

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 KEVIN A. RING, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

No. 1:08-cr-00274-ESH

**UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO MODIFY  
INSTRUCTION ON CAMPAIGN CONTRIBUTIONS AND OPPOSITION TO  
CROSS-MOTION TO DISMISS INDICTMENT**

The United States, through its undersigned attorneys, respectfully submits this reply in support of its motion to modify the instruction on campaign contributions and this opposition to defendant Ring's cross-motion to dismiss the Indictment. Defendant Ring misrepresents the Government's modest request for a change in the jury instructions—a change that simply corrects the current instruction's legal defect by inserting language taken directly from the Supreme Court's holding in *McCormick v. United States*, 500 U.S. 257 (1991). Defendant Ring also cross-moves to dismiss the Indictment based on a mischaracterization of the Government's representations in its motion. Not content with his previous unsuccessful attempts to dismiss the Indictment, defendant Ring pursues yet another creative, but ultimately untenable, argument to avoid trial. *See, e.g.*, Dkt. Nos. 143 & 155. Defendant Ring's cross-motion to dismiss should be denied, and the Government's modest request to modify the current instruction to be consistent with Supreme Court precedent should be granted.

**I. The Government's Request to Insert Language Taken Directly from *McCormick* Should be Granted**

Defendant Ring opposes the Government's request to correct the legally deficient jury instructions with what should be a non-controversial remedy—the Supreme Court's own words. More specifically, defendant Ring asserts that “[t]he Court's campaign contribution instruction remains correct as a matter of law” because “[m]uch of its language is drawn directly from Supreme Court and D.C. Circuit cases . . . .” Dkt. No. 190 at p. 9. It may be true that much of the Court's current instruction was drawn directly from Supreme Court and D.C. Circuit cases, but, more importantly, it omits the most material section from the Supreme Court's seminal holding on this issue. The Government's modest request to modify the jury instructions merely proposes to correct the current instruction's legal defect by quoting directly from the Supreme Court's holding in *McCormick*.

**A. The Government's Proposed Correction is Modest and Legally Required**

As currently formulated, the jury instructions do not provide an accurate statement of the law. The Government has an ongoing obligation to inform the Court of any legal deficiencies in its instructions to the jury that could mislead the public or could be cited incorrectly as legal precedent and, consequently, filed its motion to modify the jury instructions in furtherance of that obligation.

The Supreme Court specifically stated in *McCormick* 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.” *McCormick*, 500 U.S. at 273. To the extent that the Court's previous jury instructions did not reflect the Supreme Court's ruling, they failed to provide a complete picture of the legal status of campaign contributions.

Indeed, the previous jury instructions go so far as to state that “campaign contributions are perfectly legal and protected”—a statement in direct contradiction with the Supreme Court’s declaration 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.” *McCormick*, 500 U.S. at 273. The previous instruction is legally inaccurate, misleads the jury, and establishes a deficient precedent that other courts may rely upon in similar cases. The Government’s proposed jury instruction specifically quotes from *McCormick* in an effort to accurately describe the legal status of campaign contributions as they relate to bribery.

The Government’s proposed jury instruction preserves the entire first paragraph of the instruction as well as all the language explaining that lobbyists’ actions are often legal and appropriate. It directs the jury not to “consider campaign contributions or fundraisers provided to be an illegal gratuity to certain public officials.” Dkt. No. 188 at p. 4. It merely adds one sentence that provides an accurate and complete representation of the law quoted directly from *McCormick*: “[Y]ou 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.*” Dkt. No. 188 at p. 4 (emphasis added; emphasized portion quoted from *McCormick*). Adding this modest change to the jury instructions ensures that the jury is properly instructed and will not return a verdict based on a misunderstanding of the law. The Government is, of course, open to additional changes to the instruction to ensure that the legal instructions are complete and accurate. What the Government cannot accept is an incomplete and inaccurate recitation of the

law that may confuse the jurors, the public, or the testifying witnesses.<sup>1</sup>

It should not go unnoticed that defendant Ring's response here is part of a long-standing attempt to minimize the impact of campaign contributions in this matter. As far back as September 2009, this Court rejected defendant Ring's attempt to improperly instruct the jury to acquit him "if [it] find[s] 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." Dkt. No. 84 at p. 4 (defendant Ring's proposed jury instructions). Similarly, this Court should resist defendant Ring's reliance on another legally deficient instruction and reject his attempt to impede the Government's modest efforts to correct that instruction with the Supreme Court's own words.

