No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF APPELLANT GOVERNOR DON SIEGELMAN, ON REMAND FROM SUPREME COURT OF THE UNITED STATES

Vincent F. Kilborn, III
David A. McDonald
Kilborn, Roebuck & McDonald
Post Office Box 66710
Mobile AL 36606
(251) 479-9010

Redding Pitt
Farris, Riley & Pitt, LLP
Massey Bldg., Suite 400
2025 Third Ave. North
Birmingham AL 35203
(205) 324-1212

Sam Heldman
The Gardner Firm
2805 31st St. NW
Washington DC 20008
(202) 965-8884

Robert D. Segall
Copeland, Franco, Screws & Gill, PA
444 South Perry St.
P.O. Box 347
Montgomery AL 36104
(334) 834-1180

Certificate of Interested Persons

The following persons may have an interest in the outcome of this case. This list includes every person listed by any party in the Certificates contained in briefs to the panel.

Adams, Richard Martin, Counsel for Richard Scrushy

Blakey, George Robert, Counsel for Governor Siegelman

Coody, Honorable Charles S., U.S. Magistrate Judge

Copeland Franco, counsel for Governor Siegelman

Eastland, Hiram C., Jr., Counsel for Governor Siegelman

Feaga, Stephen P., Counsel for Appellee

Franklin, Louis V., Sr., Counsel for Appellee

Fitzpatrick, Joseph L., Jr., Counsel for Appellee

Fuller, Honorable Mark E., U.S. District Judge

The Gardner Firm, counsel for Governor Siegelman

Garrett, Jennifer, Counsel for Appellee

Gunther, Cynthia E., counsel for Richard Scrushy

Hall, W. Perry, counsel for Governor Siegelman

Heldman, Sam, Counsel for Governor Siegelman

Helmsing, Frederick George, Sr., Counsel for Richard Scrushy

Hernandez, Carmen D., Counsel for Richard Scrushy

James, Susan Graham, Counsel for Governor Siegelman

Jenkins, James K., Counsel for Richard Scrushy

Kilborn, Vincent F., III, Counsel for Governor Siegelman

Leach, Arthur W., Counsel for Richard Scrushy

Lourie, Andrew C., counsel for Appellee

McDonald, David A., Counsel for Governor Siegelman

Maloy, W. Bruce, Counsel for Richard Scrushy

Moore, Leslie V., Counsel for Richard Scrushy

Morgan Stanley (Symbol MS)

Parkman, James W., III, Counsel for Richard Scrushy

Perrine, J.B., Counsel for Appellee

Pilger, Richard C., Counsel for Appellee

Pitt, Redding, Counsel for Governor Siegelman

Rogow, Bruce, Counsel for Richard Scrushy

Romano, John-Alex, Counsel for Appellee

Segall, Robert D., Counsel for Governor Siegelman

Peter Sissman, Counsel for Governor Siegelman

Stemler, Patty Merkamp, Counsel for Appellee

UBS AG (UBS)

Welch, William M., II, Counsel for Appellee

White, William C., II, Counsel for Richard Scrushy

Statement Regarding Oral Argument

This case, which has been remanded by the Supreme Court of the United States for further consideration, offers this Court its first major opportunity to interpret an important Supreme Court decision, *Skilling v. United States*. A proper interpretation of *Skilling* is particularly important in cases, like this one, that involve the intersection of campaign finance and criminal law; the First Amendment interests that are served by political contributions would be chilled by an incorrect assessment of the impact of *Skilling* on this case. Because the issues are so important, oral argument would be helpful and appropriate.

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Statement Regarding Jurisdiction

This is an appeal from a final judgment in a criminal case. The Court has jurisdiction under 28 U.S.C. § 1291. The Supreme Court vacated this Court's prior decision, and remanded the case to this Court for further consideration. *See Siegelman v. U.S.*, 561 U.S. ___, 130 S.Ct. 3542 (2010), *vacating U.S. v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

Statement of the Issues

Because the Supreme Court of the United States "remanded … for further consideration in light of *Skilling v. United States*," ___ U.S. ___, 130 S.Ct. 2896 (2010), this brief addresses the following issues:

1. What is the impact of *Skilling* on the charges relating to the C.O.N. Board appointment?

a) After *Skilling*, does the "honest services" fraud statute, 18 U.S.C. § 1346, encompass an allegation that an elected official appointed someone to a position as a *quid pro quo* for contributions to an issue-advocacy referendum election campaign; and if it does, in what sense must the *quid pro quo* be "explicit," *see McCormick v. U.S.*, 500 U.S. 257, 273, 111 S.Ct. 1807, 1816 (1991), in order to constitute a crime after *Skilling*?

b) What is the impact of *Skilling* on those same questions as they arise under 18 U.S.C. § 666?

