

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>v.</b>	)	<b>No. 08-CR-274 (ESH)</b>
	)	
<b>KEVIN A. RING</b>	)	
	)	

**OPPOSITION TO MOTION TO MODIFY INSTRUCTION ON CAMPAIGN  
CONTRIBUTIONS AND CROSS-MOTION TO DISMISS INDICTMENT**

Kevin A. Ring, through undersigned counsel, respectfully opposes the Government's Motion to Modify Instruction on Campaign Contributions (DE 188) and cross-moves this Honorable Court to dismiss the indictment. The grounds for this opposition and motion are set forth in the accompanying Memorandum.

Respectfully Submitted,

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*pro quo*. The government has long argued that the indictment was returned on a two-pronged theory of honest services fraud: concealed conflict of interest and “bribery-like.” The Supreme Court has invalidated the concealed conflict of interest theory. *See, Skilling v. United States* 130 S. Ct. 2896, 2931 (2010) (“[t]o preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law”). The government has now invalidated the bribery theory by acknowledging that it was based on the constitutionally protected giving of campaign contributions in the absence of an explicit *quid pro quo*. *See, McCormick v. United States*, 500 U.S. 257, 272 (1991). It has likewise invalidated the gratuities theory by revealing a reasonable possibility that the grand jury based the gratuities indictment on campaign contributions given to reward. The Court should dismiss the indictment as it was fatally infected by permitting the Grand Jury to consider these erroneous legal theories.

**A. Background Leading to the Court’s Campaign Contribution Instruction**

The government ignores the history of campaign contribution evidence in this case -- a history that demonstrates the well-grounded nature of the instruction and the remarkable nature of the government’s current about-face. Before the last trial, the government sought to introduce numerous exhibits regarding campaign contributions and political fundraisers. The defense objected<sup>1</sup> on the ground that such evidence could not serve as the basis for an honest services

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<sup>1</sup> The defense’s objection read:

Campaign contributions made in response to prior legislative conduct and/or hoped for future generalized conduct are lawful and “in a very real sense [are] unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.” *McCormick v. United States*, 500 U.S. 257, 272-73 (1991). Because campaign contributions are a necessary part of the American political process, such payments are not criminal unless made “in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” *Id.* at 273. Thus, in *McCormick*, the Supreme Court held that a series of campaign contributions made with a

(footnote continued on next page)

fraud conviction in the absence of an explicit *quid pro quo* under the Supreme Court's decision in *McCormick v. United States*, 500 U.S. 257, 272 (1991), and that campaign contributions could never give rise to criminal liability under gratuities law.

This Court first addressed this issue during an August 13, 2009 hearing. There, the government initially suggested an explicit *quid pro quo* was evidenced by lobbyists discussing amongst themselves the need to get a campaign contribution to a Congressman because of things the Congressman had done. Tr. 8/13/09 at 45:23-46:2; 58:18-24. The Court properly rejected this one-sided formulation of a *quid pro quo*, and tabled resolution of the issue pending further hearing. Tr. 8/13/09 at 58:25-59:15.

Four days later, the government filed a pleading in which it conceded that it would not offer the political contributions and fundraising as part of the illegal stream of things of value

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general intent to curry favor with a state senator and to thank him for his support could not support a conviction for extortion under color of official right. This explicit *quid pro quo* requirement was affirmed shortly thereafter in *Evans v. United States*, 504 U.S. 255 (1992). The Seventh Circuit has since recognized that extortion and bribery are but "different sides of the same coin," *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), and several district courts, in unpublished opinions, have extended the *McCormick* "explicit promise" requirement to the bribery and honest service statutes. *United States v. Siegelman*, 561 F.3d 1215, 1225 n. 14 (11th Cir. 2009).

For similar reasons, it would be improper to base a gratuity charge on a *bona fide* campaign contribution. The reasoning behind that conclusion can be found in the United States Attorney's Manual:

It is problematical that a gratuity charge under 201(c) can rest on a *bona fide* campaign contribution, unless the contribution was a ruse that masqueraded for a gift to the personal benefit of the public officer as was the case in [*United States v.*] *Brewster*, [506 F.2d. 62 (D.C. Cir. 1974)]. This is because campaign contributions represent a necessary feature of the American political process, they normally inure to the benefit of a campaign committee rather than directly to the personal benefit of a public officer, and they are almost always given and received with a generalized expectation of currying favor with the candidate benefiting therefrom. For these reasons, recent Federal jurisprudence on the subject suggests substantial judicial reluctance to extend the Federal crime of gratuities under section 201(c) to *bona fide* campaign donations.

