

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 v.)
) No. 1:08-cr-00274-ESH
 KEVIN A. RING,)
)
 Defendant.)
 _____)

**UNITED STATES’ MOTION TO MODIFY
JURY INSTRUCTIONS REGARDING CAMPAIGN CONTRIBUTIONS**

The United States, by and through undersigned counsel, respectfully moves this Court to modify its jury instructions regarding campaign contributions.¹ In particular, the Government seeks to modify the previous jury instructions regarding campaign contributions to make them consistent with the law, as set forth by the Supreme Court in *McCormick v. United States*, 500 U.S. 257 (1991). The Government recognizes that a jury instruction that incorrectly states the law is inconsistent with its ongoing obligations to the public and may inappropriately be cited as precedent in future prosecutions. Consequently, the Government respectfully requests that the modified jury instruction be provided in place of the jury instructions provided during the first trial.

I. Background

During the first trial, the Court provided the jury with Jury instruction number 27, titled “Campaign Contributions,” which says the following:

¹The Government does not anticipate introducing any new witnesses in its case-in-chief or introducing any new exhibits during its direct examinations. The Government also does not anticipate lengthening the trial in any way. The only proposed change will be the modified instruction.

As I instructed you throughout the trial, campaign contributions and fundraising are an important, unavoidable, and completely 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 actions done or to be done by the elected official. The Supreme Court has recognized that legitimate, honest campaign contributions are given to reward public officials with whom the donor agrees and in the generalized hope that that official will continue to take similar official actions in the future.

Lobbyists often donate to the political campaigns of public officials, and there is nothing illegal about this practice. Official actions that advance the interests of a lobbyist's clients, taken shortly before or after campaign contributions are solicited or received from the lobbyist, are perfectly legal and appropriate. You may not consider campaign contributions or fundraisers as part of the illegal stream of benefits that Mr. Ring is charged with providing to certain public officials.

Dkt. No. 113 at p. 28. This Court provided a similar, though paraphrased, instruction to the jury during the first trial on every occasion that the Government presented evidence of fundraisers or campaign contributions.

Similarly, jury instruction number 28, titled "Legitimate Gifts and Lobbying," begins by stating that "Although campaign contributions are perfectly legal and protected . . ." Dkt. No. 113 at p. 29. Instruction number 29, titled "Thing of Value," contains the following: "[A] 'thing of value' . . . does not, as I previously instructed you, include campaign contributions." Dkt. No. 113 at p. 31.

II. The Court's Jury Instructions are Legally Insufficient and Contravene Well-Established Supreme Court Authority

In *McCormick*, the Supreme Court observed that campaign contributions "are unavoidable so long as election campaigns are financed by private contributions or expenditures," and ruled that legislators do not "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” *Id.* at 272. Indeed, this Court’s previous instructions appropriately embraced that legal concept. However, the Supreme Court went further than this Court did in the first trial, and held that campaign contributions *can* constitute an illicit thing of value “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.” *Id.* at 273; *see also id.* (“Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.”). While such a promise would not be sufficient for a violation of the illegal gratuities statute, such an explicit promise would be entirely consistent with the “bribery plus” theory of honest services fraud. Therefore, this Court’s previous jury instructions on campaign contributions are incorrect as a matter of law.

Moreover, while this Court’s instructions declare categorically that “campaign contributions are perfectly legal and protected” and “[y]ou may not consider campaign contributions or fundraisers as part of the illegal stream of benefits that Mr. Ring is charged with providing to certain public officials,” the Supreme Court instead declared that “[t]his is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign.” *Id.* at 273. The Court should properly instruct the jury based upon the Supreme Court’s ruling on the situations when campaign contributions can be illegal.

While *McCormick* addressed the receipt of campaign contributions by a public official, the same analysis applies to a lobbyist, such as the defendant, who provides the campaign contributions as part of an honest services fraud scheme. While *McCormick* addresses campaign contributions in the context of the Hobbs Act extortion under color of official right, subsequent

cases have made clear that a bribery charge can be based on the giving or acceptance of campaign contributions. *See generally United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (noting that bribery and extortion “are really different sides of the same coin” and concluding that “absent some fairly explicit [statutory] language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act”). It is widely accepted that campaign contributions can form the basis of a bribe. *See United States v. Whitfield*, 590 F.3d 325, 347-54 (5th Cir. 2009) (discussing the application of *McCormick* to bribery cases and citing precedent from several circuits); *United States v. Siegelman*, 561 F.3d 1215, 1224-27 (11th Cir. 2009) (holding that donations to the Governor’s issue-advocacy campaign could form the basis for federal programs bribery charges); *United States v. Tomblin*, 46 F.3d 1369, 1378-80 (5th Cir. 1995) (discussing jury instructions when a bribery scheme under § 201 deals with campaign contributions). Therefore, campaign contributions given as part of an explicit *quid pro quo* can form the basis of an honest-services bribery charge.