**B. Correcting the Instruction to Comply with *McCormick* Will Not Alter the Case**

This Government's proposed correction to the legally deficient jury instructions will not

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<sup>1</sup>The Government acknowledges that its change in position occurred after Mr. Albaugh's statements regarding campaign contributions, discussed in Exhibit 1 of Docket Entry 187. As defendant Ring notes, Mr. Albaugh heard at trial that all campaign contributions were "perfectly legal and appropriate." Dkt. No. 187 at p. 4. Unfortunately, the instruction Mr. Albaugh heard repeatedly does not accurately reflect the state of the law of campaign contributions as discussed in *McCormick*. Yet, Mr. Albaugh pleaded guilty to an information charging him with receiving both campaign contributions as well as meals and tickets as part of the stream of things of value "in exchange for" his performance of official acts. Dkt. No. 1 at p. 5 ¶ 13 (*United States v. Albaugh*, 08-cr-157-ESH). Although he testified at trial consistently with his factual basis, as the Government disclosed to the Defendant on September 28, Mr. Albaugh now has stated that he did not take any official acts because of the meals and tickets, but only because of the receipt of campaign contributions. The Government is not opining on Mr. Albaugh's motivations in making these statements, but Ring implies that Mr. Albaugh's rejection of his prior testimony may have been influenced by the repetition that campaign contributions were legal and appropriate. As explained in the Government's motion to reconsider the jury instructions, the instruction as provided to the jury and heard repeatedly by Mr. Albaugh is an incorrect statement of law.

alter the presentation of evidence. In fact, the Government intends to present fewer exhibits about campaign contributions and fundraising in its case-in-chief than it did during the first trial. The 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 change will be providing a legally correct jury instruction instead of an instruction that contravenes the Supreme Court's holding in *McCormick*.

In support of his opposition, defendant Ring asserts that “[t]hroughout its entire pleading, the government fails to acknowledge that it has no evidence of an explicit *quid pro quo* in relation to campaign contributions and has repeatedly conceded as much . . . .” Dkt. No. 190 at pp. 9-10. The Government has conceded no such thing. During trial, the Government noted that some of the campaign contributions were *quid pro quos*, but chose not to argue the legal impact of those in the last trial. *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.”). Defendant Ring will certainly argue to the jury that the Government has presented no evidence of an explicit *quid pro quo*, but defendant Ring's self-serving pretrial assessment of the Government's evidence is not a sufficient basis to charge the jury with an improper instruction.<sup>2</sup> Tr. Sept. 22, 2009 at pp. 85-86. As noted in the Government's Motion, matters of intent, such as whether a particular campaign contribution was provided as part of an explicit *quid pro quo*, are decided by the jury. *See*

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<sup>2</sup>For example, during the last trial, Mr. Boulanger testified about defendant Ring's statement “hello *quid*, where's the *pro quo*,” which defendant Ring argued applied only to campaign contributions, even though Mr. Boulanger testified that it applied to both campaign contributions and other things of value.

*McCormick*, 500 U.S. at 270 (“It goes without saying that matters of intent are for the jury to consider.”). The role of the Court is to properly instruct them.

The Government’s motion to amend the jury instructions (and the proposed instruction itself) is strikingly modest in comparison to defendant Ring’s cross-motion to dismiss the Indictment. The Government does not make any new factual representations, quotes directly from the Indictment and from *McCormick*, and expressly qualifies that campaign contributions could only be considered as part of an explicit *quid pro quo*, not an illegal gratuity. It is unclear how correcting the defect in the current instruction by quoting directly from *McCormick* could be objectionable. *See* Dkt. No. 190 at p. 8 n.3.

Furthermore, this trial constitutes a different, and separate, proceeding than the last one. When the Government tries a defendant following a mistrial, it may adjust its approach to the case in response to the mistakes of the first trial or to reflect new information that has come to light in the interim. *See United States v. Poole*, 407 F.3d 767, 773-77 (6th Cir. 2005) (noting that prosecutors may add additional charges and develop new trial strategy in anticipation of a retrial); *United States v. Motley*, 655 F.2d 186, 190 (9th Cir. 1982) (“Here . . . we have a simple case of a prosecutor doing what every trial lawyer tries to do: improve his chances of winning on retrial by learning from his mistakes at the original trial.”). As described in its Motion, the Government’s position clarifying the appropriate legal standard as set forth in *McCormick* also makes perfect sense in light of the Supreme Court’s decision in *Skilling v. United States*, 130 S.Ct. 2896 (2010), which held that 18 U.S.C. § 1346 is “[i]nterpreted to encompass only bribery and kickback schemes.” *Id.* at 2933.