*United States Attorneys Manual, Section 9-85.101, Criminal Resource Manual at 2046*, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02046.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02046.htm).

given in exchange for official acts but sought admission of the exhibits as “legal” overt acts. DE 81, citing *United States v. Lukens*, 114 F.3d 1220, 1221-22 (D.C. Cir. 1997). The defense objected, again pointing to the absence of an evidence of an explicit *quid pro quo*. DE 82.

At an August 20, 2009 hearing, the Court specifically inquired whether the government was arguing that the political contributions were a *quid pro quo* that fell with *McCormick*, Tr. 8/20/09 at 9:20-24, to which the government confirmed what it had stated in its pleading:

We’re arguing that the campaign contributions, we’re not going to argue that they are part of the illicit stream or that they’re an illegal gratuity. We do think that they can be overt acts. The case law is clear that legal acts can be overt acts in a conspiracy.

Tr. 8/20/09 at 10:14-18. The rest of the campaign contribution exhibits were analyzed under the assumption, which the government did not challenge, that there was no evidence of an explicit *quid pro quo* related to campaign contributions. Indeed, the government proposed instructing the jury that campaign contributions “cannot be an illegal gratuity or part of the illicit stream of value for purposes of the scheme, or for purposes of the objects of the conspiracy. But they can be overt acts in the conspiracy.” Tr. 8/20/09 at 11:1-4. Such an instruction, the government argued, would place the Court on “solid legal ground.” *Id* at 11:6.

Over defense objection, the Court agreed to admit the evidence, analogizing the campaign contribution evidence to the same sort of entirely lawful conduct that often appears in indictments. Tr. 8/20/09 at 20:1-24. The Court, however, noted that the government’s proffered instruction was “weak” given the constitutional issues at stake, and suggested that “we’re going to have to carefully [craft] an instruction.” Tr. 8/20/09 at 19:3-4. After the Court ruled, the government reaffirmed that the campaign contributions made by Mr. Ring were *bona fide* and “we are not going to ask the jury to judge that, to be the judge of those facts. We’ll say, okay, if they’re talking about it like a fundraiser, we’ll accept that.” Tr. 8/20/09 at 19:9-17; *see also*

Tr. 8/20/09 at 23:18-21 (government concedes that any discussion of “dough” in emails was referenced to protected fundraising activities).

On September 2, 2009, pursuant to the Court’s order, Mr. Ring filed a proposed instruction on campaign contributions. The motion relied heavily on both *McCormick* and on *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), which made clear the Court has a duty to “draw an intelligible charge to the jury defining the difference between prohibited offenses and legal conduct in the making of political contributions.” *Id.* at 78. As Mr. Ring’s pleading noted, *Brewster* reversed a criminal conviction because the trial judge’s instructions, taken as a whole, failed to fairly draw the distinction between a bribe, an illegal gratuity and “an innocent contribution.” *Id.* at 82. The instruction that the Court found insufficient with respect to campaign contributions was as follows:

[Y]ou are instructed that campaign contributions given to legislators with those general positions on legislative issues a contributor agrees and in the hope only that the position will continue, is entirely proper and legal.

*Id.* at 80. The inadequacy of this instruction was that, read in conjunction with earlier instructions on gratuities and bribery, it failed to eliminate the possibility that the official could be convicted based solely on a contribution designed to reward his prior legislative record and in the hopes that that record would continue. *Id.* at 82. The Court explained such a possibility must be entirely ruled out by the instructions because it is always true as a factual matter that politicians know “the inspiration behind the donation” but that such knowledge is completely legal. *Id.* at 81.

As the defense motion also noted, the instruction in *Brewster* was given long before the Supreme Court’s decision in *McCormick v. United States*, 500 U.S. 257 (1991), which had made clear that campaign contributions that are not the result of an explicit *quid pro quo*, even ones made close in time before or after official acts, had long been thought to be “well within the

law.” *Id.* at 272. Indeed, the Court made clear such contributions were “in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been since the beginning of the Nation.” *Id.*

Based on these authorities, Mr. Ring proposed the following instruction on campaign contributions:

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 acts 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 acts in the future. As a result, official acts furthering the interests of the donor or his clients (if the donor is a lobbyist), taken shortly before or after campaign contributions are solicited and received from those beneficiaries, are perfectly legal and appropriate. You may not impose criminal liability as a result of campaign contributions or fundraisers by Mr. Ring in this case, and if you find that acts in the indictment were taken because of Mr. Ring’s participation in or connection to campaign contributions or fundraisers, you must acquit him on charges arising out of those acts.

DE 84 at 4.

