley's behalf were not connected with SB380. Massey in turn acknowledged that his contribution(s) to Senator Ross' campaign during 2009 were made *not* in connection with SB380, but instead in recognition of Ross' sponsorship of the electronic bingo bill during the previous, 2009 session and Ross' history of supporting pro-gaming legislation generally.¹⁹

With respect to Ross' alleged (but apparently unsuccessful) solicitations of contributions in 2010, according to both an intercepted call between Massey and Gilley (J-044) and Massey's testimony, Massey simply ignored Ross' alleged solicitation of (per Pouncy) between \$15,000 and \$25,000.²⁰ Perhaps recognizing that ignoring an alleged contribution request would not establish the necessary *quid pro quo*, Massey testified at trial that on the day of the final vote on SB380, after Pouncy had texted Massey that Ross was looking for him at the State House, Massey saw Ross at the elevator and then told Ross (while they were walking down the hall) that Massey did not have the money to make a contribution then, but would give Ross an unspecified contribution at an undefined later time after the SB380 vote.

¹⁹ At the time(s) Massey contributed to Senator Ross' campaign in 2009, and when Ross solicited contributions from Massey in 2009, the Legislature was between sessions; SB380 had not been drafted, much less introduced in the Legislature; and no electronic gaming legislation was pending (all unpassed bills from the previous, 2009 session having died with the end of the session).

²⁰ Although Massey says during the call marked as J-044 that Ross called him with the request, Massey testified Ross made the specific money request to Pouncy, who denied that Ross gave her any figure and said her figure came from Massey. On that evidence, whether Ross actually made any request in 2010, as well as whether he requested the amount claimed by Massey during the intercepted call or the amount Pouncy identified during trial, are at best both highly questionable.

Even assuming the State House conversation took place as testified, Massey's undefined "offer" of some contribution at some point does not satisfy the specific "quid" that we believe *McCormick* requires. Perhaps more important, as to both the conversations Pouncy had with Ross about contributions in 2009 and those she said she had in 2010, and the conversation(s) with Ross about contributions that Massey claimed to have had in either year, both Massey and Pouncy agreed that during those conversations, there was no discussion of Senator Ross' vote; neither of them asked Senator Ross for his vote; neither of them asked him to do any other official act; Senator Ross did not promise to vote for the bill or do any other official act if he received a contribution; and Senator Ross did not threaten to vote against the bill if he did **not** receive a contribution.²¹

²¹ The Government has suggested during oral arguments that Ross, when allegedly soliciting contributions from Massey, Pouncy, and then McGregor during March 2010, was "wavering" on his vote and trying to leverage his vote – by introducing a "competing [electronic bingo] bill" -- to coerce more money for his vote. But, as Massey suggested during an intercepted call (indicating Ross' bill was "not terrible" and almost the same as the House Speaker's bingo bill, J-044, at 3) and testified at trial, Massey and the other Gilley folks did not view the bill seriously (as a threat to passage of SB380 or as a loss of Ross' vote for SB380)..

Further, the evidence does not support the Government's claim that Ross was "wavering" in his support of SB380 at any time. All three Gilley defendants understood Ross historically had been a strong supporter of gaming in Alabama. Massey and Pouncy both knew Ross had consistently voted in favor of each gaming initiative that had come up for a Senate vote since his election to the Senate in 2002. Ross was never identified by Massey, either during the legislative session or to law enforcement after his indictment and arrest, as being "in play" (i.e., undecided as to his vote on SB380). Both Massey and Pouncy always regarded Ross as a vote in favor of SB380. And, none of the three doubted – even when they hinted that Ross was trying to leverage his vote into a further contribution – that Ross would vote in favor of SB380 in the end.

Even the intercepted call between Ross and McGregor on March 29, 2010, one day before the final vote finally occurred, on which the Government relies heavily as to alleged bribes of Ross by McGregor, suggests that Ross was solid in his support of SB380 and not wavering. Specifically, when McGregor responded to Ross' question whether supporters had the twenty-one votes needed to pass SB380 in the Senate by saying he was "cautiously optimistic" the supporters had the votes, Ross promptly inquired about two senators (Dixon and Denton) whom he thought could become

In short, there was no *quid pro quo* for the contribution(s) Ross received from Massey, or for the alleged offer on what turned out to be the day of the vote, of an unspecified contribution at an undefined later time; and no explicit exchange as is required to criminalize a campaign contribution under *McCormick*.