2. What is the impact of *Skilling* – and particularly its emphasis on fair-warning as a component of due process in the interpretation of criminal laws – on this Court's prior opinion regarding the charge under 18 U.S.C. § 1512(b)(3)?

Siegelman also continues to rely on all the issues as stated in his previous briefing and argument to this Court.

Statement of the Case

A. Course of Proceedings and Disposition Below.

Don Siegelman, former Governor of Alabama, was charged along with other defendants in a multi-count indictment. [R1-61 (second superseding indictment)]. He was acquitted on the great majority of the charges.

The counts of conviction were: (a) Counts 3, 5, 6, 7, 8, and 9, all relating to the reappointment of Richard Scrushy to the Certificate of Need (C.O.N.) Board, allegedly in return for a contribution to an issue-election or referendum campaign;[1] and (b) Count 17, a charge under 18 U.S.C. § 1512(b)(3). [R10-634].

The District Court sentenced Governor Siegelman to 88 months of incarceration, 3 years of supervised release, and a fine. [*Id.*].

The District Court ordered Governor Siegelman incarcerated immediately at the close of sentencing. He was incarcerated for nine months. In March 2008, this Court ordered his release pending appeal. He remains in that status.

In 2009, this Court reversed Governor Siegelman's convictions on Counts 8 and 9 (two of the "honest services" charges), but otherwise affirmed. *U.S. v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009). The Supreme Court granted Governor

[1] Count 3 was a charge under 18 U.S.C. § 666(a)(1)(B). R1-61, p. 29. Counts 6 through 9 were "honest services" mail fraud charges. R1-61, p. 34. Count 5, was a charge of conspiracy to violate the "honest services" statute. R1-61, p. 31. So, count 5 will rise or fall with the substantive "honest services" charges on the issues discussed herein.

Siegelman's petition for certiorari, vacated this Court's decision, and remanded for further consideration in light of *Skilling*. *Siegelman v. U.S.*, 561 U.S. ___, 130 S.Ct. 3542 (2010).

Proceedings in the District Court, regarding the issues addressed in this brief, include the following:

"Honest services" and § 666 charges.

Governor Siegelman requested jury instructions requiring proof by the prosecution of an "explicit *quid pro quo*." [R3-275, pp. 10, 37, 41, 50, 52]. But the District Court disagreed, and its instructions did not include that requirement. [R66-839 pp. 36-41 (Tr. 7292-97) ("honest services" instructions); *id.* pp. 47-48 (Tr. 7303-04) (bribery instructions)]. Governor Siegelman made timely objection. [*Id.*, pp. 65, 67-68 (Tr. 7321, 7323-24)].[2] Governor Siegelman also sought judgment of acquittal on this basis. [*See*, *e.g.*, R62-823 pp. 87, 136-38, 143-44, 146 (Tr. 6508, 6557-59, 6564-65, 6567); R65-838 p. 61 (Tr. 7232)]. He renewed the argument by his post-trial written motion for judgment of acquittal. [R5-455]. The District Court denied the motions. [R6-468].

Section 1512(b)(3) charge

Governor Siegelman moved for judgment of acquittal on the § 1512(b)(3)

[2] In citations to transcripts, we include the page number of the relevant pdf file in the form "p. __" or pp. ___." We also include the parallel citation to the page number of the transcript as a whole, in the form "Tr. ____."

charge both orally and in writing. [R62-823 pp. 178-79 (Tr. 6599-6600); R65-838 pp. 62-63, 67-68 (Tr. 7233-34, 7238-39); R5-453]. As noted above, the District Court denied the motions.

B. Statement of Facts

Assuming familiarity with this Court's initial opinion, the core factual points can be summarized briefly (with more extensive explanation, and citation to the record, to follow immediately below):[3] (1) There was undoubtedly no "explicit" *quid pro quo* agreement or promise by Governor Siegelman, between the C.O.N. Board appointment and the contributions to the pro-lottery campaign, if "explicit" means "express" or "actually stated." The panel indicated that the evidence would support a finding that there was an inferable "state of mind" amounting to an unstated and "implied" agreement connecting the contribution and the action,[4] but all must certainly agree that there was no proof beyond a reasonable doubt of any actual express statement, promise or agreement linking them. The panel, correctly, did not suggest that there was such proof. (2) As to the § 1512(b)(3) charge, the panel repeatedly indicated that there was sufficient evidence of a "coverup," or an

[3] We will often refer to this Court's earlier opinion in this case by referring to "the panel." This is not meant as any disrespect, but is instead an attempt at avoiding potential confusion as to whether we are talking about the Supreme Court's decision in *Skilling* or this Court's decision in this case.