On September 9, 2009, the government proposed an edit to the last sentence of the instruction but otherwise did not object to Mr. Ring’s proposed language.<sup>2</sup> DE 94. The Court

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<sup>2</sup> The government did interpose the general statement that *McCormick* was “clearly not controlling in the honest-services fraud context.” DE 94 at 1, citing *United States v. Kincaid-Chauncey*, 556 F.3d 923, 941 (9th Cir. 2009). That argument proved to be erroneous when the Supreme Court granted certiorari and vacated the Eleventh Circuit’s opinion in *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009), for reconsideration in light of *Skilling*. *Siegelman v. United States*, 130 S. Ct. 3542 (U.S. 2010); *Scrushy v. United States*, 130 S. Ct. 3541 (U.S. 2010). The question presented in the *Siegelman* petition for certiorari argued that the Eleventh Circuit had improperly watered down the *McCormick* standard in an honest services fraud case involving campaign contributions. The Supreme Court’s grant, vacatur and remand (GVR) suggests “a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The Supreme Court’s action makes clear both that *McCormick* applies in the honest services context, and suggests that the standard for proving the “explicit” quid pro quo agreement is a high one. In their motion, the government fails to acknowledge the GVR in *Siegelman* and goes on to rely on the vacated Eleventh Circuit decision. DE 188 at 4.

agreed to the government's proposed modification and provided this instruction repeatedly to the jury.

Throughout the trial, the government elicited testimony from its own witnesses that various campaign contributions and political fundraisers were perfectly legal. *See, e.g.* Tr. 9/22/09 p.m. at 53:4-5 (government presents fundraiser email along with the question "[a]nything wrong with throwing someone a fundraiser?"); 9/23/09 a.m. at 41:25-42:1 (same); 74:13-15 (same); 84:14-18 (same); 99:16-23; at 102-04 (government agrees that fundraising instruction should be given after it elicits information about email referencing need to "step up" contributions to Hastert's office and further agrees that "of course" the campaign contributions instruction should be in the final packet provided to the jury). The defense made legal campaign contributions a core theme of its cross-examination of witnesses.<sup>3</sup> Both parties addressed the legality of campaign contributions and fund-raisers in opening statement and in closing argument. And the Court noted again during trial that the government had conceded the lack of an explicit *quid pro quo*. Tr. 9/22/09 p.m. at 60:19-23 ("I don't want to get into campaign [contributions] . . . you said you weren't going to argue quid pro quo for campaign. They say and they are correct that there [are] First Amendment rights.")

After the jury deadlocked and a mistrial was declared, the Court ultimately set a new trial date for October 18, 2010. In the interim, the Court directed the parties to file *in limine* motions

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<sup>3</sup> Even if the Court were to determine that the instruction was erroneous, the defense has relied on it and the government's position in litigation of this case. The government is judicially estopped from shifting its position. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (rejecting argument that judicial estoppel could not be applied to government, and defining it as "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."); *Convertino v. United States DOJ*, 674 F. Supp. 2d 97, 106 (D.D.C. 2009) (Department of Justice successfully invoking judicial estoppel).

by July 19, 2010, and the government sought to have the Court reconsider several of the jury instructions given in the last trial. The campaign contribution instruction was not one of them.

On September 28, 2010, however, John Albaugh told prosecutors that campaign contributions from Mr. Ring, rather than the meals and tickets he cited during his earlier trial testimony, caused him to take the official acts he did that benefited Mr. Ring. *See* DE 187 at 1. Mr. Albaugh also reaffirmed the absence of such an explicit agreement with lobbyists that provided contributions and sought earmarks. *Id.* at 3 n. 1. As a result, the government notified defense counsel it would no longer be calling Mr. Albaugh as a government witness. On October 6, 2010, pursuant to a deadline imposed by the Court, Mr. Ring moved to strike Mr. Albaugh's hearsay statements on a variety of grounds.<sup>4</sup> DE 187. That motion remains pending, and the government has not filed its opposition within the five day deadline ordered by the Court. *See* Fed. R. Crim. P. 45 (order to perform an act within certain number of days requires that it be performed within that number of calendar days).

**B. The Motion to Modify Is Meritless and Should Be Summarily Denied**

The Court's campaign contribution instruction remains correct as a matter of law and appropriate given the state of the evidence. Much of its language is drawn directly from Supreme Court and D.C. Circuit cases and it is peculiar for the government to suggest it must now file its motion "[c]onsistent with its ongoing obligations to the public," DE 188 at 1, when it agreed to the language of the instruction prior to the first trial. Throughout its entire pleading, the government fails to acknowledge the fact that it has no evidence of an explicit *quid pro quo*

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<sup>4</sup> The government's response to that motion was due October 12, 2010. *See*, 9/28/10 minute order, FRCP 45(a). As of this filing, the government has not filed a response to that motion or to the defense's *in limine* motion also filed October 6, 2010.

in relation to campaign contributions and has repeatedly conceded as much -- a fact that renders inexplicable its proposed addition of the following language:

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 understanding by the official to perform or not to perform an official act.

DE 188 at 4. Such an instruction would be nothing more than an invitation to the jury to base a conviction on speculation in the conceded absence of evidence. The government's motion, filed six days before trial is scheduled to begin, should be summarily denied.