Therefore, the Government respectfully requests that the Court correct the legal defect in

the jury instructions by inserting all relevant parts of the Supreme Court's holding in *McCormick*.

## **II. Defendant Ring's Cross-Motion to Dismiss the Indictment is Without Merit**

Defendant Ring moves to dismiss the Indictment because the Government's request to quote the Supreme Court's holding in *McCormick* "suggests the Grand Jury returned the Indictment on the flawed understanding (and likely following an incorrect instruction) that honest services fraud and/or gratuities liability could flow from evidence of campaign contributions even without evidence of an explicit *quid pro quo*." Dkt. No. 190 at pp. 2-3. Defendant Ring mischaracterizes the Government's representations in its Motion.<sup>3</sup> The Indictment is facially valid and, consequently, any improper instructions provided to the grand jury are not a proper basis to dismiss the indictment. Moreover, defendant Ring mischaracterizes the Government's representations, and his speculative accusations of prosecutorial error fail to meet the high legal burden for dismissal or even inquiry into the grand jury proceedings.

### A. Legal Background

"An indictment returned by a legally constituted and unbiased grand jury . . . , if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350

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<sup>3</sup> Indeed, defendant Ring infers such a suggestion from the Government's motion even though the Government's proposed modifications to the instruction contain the following admonishment: "[Y]ou 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.'" Dkt. No. 188 at p. 4 (quoting *McCormick*, 500 U.S. at 273). Moreover, contrary to defendant Ring's assertion quoted above, the Government's proposed instruction specifically cautions about the use of campaign contributions in illegal gratuities: "[Y]ou may not consider campaign contributions or fundraisers provided to be an illegal gratuity to certain public officials." Dkt. No. 188 at p. 4.

U.S. 359, 363 (1956); *see also United States v. Rostenkowski*, 59 F.3d 1291, 1298 (D.C. Cir.

1995) (citing *Costello* with approval). Although “an indictment obtained in violation of federal constitutional rights must be dismissed, at least where substantial prejudice resulted,” *Jones v. United States*, 342 F.2d 863, 871-72 (D.C. Cir. 1964), there exists a “presumption of regularity which attaches to Grand Jury proceedings,” *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974).

**B. An Improper Instruction to the Grand Jury is Insufficient to Dismiss a Facially Valid Indictment**

As the Court has previously found in rejecting the renewed motion for judgment of acquittal, the Government presented sufficient evidence at trial for a finder of fact to convict defendant Ring of bribery honest services fraud. The Court’s ruling makes plain that the Indictment is facially valid and adequately charges defendant Ring with bribery honest services fraud. Contrary to defendant Ring’s assertion, neither the wording of the Indictment nor the Government’s request to insert language into the jury instructions, which is taken directly from the Supreme Court’s holding in *McCormick*, required the grand jury to have inappropriately considered campaign contributions without finding an explicit *quid pro quo*.

Courts generally have refused to review the adequacy of an indictment based on alleged errors in the legal instructions provided to the grand jury. *See, e.g., United States v. Zangger*, 848 F.2d 923, 925 (8<sup>th</sup> Cir. 1988) (“The prosecutor is under no obligation to give the grand jury legal instructions.”); *United States v. Buchanan*, 787 F.2d 477, 487 (10<sup>th</sup> Cir. 1986), cert. denied, 494 U.S. 1088 (1990) (“Challenges going only to the instructions given to the grand jury as to the elements of the offenses are not grounds for dismissal of an indictment that is valid on its face.”). Courts in this District and elsewhere have found that speculation regarding improper

instruction is not sufficient to establish dismissal of the indictment. *See, e.g., United States v. Trie*, 23 F. Supp. 2d 55, 62 (D.D.C. 1998) (ruling that although “conceivable that the grand jury was not instructed [properly about FECA violations] . . . the mere suspicion that the grand jury may not have been properly instructed with respect to the legal definition of contribution is insufficient to establish that [defendant] is entitled either to dismissal of the indictment or to disclosure of grand jury materials”); *United States v. Hart*, 513 F. Supp. 657, 658 (E.D. Pa. 1981) (“The general rule that an indictment will not be the subject of independent scrutiny and is given a presumption of regularity is just as applicable to a challenge of inadequate instructions as inadequate evidence. Thus, mere speculation of irregularity is not enough to entitle the defendant to disclosure of grand jury material.”). Because a prosecutor’s provision of an improper instruction to the grand jury is insufficient to dismiss an otherwise facially valid indictment, the Court should summarily reject defendant Ring’s cross-motion to dismiss the facially valid indictment, which charges defendant Ring with bribery honest services fraud.