[4] *Siegelman*, 561 F.3d at 1226, 1228.

intent to "cover up" something. We disagree, but more importantly the question of law in this case does not depend on that colloquial and non-statutory term "coverup" or "cover up." There was, undoubtedly, no proof beyond a reasonable doubt that Governor Siegelman had the actual intent to hinder, delay, or prevent communications to law enforcement, as the statute requires for conviction.

1. With regard to the charges involving the C.O.N. Board appointment and the campaign contributions, the pertinent facts were as follows, taking the prosecution's evidence as true.

Don Siegelman was the Governor of the State of Alabama. Richard Scrushy was the founder and CEO of Healthsouth Corporation, one of the State's most prominent corporations and employers, and one of the world's leading healthcare corporations. [R37-679 pp. 184-85 (Tr. 715-16); R39-689 p. 134 (Tr. 1161)].[5]

The Certificate of Need (or C.O.N.) Board is an instrumentality of Alabama's government with certain responsibilities relating to healthcare delivery in the state. [R35-670 pp. 203-04 (Tr. 203-04)]. The members of that Board are appointed by the Governor, and serve without pay. [*Id.*, p. 205 (Tr. 205); R36-673 p. 59 (Tr. 298)].

Scrushy had served on that Board through appointment by three Governors,

[5] Although it was later revealed that Healthsouth was the site of a major accounting fraud scandal, that has nothing to do with this case; and there is no evidence that Governor Siegelman knew anything about it.

prior to Governor Siegelman's administration. [R35-670 p. 227 (Tr. 227); R36-673 p. 59 (Tr. 298)]. Three of the Board's nine seats are reserved by law for health-care providers. [R35-670 p. 205 (Tr. 205)]. So there is nothing at all improper about appointing a healthcare company executive such as Scrushy to the Board. It is also not unusual for Governors to appoint political contributors to the Board; it is the norm. [R36-673 p. 62 (Tr. 301)].

Scrushy, having been reappointed to the C.O.N. Board by Governor Siegelman's immediate predecessor, had resigned from the Board before Siegelman was elected. [R36-673 p. 83 (Tr. 322)]. However, even during the "transition" period between his election and inauguration (i.e., November 1998 to January 1999), Siegelman was considering Scrushy for reappointment to the Board. Scrushy was on a list of potential "C.O.N. Candidates," where his name was accompanied by two typewritten stars, circled in handwriting and emphasized with another handwritten star. This document was created during the transition period between election and inauguration; the handwritten notations were Siegelman's. [Siegelman Ex. 220; R40-694 pp. 244-47 (Tr. 1453-56)]. Alabama Power Company's Chief Executive Officer Elmer Harris, who was serving as head of Siegelman's transition team, met with Scrushy and asked him to come back to service on the C.O.N. Board. [R 64-832 pp. 160-61 (Tr. 7044-45)].

Governor Siegelman's former aide, prosecution witness Nicholas Bailey,

testified that he heard a conversation between Governor Siegelman and Eric Hanson at some point after Governor Siegelman's inauguration [R36-673 p. 258 (Tr. 497)]. Hanson was a friend of Governor Siegelman, and a Healthsouth employee or consultant. [*Id.*, pp. 257-58 (Tr. 496-97)]. According to Bailey, Governor Siegelman said "Mr. Scrushy had contributed at least … $350,000 to the Fob James campaign. And in order to make it right for the Siegelman campaign, he needed to do at least 500,000." [*Id.*, p. 261 (Tr. 500)].

The "Siegelman campaign" in question was Governor Siegelman's campaign for voter approval of his ballot initiative to establish a state lottery to fund educational programs. [*Id.*] In short, it was "a referendum campaign." **[**R40-694 p. 16 (Tr. 1225)].