**C. The Court Should Dismiss The Indictment Because the Government's Motion Reveals that It Is Legally Insufficient And Was Obtained Improperly**

Although the government's motion clearly lacks merit, its filing does raise a serious question about the validity of the Indictment. Where it is clear that the grand jury was improperly instructed on the law, dismissal is warranted because the Court "cannot speculate as to what the grand jury would have done absent reliance" on the erroneous theory. *See United States v. D'Alessio*, 822 F. Supp. 1134, 1135-36 (D.N.J. 1993) (dismissing indictment because a New Jersey court rule presented to the grand jury as a basis for "intangible rights" mail fraud charges likely did not apply to the defendant and because it was impossible to determine the extent to which the grand jury relied on the court rule in making its decision to indict the defendant on the "tangible rights" prong of mail fraud counts); *see also United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991) (exercising supervisory authority to dismiss indictment where the defendants were "seriously prejudiced by the cumulative effect of the government's misleading statements of law and its use of inaccurate hearsay testimony. ").

In *D'Alessio*, the court determined that the invalidity of the "intangible rights" prong of three mail fraud counts required the dismissal of those counts in their entirety. *See, D'Alessio*, 822 F. Supp. at 1145. While there was a "possibility" that the Grand Jury used a rule cited in the

indictment "solely for the purposes of the intangible rights fraud charges, its inclusion may have also played a part in the [grand] jury's decision to indict on the tangible rights fraud charges." *Id.* Thus, because there was a "distinct and reasonable possibility" that the inclusion of an erroneous theory of honest services fraud infected both prongs of the indictment's alleged mail fraud scheme, the court concluded that the mail fraud counts had to be dismissed in their entirety. *Id.* at 1146, *accord United States v. Rawlins*, 770 F. Supp. 571, 576 (D. Or. 1991) (dismissing indictment because grand jury instructed on erroneous theories of honest services fraud).

It is indisputable that the indictment here is infected by the same sorts of errors that caused the courts in the cases cited above to vacate indictments. The government has acknowledged earlier in this case that the indictment rested on precisely the type of "undisclosed conflict of interest" theory that the Supreme Court invalidated in *Skilling*. *United States v. Ring*, 628 F. Supp. 2d 195, 214 (D.D.C. 2009) ("[i]n addition, the allegations regarding the congressional rules support an honest services fraud charge under a theory of material non-disclosure"). *Id.* While the Court saved the government from Skilling-based error at the first trial by striking the conflict of interest theory near the end of the government's case, Tr. 9/28/09 (p.m.) at 48:7-54:21, that decision has no impact on the infirmity of the Indictment. It is clear now that the government sought, and received from the Grand Jury, an indictment that was based on an invalid theory of the law.

The government's recent filing compounds this infirmity by admitting that the Grand Jury also was permitted to consider campaign contributions as part of an illegal stream of value without the constitutional protections required to be afforded to such evidence under *McCormick*. Thus, neither of the two legal theories presented to the Grand Jury regarding honest services fraud was legitimate. And given the government's repeated use of "intent to reward"

language untethered to any specific act at the trial itself, it is a virtual certainty that the grand jury was provided with such unguided discretion to indict Mr. Ring for gratuities based on campaign contributions given merely “to reward” in the absence of any explicit *quid pro quo* related to an official act.<sup>5</sup> Indeed, the entire discussion regarding campaign contribution evidence (referred to throughout the August 13, 2009 hearing as “the thirties”) started with an email regarding a potential contribution that Mr. Ring advocated as a way to “reward” our friends. *See*, GX (first trial) 30.

In deciding whether to dismiss the indictment, moreover, it is also important for the Court to consider the circumstances under which the instant motion was filed. It is now six days before trial. If the campaign contribution instruction was “legally insufficient” as the government now claims, it had no legitimate basis for waiting until the week before trial to ask the Court to reconsider it. The fact that the motion comes only days after Mr. Albaugh’s recantation suggests a level of gamesmanship and evidences a continuing willingness to alter, re-define, and abandon theories of criminal liability on the fly that conflicts with Mr. Ring’s fundamental right to due process. *See Sorich v. United States*, 129 S.Ct. 1308, 1310 (2009) (Scalia, J. dissenting from denial of certiorari) (“[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.”). The Court should draw these proceedings to an end by dismissing the indictment with prejudice, in light of the government’s repeated concession that any attempt to secure a new indictment is prohibited by the statute of limitations.

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<sup>5</sup> These errors only serve to exacerbate the prejudice caused by the government decision to put most of its case before the Grand Jury through hearsay testimony of investigating agents. Of the four main witnesses who testified for the government at the first trial, none appeared before the Grand Jury.

Respectfully submitted,

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