From the testimony during its case-in-chief, the most the Government can say about Ross' solicitations to any of the Gilley defendants is that, according to Pouncy, Ross became "adamant" and "increasingly demanding" in his communications²²; and that Ross, during late 2009, allegedly said he was "not feeling the love" and he felt he deserved a contribution because he had sponsored the 2009 electronic bingo legislation. But, as shown above, even aggressive fundraising is not a crime; and seeking to justify a solicited contribution based on what Ross had done in the Legislature on the issue previously is protected political speech under the First Amendment and "well within the law" as to such political campaign activity. *McCormick*, 500 U.S. at 272.

favorable towards the bill. J-159, at 7-8. Sen. Ross also talked about his skirmish the previous Thursday with Sen. Beason over Beason's efforts to block the bingo bill by trying to bring up a constitutional amendment on opting out of the federal health care law, and recounted telling Beason that "bingo was here first" and should be voted on first ("let's get the bingo out the way") before taking up the health care amendment. *See id.* at 6-7. Rather than showing Ross allegedly trying to leverage his vote -- which the supporters needed in order to reach the twenty-one votes required for passage in the Senate -- for more money, Ross' remarks during the intercepted call reflect a legislator solidly in support of SB380 and working to get it passed without any effort to see what else he could get for his vote (a la Gov. Rod Blagojevich on recorded conversations played during his corruption trial).

²² At the same time Pouncy made this claim -- which she related mainly to Ross' frustration about Massey allegedly not returning Ross' calls -- she agreed that Ross was not acting "demanding" toward her, was not directing anything toward her personally, and did not curse, yell at, or threaten her in any way.

In turn, counts twelve and seventeen accuse Ross of agreeing to accept from McGregor and Coker (count twelve) and soliciting and pressuring McGregor and Coker to consent to provide (count seventeen) an unspecified amount of campaign contributions in return for Ross' vote on SB380. Those two counts hinge almost entirely on two recorded telephone conversations between Ross and McGregor, on the day before (March 29, 2010) and the day on which (March 30, 2010) the Senate ended up voting on SB380. See J-159 and J-161. Those calls are described in detail in the original motion for acquittal. See Motion for Judgment of Acquittal, at 15-17.

In those two calls, the conversation is clearly that of friends. As the Government's co-case agent John McEachern acknowledged, although Senator Ross did request a campaign contribution from Mr. McGregor, there was no discussion of Senator Ross' anticipated vote on SB380; Mr. McGregor never asked for Ross' vote on SB380; or for any other official act; Ross never promised to vote for SB380 or to perform any other official act; and Ross never said or otherwise indicated he would *not* vote for SB380 if he did *not* receive any further contribution. During the second call McGregor in fact turned down Ross' request for a contribution, J-161, at 3; although McGregor did volunteer to call some others (including Mr. Coker and Fine & Geddie) to see whether they or their other clients would be willing to contribute to Ross, *id.* at 4-5, McGregor at no time made any specific promise other than to make the calls (as well as the non-specific assertion that "I'm gon' do everything I can do in, in that regard ..." *Id.* at

6). Again, then, there is no evidence to show any explicit *quid pro quo* as would be required to criminalize a campaign contribution (if there had been one).

The Government stresses that Ross discussed the bill (actually, the pending estimate of yes votes, and other senators who might be added to that count) and requested contributions in the same call (J-159, on March 29), suggesting that implied a *quid pro quo*. But, under *McCormick*, merely discussing those subjects together would not criminalize any contribution by McGregor; even if McGregor had made or agreed to make a contribution (as opposed to volunteering to call others to see whether they might help) to Ross, Ross' vote in favor of SB380 – which had the potential to benefit McGregor, although not a certainty – even if cast just shortly after soliciting and accepting a McGregor contribution, would not cross the *McCormick* line.

Focusing on Ross' remarks during the second call (J-161, on March 30, when the Senate finally did vote on the bill) that “we’re just getting down to the wire” and “we know the window is closing on us fast and so I’m just trying to do everything I can to ... make sure I can raise,” J-161, at 5, the Government further argues that Ross was referring to the vote on the bill and using an implied threat to withhold his vote to squeeze McGregor for more money before the bill came up for a vote. But, the Government’s theory ignores that the very next thing out of McGregor’s mouth was to ask whether Ross “ha[d] an opponent yet,” *id.* at 6, followed by the parties discussing that “Friday [referring to Fri. April 2, 2010] is the deadline,” *id.* – for candidates to qualify for the Democratic and Republican party primaries. It also ignores that Ross voted in favor of the bill that same day

– without a further contribution from McGregor, and without anything more than a promise to call some others to see **if** they might be able to get another client to make a contribution to Ross.²³

Although McGregor did later call Coker and ask whether Coker could say something to his other clients about helping Ross (inferably with a campaign contribution), see J-167 (3/31/10 telephone call between McGregor and Coker), at 3, that call took place **after** Ross voted in favor of SB380. And, there is no evidence that Senator Ross knew that any such conversation had taken place, much less whether any contribution may have come from that request by McGregor to Coker.