Former Healthsouth CFO Michael Martin testified that Scrushy told him that "in order to get in the good graces of Governor Siegelman that we needed to assist him with raising money for the lottery campaign." [R41-700 pp. 248-49 (Tr. 1766-67)]. According to Martin, "There were a number of occasions when Mr. Scrushy told me that it was important for us to be in the good graces of that governor or any other governor so that we could have some influence or a spot on the CON Board." [*Id.*, p. 249 (Tr. 1767)]. Martin testified that Scrushy's view was that "if we raised that money, then we would have a spot on the CON Board." [R42-710 p. 73 (Tr. 1865)]. There is, however, no evidence that this view was based on anything that

Governor Siegelman had done or said to Scrushy or to anyone else. Nor was there evidence that Governor Siegelman knew of conversations between Martin and Scrushy.

Bailey testified that at some point, Governor Siegelman showed him a check for $250,000 and said that Scrushy "was halfway there." [R36-673 pp. 265-68, 271 (Tr. 504-07, 510)]. (There was much confusion in Bailey's testimony as to when this supposedly happened.) According to Bailey, "I responded by saying, what in the world is he going to want for that? And his response was, the CON Board, the C-O-N Board." [*Id.*, p. 268 (Tr. 507)]. "I said, I wouldn't think that would be a problem, would it? And he said, I wouldn't think so." [*Id.*]

As we will discuss in the Argument, a crucial point is that there was no evidence of any agreement – much less an *explicit* agreement – connecting the C.O.N. Board appointment to the Education Lottery campaign contributions. At most, with the prosecution's evidence taken as true there was some *expectation*, as shown by Bailey's testimony that we have just quoted. Bailey confirmed that he did not have first-hand knowledge of anything that Governor Siegelman and Scrushy said to each other. [R38-687 pp. 196-97 (Tr. 1003-04)]. And the existence of an agreement cannot be inferred from the fact that Governor Siegelman and Scrushy met. As Bailey confirmed, it was routine for Governor Siegelman to have meetings in private – so routine that nothing improper can be

inferred from the fact of a private meeting with Scrushy. [R39-689 pp. 33-34 (Tr. 1060-61)].

The check was payable to the Alabama Education Lottery Foundation, a § 501(c)(3) entity that was "a campaign fund for the lottery that Governor Siegelman was promoting." [R36-673 p. 272 (Tr. 511); R37-679 p. 212 (Tr. 743)]. The check was written from Integrated Health Services, a Maryland corporation. [R36-673 p. 272 (Tr. 511)].

On July 26, 1999, Governor Siegelman appointed a slate of members, including Scrushy, to the C.O.N. Board. [*Id.* pp. 89, 278 (Tr. 328, 517)].

In the fall of 1999, according to former Healthsouth CFO Martin, Eric Hanson bragged "that he was able to get us a spot on the CON Board with the help of the Integrated check." [R41-700 pp. 263-64 (Tr. 1781-82)]. "He was bragging about the fact that he was able to get the CON slot for HealthSouth and the fact that Integrated had made the payment and that [investment banker] McGahan had worked with him on getting that done." [*Id.* p. 269 (Tr. 1787)].

Subsequently, Bailey deposited another $250,000 check, this one from Healthsouth, into an account belonging to the Alabama Education Foundation. [R36-673 pp. 283-84 (Tr. 522-23)]. Governor Siegelman received that check at a meeting with Scrushy, at Healthsouth, approximately ten months after Scrushy's appointment to the C.O.N. Board. [R37-679 pp. 6-8, 17-22 (Tr. 537-39, 548-53)].

The Alabama Education Foundation was a successor to the Alabama Education Lottery Foundation. [*Id.*, p. 211 (Tr. 742)].

In 2001, Scrushy told the Governor that he no longer wished to serve on the Board. Governor Siegelman appointed a Healthsouth employee, Tom Carman, to finish the unexpired term, and later reappointed Carman to another term. Carman, like Scrushy, had served on the C.O.N. Board in the past, through appointment by former Governor Fob James. [R35-670 pp 221, 224, 226 (Tr. 221, 224, 226); R43-720 p. 17 (Tr. 2058)].

2. With regard to the § 1512(b)(3) charge, the pertinent facts were as follows, taking the prosecution's evidence as true.

In 1999, Governor Siegelman had been working with The Honda Corporation to bring a new automobile manufacturing plant to Alabama. [R62-823 p. 44 (Tr. 6465)]. Honda wanted to give a motorcycle to Governor Siegelman, but he declined that offer. Instead he insisted on purchasing the motorcycle himself. [R36-673 pp. 199-201 (Tr. 438-40); R62-823 p. 35 (Tr. 6456)].