C. Defendant Ring’s Argument for Dismissal Relies on a Mischaracterization of the Government’s Request, which Merely Quotes from the Supreme Court’s Opinion in *McCormick*

Defendant Ring contends that the Indictment is infirm because “[t]he 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*.” Dkt. No. 190 at p. 3. Defendant Ring is incorrect because the Government has not in any way acknowledged that the Indictment was improperly obtained. Defendant Ring cites *McCormick* as supporting authority for this assertion, but in doing so he ignores the fact that the Government’s proposed amended instruction quotes directly from that case. Indeed, defendant

Ring either misreads or misconstrues the Government's request. As noted above, the Government's proposed modification specifically instructs the jury that it "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.'" Dkt. No. 188 at p. 4 (quoting *McCormick*, 500 U.S. at 273).

In support of his assertion defendant Ring points not to the wording of the Indictment, but rather generally refers to the Government's Motion to Modify the Instruction on Campaign Contributions. Dkt. No. 190 at p. 11. In that Motion, the Government merely observed the undisputed principle that some campaign contributions can be bribes—to wit, "campaign contributions given as part of an explicit *quid pro quo* can form the basis of an honest-services bribery charge." Dkt. No. 188 at p. 4. Although defendant Ring chooses to ignore the Government's specific references to the *McCormick quid pro quo* requirement, the fact remains that the Government's motion cannot reasonably be interpreted as a concession that the grand jury "was permitted to consider campaign contributions as part of an illegal stream of value without the constitutional protections required to be afforded such evidence under *McCormick*." Rather, the Government's motion merely affirms facts already alleged in the Indictment and references controlling Supreme Court law.

Defendant Ring's misunderstanding of the Government's motion is best exemplified by his assertion that the Government "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." Dkt. No. 190 at p.3. There is nothing in the Government's

motion that supports defendant Ring's assertion here. In fact, as noted above, the Government's motion suggests just the opposite. The Government's proposed modification includes the following cautionary instruction: "[Y]ou may not consider campaign contributions or fundraisers provided to be an illegal gratuity to certain public officials." Dkt. No. 188 at p. 4.

D. There is Nothing New in the Government's Motion

The Government's request to correct the legally deficient jury instructions presents no new information or representations that could possibly form the basis of a new motion to dismiss. The sections of the Government's Motion that defendant Ring finds objectionable are merely quotes from the Indictment, which was returned on September 5, 2008. Moreover, the Government clarified on the first page of its motion that it "does not anticipate introducing any new witnesses in its case-in-chief or introducing any new exhibits during its direct examinations." Dkt. No. 188 at p. 1 n.1. As noted above and in the Government's pleading at docket number 188, *McCormick* 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. The Government's request to modify the jury instructions is consistent with the Indictment, consistent with *McCormick*, and avoids misleading the jury into thinking that campaign contributions can never be bribes and are always legal and appropriate.

E. Defendant Ring Fails to Establish Prosecutorial Error

Defendant Ring argues that because the Government initially pursued the concealed conflict of interest theory of honest services fraud, and because the Indictment mentions campaign contributions and fundraising, "[i]t 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.” Dkt. No. 190 at p. 11. That conclusion simply does not follow from its premises, and it represents yet another untenable attempt to invalidate the Indictment. Indeed, the Indictment has been the same since September 5, 2008. Defendant Ring cannot claim that this latest filing makes clear to him, more than two years later, that the Indictment’s Manner and Means section and Overt Acts section include references to fundraisers and campaign contributions.

Furthermore, defendant Ring cannot point to any relevant part of the record that supports his speculation that the Government argued to the grand jury that concealed campaign contributions were the basis of the concealed conflict of interest theory of honest services fraud. Without such evidence, any further inquiry into the grand jury proceedings is based on pure speculation, and, therefore, lacks any legal support to inquire into the adequacy of instructions provided to the grand jury.<sup>4</sup> Defendant Ring’s unfounded speculation—based on the