Based on Mr. Coker's assertion during the intercepted call that (paraphrasing only slightly) he was going to give Senator Ross a good check from the medical association, the Government seeks to tie the Alabama Medical Association PAC's later contribution to Ross' campaign – even though dated **six weeks after** the McGregor-Coker conversation in J-167 – to McGregor, and thus to Ross' vote on SB380. It's against that backdrop that Mr. Coker called Richard Whitaker as the first (and, as it turned out, only) witness in the defense case.

²³ The Government's alternate explanations of "getting down to the wire" and "the window is closing on us fast" do not make sense, especially in light of the "Friday is the deadline" comment. With the Legislature operating on a Tuesday through Thursday basis, Friday would not have been a legislative day, so a vote on the bill would have been out. On the other hand, the Government's new theory – raised for the first time during argument on the motions for acquittal – that Ross was referring to the upcoming end of the legislative session in 8 legislative days, ignores that SB380, once passed, could have passed the House as well with as few as 3 legislative days left in the session (as testified to by former Senator Steve French), which would have been about 2 weeks away (and again not "Friday").

B. The Testimony of Richard Whitaker

The executive director of the Alabama Medical Association for 37 years, and the secretary-treasurer of ALAPAC, Whitaker testified to the circumstances leading up and the reasons for the PAC's May 5, 2010 contribution for \$10,000 to the Ross re-election campaign.

Based on undersigned counsel's notes and recollection, the Government's rendition of Mr. Whitaker's testimony is flat wrong on at least three, if not more, points, as well as being so selectively incomplete as to be misleading. Ross did call Whitaker to request a contribution from ALAPAC, but probably did so either in late 2009 or early 2010, **not after** the 2010 legislative session. And, rather than Coker calling Whitaker separately about contributing to Ross, Whitaker in fact called Coker after getting a call from Ross requesting a contribution. Contrary to the Government's claim that Whitaker was reluctant to contribute to Ross because Ross was running unopposed, Whitaker stated it was "not out of the norm to contribute to a candidate who's running unopposed." Further, contrary to the implication in the Government's assertion that Whitaker "often received input from Coker, his friend of approximately forty years, when [Whitaker] made recommendations to the ALAPAC board regarding contributions," Government's Supp. Submission, at 7, Whitaker suggested that he asked for Coker's opinion occasionally; Whitaker testified he [Whitaker] sometimes makes recommendations to ALAPAC on who to contribute to; but

specifically testified that Coker had **no** input into the ALAPAC contribution to Ross.²⁴

Conspicuously omitted by the Government: Although Senator Ross did request a contribution from ALAPAC (again, before or at the beginning of the 2010 session, not after it), a local physician had already recommended Ross for a contribution. ALAPAC had contributed to Ross' campaign in connection with each of his previous two elections: \$5000 after the 2002 election, in which Ross defeated a Montgomery physician who was the original choice for ALAPAC's support in that race; and \$10,000 before the 2006 election. After Ross called Mr. Whitaker requesting an ALAPAC contribution for the 2010 campaign, Whitaker forwarded the request to the local physician on the local (Congressional district) committee for ALAPAC who had requested the contribution to the Ross campaign earlier. The local committee approved the request; Whitaker endorsed the local committee's approval, recommended to the ALAPAC state board that the PAC give the Ross campaign a contribution, and recommended the amount; and the state board also approved giving the Ross campaign a contribution, in accordance with regular board procedure.²⁵

²⁴ The parties did stipulate that on March 31, 2010 at shortly after 4:00 PM (undersigned counsel missed the exact time), there was a connected call from Coker's cell phone number to the number for Whitaker or the Medical Association. This was approximately 8 hours after the intercepted conversation between McGregor and Coker set out in J-167, but there was no recording of the call and no evidence at trial as to the nature of the discussion during the call.