Specifically, the Government recommends a modification to the second paragraph of Jury Instruction 27 to specifically incorporate the Supreme Court’s *McCormick* language, so that it reads as follows:

Lobbyists often donate to the political campaigns of public officials, and there is nothing inherently illegal about this practice. Official actions that advance the interests of a lobbyist’s clients, taken shortly before or after campaign contributions are solicited or received from the lobbyist, may be perfectly legal and appropriate. Consequently, you may not consider campaign contributions or fundraisers provided to be an illegal gratuity to certain public officials. However, you may consider campaign contributions or fundraisers as part of the stream of things of value provided to public officials if the payment is made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.

The Government respectfully submits that the proposed instruction directly quotes from *McCormick* and, thus, accurately reflects the legal status of campaign contributions. The Government respectfully submits that this instruction should be provided during final instructions and, if the defendant requests, whenever evidence of campaign contributions or fundraisers are presented during trial.²

III. Fundraising is Part of Charged Conspiracy

The Indictment clearly identifies fundraising and campaign contributions as part of an illegal *quid pro quo* that is part of the charged conspiracy. In fact, the Manner and Means section of Count One expressly identifies fundraising as one of the most important and widely used things of value constituting the illegal stream of benefits defendant Ring and his co-conspirators provided to public officials:

Defendant RING and his coconspirators offered and provided things of value to certain public officials and others as a means of influencing, inducing, and rewarding official actions, and in exchange for official actions. These things of value included but were not limited to all-expenses-paid domestic and international travel, fundraising assistance

Dkt. No. 2 at ¶ 25; *see also* ¶¶ 34, 37, 45, 47, 56, 66, & 69 (identifying fundraisers and campaign contributions as overt acts of the conspiracy charged in Count One). Moreover, in spite of the legally incorrect instructions given during the first trial, the Government reiterated its position that the fundraisers and campaign contributions are part of the illegal stream of benefits that

² In addition, the Government respectfully submits that the Jury Instruction 28 should remove the introductory phrase: “Although campaign contributions are perfectly legal and protected.” Also, in defining “Things of Value” in Jury Instruction 29, the text should be modified to include the following: “A ‘thing of value’ does not, as I previously instructed you, include campaign contributions when you are considering a violation of the gratuity statute. However, as I previously instructed you, a ‘thing of value’ can include campaign contributions when you are considering a violation of the honest services fraud statute.”

defendant Ring and his co-conspirators at times provided to public officials. *See, e.g.*, Tr. Sept. 16, 2009 at p. 13 (“[I]n some situations in this case there was a *quid pro quo* for campaign contributions.”).

During the first trial, the Government did not object to the legally incorrect instruction, which was provided repeatedly to the jury. During much of the trial, the Court was considering whether to instruct the jury on the undisclosed conflict of interest theory of honest services fraud. Campaign contributions, however, did not fit appropriately into the undisclosed conflict of interest theory of honest services fraud. However, as the Court accurately predicted in its jury instructions, the Supreme Court’s decision in *Skilling v. United States*, 130 S.Ct. 2896 (2010), held that 18 U.S.C. § 1346 is “[i]nterpreted to encompass only bribery and kickback schemes,” *id.* at 2933. Consequently, there is no longer any risk of confusion because the Government is now required to prove a *quid pro quo* for any honest services fraud conviction. Based on the clarification of the law and consistent with the Court’s previous instructions, the Government respectfully submits that the Court should give the instruction consistent with the Supreme Court’s holding in *McCormick*, as cited *supra*.

IV. The Supreme Court was Clear in *McCormick* that the Jury Must Decide Whether Campaign Contributions were Part of a Quid Pro Quo

Given that the Indictment charges defendant Ring with participating in a scheme to defraud that used fundraisers and campaign contributions as part of a stream of things of value and the Supreme Court recognizes the validity of such a prosecutorial theory, the Court should modify the legally deficient jury instructions. Indeed, whether a particular fundraiser or campaign contribution was intended to be part of a *quid pro quo* is a matter for the jury to decide, not the Court. *See McCormick*, 500 U.S. at 270 (“It goes without saying that matters of intent are for the jury to consider.”). Based on the evidence of the abundant use of campaign contributions

by defendant Ring and his co-conspirators, the Court can only properly instruct the jury on the law as it actually exists and as specifically outlined by the Supreme Court in *McCormick*.

V. Conclusion

Accordingly, the Government respectfully requests that this Court modify its jury instructions to accurately state the law applicable to campaign contributions, in accordance with the Supreme Court's holding in *McCormick*.

Respectfully submitted,

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Dated October 12, 2010

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 12th day of October 2010, I caused a true and correct copy of the foregoing Motion to be electronically delivered to Andrew Wise and Timothy O'Toole, counsel for Mr. Ring.

/s/ Nathaniel B. Edmonds

Criminal Division

U.S. Department of Justice