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<sup>4</sup> Rather, a defendant seeking disclosure of grand jury materials must make specific allegations that improprieties occurred, supported by independent evidence, before the “heavy presumption” of grand jury regularity can be overcome and disclosure considered. *United States v. Rastelli*, 653 F. Supp. 1034, 1056-7 (E.D.N.Y. 1986); see also *United States v. Tones*, 901 F.2d 205, 233 (2d Cir. 1990) (“[R]eview of grand jury minutes is rarely permitted without specific factual allegations of government misconduct.”); *United States v. Azad*, 809 F.2d 291, 295 (6th Cir. 1987) (“Lacking any demonstration of prosecutorial misconduct, [defendants] have failed to meet the requisite standards for disclosure of otherwise secret grand jury proceedings. A presumption of regularity attaches to grand jury proceedings, and appellants have failed to carry the ‘difficult burden’ of proving any irregularity.”) (citations omitted); *Lucas v. Turner*, 725 F.2d 1095, 1102 (7th Cir. 1984) (ruling that movant’s “mere unsubstantiated allegation that a cover-up occurred and that the grand jury materials could help prove this is nothing but pure conjecture and speculation” insufficient to demonstrate particularized need); *United States v. Edelson*, 581 F.2d 1290, 1291 (7th Cir. 1978) (holding that defendant’s request to inspect grand jury materials properly denied; “unsupported speculation [] is not enough to constitute a particularized need”) (citations omitted); *United States v. Wilson*, 565 F. Supp. 1416, 1436 (S.D.N.Y. 1983) (“Speculation and surmise as to what occurred before the grand jury is not a substitute for fact” and is inadequate to demonstrate particularized need necessary for overcoming presumption of grand jury secrecy.); *United States v. Abrams*, 539 F. Supp. 378, 389

Government's request to insert language into the jury instructions taken directly from the Supreme Court's holding in *McCormick*—that the Government *might have* obtained the Indictment by specifically instructing the jury to find honest services fraud based on concealed campaign contributions, is meritless. Consequently, his motion should be rejected.<sup>5</sup>

### III. Conclusion

Accordingly, the Government's motion requesting the insertion of language taken directly from *McCormick* should be granted and defendant Ring's cross-motion to dismiss the indictment should be denied.

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(S.D.N.Y. 1982) (“[S]uggestion that [] improper remarks may have prejudiced the grand jury is, of course, pure speculation . . . not sufficient to lift the veil of secrecy that surrounds grand jury proceedings.”) (citations omitted).

<sup>5</sup> To bolster this speculation, defendant Ring cites three inapposite cases. In *United States v. D'Alessio*, 822 F. Supp. 1134 (D.N.J. 1993), the district court dismissed an indictment as facially invalid because it alleged that the defendant violated a court rule that might not have applied to him at all. *See id.* at 1136 (“[T]he court concludes only that the court rule presented to the grand jury was not clearly imposed upon defendant D'Alessio so as to sufficiently inform him that its violation would provide the basis for criminal charges. Therefore, the inclusion of this rule in the grand jury's consideration and indictment is improper as a matter of law.”). In *United States v. Peralta*, 763 F. Supp. 14 (S.D.N.Y. 1991), the district court dismissed the indictment after reading the colloquies between the prosecutor and the Grand Jury and determining that the prosecutor inadequately explained crucial points of law. *See id.* at 22 (“We find that defendants were seriously prejudiced by the cumulative effect of the government's misleading statements of law and its use of inaccurate hearsay testimony.”). Unlike the mere speculation about prosecutorial error present in this case, in *Peralta*, the judge read and relied upon the grand jury transcripts to find that the prosecutor misled the jury. In *United States v. Rawlins*, 770 F. Supp. 571, 576 (D.Or. 1991), the district court dismissed three counts of the indictment because they alleged conduct that was “not actionable under the statutes that [the defendants were] charged with violating.” By contrast, in this case, the Indictment only alleges criminal conduct actionable under the honest services fraud statute.

Respectfully submitted,

JACK SMITH  
Chief  
Public Integrity Section

DENIS J. MCINERNEY  
Chief  
Fraud Section

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By: /s/ Peter M. Koski  
PETER M. KOSKI  
Trial Attorney  
Public Integrity Section  
U.S. Department of Justice  
1400 New York Ave, NW  
Washington, D.C. 20005  
Ph: 202-307-3589  
Peter.Koski@usdoj.gov

NATHANIEL B. EDMONDS  
Assistant Chief  
Fraud Section

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on this 14<sup>th</sup> 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/ Peter M. Koski\_\_\_\_\_  
Peter M. Koski  
Trial Attorney  
Public Integrity Section  
Criminal Division  
U.S. Department of Justice