²⁵ When Ross called Whitaker to request an ALAPAC contribution, Ross requested more than the \$10,000 the PAC had given him previously – possibly twice that, or \$20,000. When Whitaker asked why Ross was requesting that much money, more than Whitaker thought the committee would approve, Ross stated that, although he was unopposed, he was helping raise money for the Democratic Caucus, for his fellow Democratic senators, to keep a Democratic majority in the Senate. After receiving that call, Whitaker called Coker and asked whether every candidate running for re-election was going to say they

The Government also consciously chose not to ask Mr. Whitaker the reason(s) why ALAPAC made a contribution to Senator Ross' 2010 campaign. Whitaker testified he recommended that the PAC give the Ross campaign a contribution because Senator Ross was on the Senate Health Committee; Ross regularly notified the Medical Association of pending bills that might affect their interests and requested their input; and Ross was always willing to listen to their ideas and easy to work with. Whitaker did not recall Ross ever voting against the Medical Association on any amendments they wanted to legislation that affected them. Whitaker also stated emphatically that the May 5, 2010 contribution to the Ross campaign had nothing whatsoever to do with gambling or Ross' vote on SB380.

In short, the Government's claim that the ALAPAC contribution to the Ross campaign was tied to Senator Ross' conversations with Milton McGregor on March 29 and 30, 2010, is refuted by Ross' previous, likely pre-session request for a contribution; the independent, earlier request by a local Montgomery-area physician that the PAC contribute to Ross; the approval by the local committee and the state board of the contribution request; the lack of any input by Coker into the recommendation; the previous ALAPAC contributions to Ross' campaign; the twenty-three senators in total who received ALAPAC

were raising money for the Caucus. Coker told Whitaker he thought Ross had been designated to raise money for the Caucus, because he had no opponent. Given that Whitaker recommended the contribution and the amount, and the PAC sent the Ross campaign a \$10,000 contribution, one may infer Whitaker recommended a \$10,000 contribution – which was less than the \$15,000 total contributions received by, e.g., Senator Scott Beason and then-Senator Steve French in the 2010 election cycle.

contributions in 2010; and the non-gambling, Medical Association-related reasons for the donation.²⁶

And, there is no evidence – specifically including any testimony of Mr. Whitaker -- to support the Government’s claim that the Medical Association contribution, given six weeks after those conversations, constituted a quid pro quo, whether explicit or implied, for Senator Ross’ vote in favor of SB380.

Finally, the testimony of Mr. Whitaker does nothing to address the fatal flaw in the Government’s charge against Senator Ross in count one: the absence of any evidence that Ross even knew of -- much less knowingly joined and participated in -- any scheme to buy votes in favor of SB380 that addressed the vote of any other senator. The absence of such evidence bars any reasonable jury from finding Senator Ross guilty beyond a reasonable doubt as to either the conspiracy as charged, or the alleged fraudulent scheme required as part of the honest services charges.

Conclusion

For all the foregoing reasons, as well as those stated in the original motion for acquittal at the close of the Government’s evidence, the evidence in the entire case is insufficient to allow the jury to find beyond a reasonable doubt that Senator Ross is guilty of any of the charges against him. Senator Ross’ motion

²⁶ Undersigned counsel does not recall Mr. Whitaker testifying, as the Government asserts, that “in his view, it was clearly improper – even illegal – to discuss campaign contributions in connection with specific legislation.” Government’s Supp. Submission, at 8. Counsel recalls Mr. Whitaker testifying only that offering or giving a contribution in return for a vote or other official act is probably illegal and is improper. Even if Mr. Whitaker did testify as the Government asserts, which undersigned counsel does not believe he did, his legal opinion is not supported by *McCormick*.

for judgment of acquittal is due to be granted, and Senator Ross is entitled to entry of a judgment of acquittal against him on all charges.

Respectfully submitted,

H. LEWIS GILLIS (GIL001)
TYRONE C. MEANS (MEA003)

OF COUNSEL:

THOMAS, MEANS, GILLIS & SEAY, P.C.

3121 Zelda Court
Montgomery, Alabama 36103-5058
Telephone: (334) 270-1033
Facsimile: (334) 260-9396
hlqillis@tmgslaw.com
tcmeans@tmgslaw.com

/s/ Mark Englehart
MARK ENGLEHART (ENG007)

OF COUNSEL:

ENGLEHART LAW OFFICES

9457 Alysbury Place
Montgomery, Alabama 36117-6005
Telephone: (334) 782-5258
Facsimile: (334) 270-8390
jmenglehart@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2011, I have filed the foregoing with the Clerk of the Court electronically using the CM/ECF system, which will send notification to all counsel of record, as follows:

<p>Louis V. Franklin, Sr. Assistant U. S. Attorney 131 Clayton Street Montgomery, Alabama 36104 Louis.franklin@usdoj.gov</p> <p>Stephen P. Feaga U.S. Attorney's Office P.O. Box 197 Montgomery, AL 36101-0197 Steve.feaga@usdoj.gov</p> <p>Justin V. Shur Brenda Morris Eric Olshan Barak Cohen Emily Rae Woods Edward T. Kang U.S. Department of Justice Public Integrity Section 1400 New York Avenue-NW 12th Floor Washington, DC 20005 Justin.Shur@usdoj.gov Brenda.Morris@usdoj.gov Eric.olshan@usdoj.gov Barak.cohen@usdoj.gov Rae.woods@usdoj.gov Edward.kang@usdoj.gov</p> <p>Robert D. Segall David Martin Shannon Holliday Clayton R. Tartt Ashley N. Penhale COPELAND, FRANCO, SCREWS & GILL, P.A. P.O. Box 347 Montgomery, Alabama 3610 1-0347 segall@copelandfranco.com martin@copelandfranco.com holliday@copelandfranco.com tartt@copelandfranco.com</p>	<p>Joe C. Espy, III William M. Espy Benjamin J. Espy MELTON, ESPY & WILLIAMS, PC P.O. Box Drawer 5130 Montgomery, AL 36103 jespy@mewlegal.com wespy@mewlegal.com bespy@mewlegal.com</p> <p>Fred D. Gray Walter E. McGowan GRAY, LANGFORD, SAPP, McGOWAN, GRAY, GRAY & NATHANSON, P.C. P.O. Box 830239 Tuskegee, AL 36083-0239 fgray@glsmgn.com wem@glsmgn.com</p> <p>David McKnight William J. Baxley Joel E. Dillard Baxley, Dillard, Dauphin, McKnight & Barcliff 2008 Third Avenue South Birmingham, AL 3523 dmcknight@bddmc.com bbaxley@bddmc.com jdillard@bddmc.com</p> <p>Brett M. Bloomston Joseph J. Basgier, III Bloomston & Basgier 1330 21st Way South, Suite 120 Birmingham, AL 35235 brettbloomston@hotmail.com joebasgier@gmail.com</p> <p>William N. Clark Stephen W. Shaw William Mills</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>penhale@copelandfranco.com</p> <p>Sam Heldman THE GARDNER FIRM, P.C. 2805 31st Street NW Washington, DC 20008 sam@heldman.net</p> <p>James W. Parkman, III Richard Martin Adams William C. White, II Parkman, Adams & White 505 20th Street North, Suite 825 Birmingham, AL 35203 parkman@parkmanlawfirm.com adams@parkmanlawfirm.com wwhite@parkmanlawfirm.com</p> <p>Susan G. James Denise A. Simmons M. Geron Gadd Susan G. James & Associates 600 S. McDonough Street Montgomery, AL 36104 sgjamesandassoc@aol.com dsimlaw@aol.com mgerongaddsgja@gmail.com</p> <p>Thomas M. Goggans Attorney at Law 2030 East Second Street Montgomery, AL 36106 tgoggans@tgoggans.com</p> <p>Samuel H. Franklin Jackson R. Sharman, III LIGHTFOOT, FRANKLIN & WHITE, L.L.C. The Clark Building 400 North 20th Street Birmingham, AL 35203 sfranklin@lightfootlaw.com jsharman@lightfootlaw.com</p>	<p>Redden Mills & Clark 505 North 20th Street, Suite 940 Birmingham, AL 35203 wnc@rmclaw.com sws@rmclaw.com whm@rmclaw.com</p> <p>Ron W. Wise Attorney at Law 200 Interstate Park Drive, Suite 105 Montgomery, AL 36109 ronwise@aol.com</p> <p>David J. Harrison Post Office Box 994 306 South Academy Street Geneva, Alabama 36340 davidjharrison@centurytel.net</p> <p>Joshua L. McKeown The Cochran Firm Criminal Defense- Birmingham LLC 505 20th Street North Suite 825 Birmingham, AL 35203 jmckeown@parkmanlawfirm.com</p> <p>Jeffery Clyde Duffey Law Office of Jeffery C. Duffey 600 South McDonough Street Montgomery, AL 36104 jcduffey@aol.com</p> <p>James D. Judkins Larry Dean Simpson Judkins, Simpson, High & Schulte P.O. Box 10368 Tallahassee, FL 32302 jjudkins@readyfortrial.com lsimpson@readyfortrial.com</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

/s/ Mark Englehart
MARK ENGLEHART