In January 2000, Lanny Young wrote Bailey a check for $9200; and Bailey wrote a check to Governor Siegelman's wife in the same amount. [R36-673 pp. 217-19 (Tr. 456-58)]. Bailey's testimony was that Young told him that he was buying a portion of the motorcycle from the Governor. [*Id.* p. 220 (Tr. 459)]. Bailey – not Governor Siegelman – suggested that the payment go through himself,

rather than directly from Young to the Governor. [*Id.*] Bailey purchased an interest in the motorcycle, and a formal bill of sale was executed. [R37-679 pp. 253-54 (Tr. 784-85)]. Bailey and the prosecutors contended that this was not a *bona fide* purchase of part of a motorcycle, but was instead a payoff by Young to Governor Siegelman as part of an ongoing "pay-to-play" scheme. However, the jury rejected those charges.

A federal investigation began into the relationships of various people including Governor Siegelman, Bailey, and Young. Governor Siegelman and Bailey knew of that investigation. [R36-673 pp. 196-97, 236 (Tr. 435-36, 475)]

Bailey wrote a check to Young in June 2001, noting on the check that it was repayment plus interest of the $9200 check that Young had written to Bailey earlier. [*Id.* p. 235 (Tr. 474)]. Bailey's testimony is that this description of the check was a "disguise." [*Id.*] This was Bailey's idea and his intent, he says. There was no evidence that it was Governor Siegelman's idea to have Bailey write this check, or that Governor Siegelman persuaded him to write it, or even requested that he do so. As Bailey said, "I found out about the investigation that was going on with Lanny. … I wanted to repay Lanny's $9200. I did it in the form of a check." [*Id.* p. 236 (Tr. 475)]. Bailey testified that Governor Siegelman knew of, and agreed to, his (Bailey's) plan to write the check. [*Id.* p. 237 (Tr. 476)]. Count 16 [R1-61, pp. 39-40] charged Governor Siegelman with obstruction of

justice in regard to Bailey's check to Young; the prosecution alleged that Governor Siegelman "caused" Bailey to write that check. The jury correctly rejected that charge.

Bailey testified that the "plan" was that he had borrowed money from Young to purchase the motorcycle, that he would repay Young, and that he would then pay Governor Siegelman the remaining value of the motorcycle and take possession of it. [R36-673 p. 237 (Tr. 476)]. There is no evidence that Governor Siegelman came up with this plan; there is no evidence that he urged or cajoled or even requested Bailey to come up with it or to carry it out.

In October 2001, Bailey wrote a check to Governor Siegelman for $2,973.35, noting on the check that it represented the balance due on the motorcycle. [*Id.*, p. 240 (Tr. 479)]. This check was the subject of Count 17, which is at issue in this appeal. [R1-61-40].

There was a further formal bill of sale of the remaining interest in the motorcycle. [R37-679 pp. 270-71 (Tr. 801-02)]. When asked by the prosecutor why he wrote that check, Bailey's answer was "I had had a discussion with the Governor and expressed interest in either the Governor buying the motorcycle from me or me buying the motorcycle from the Governor in full. So if I bought it, I could sell it and be done with the motorcycle. That's what ultimately happened on October 16, 2001." [*Id.* p. 242 (Tr. 481)]. Bailey also testified, "We made a

decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that." [*Id.* p. 243 (Tr. 482)]. According to Bailey, "We met at the Governor's attorney's office and with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier." [*Id.* p. 244 (Tr. 483)].

C. Standard and Scope of Review

A motion for judgment of acquittal is reviewed *de novo*, taking the prosecution's evidence as true. *See*, *e.g.*, *U.S. v. Frank*, 599 F.3d 1221, 1233 (11th Cir. 2010). Where (as here) a challenge to jury instructions is that they did not correctly state the law, review is *de novo*. *See*, *e.g.*, *Frank*, 599 F.3d at 1236.

Summary of the Argument

First, after *Skilling* there can no longer be an "honest services" charge based on the assertion that an official took action because of a contribution to an issue-advocacy or referendum election campaign (or, for that matter, a contribution to any election campaign.) *Skilling* pared down "honest services" to its pre-*McNally* core. The only "honest services" cases that survive are those that fall into patterns that were well established as consensus applications of the law before *McNally*. But the pre-*McNally* core of "honest services" was only about "self-enrichment schemes," not about campaign contributions.

If there can be any "honest services" charge here, then *Skilling* demands at least that there be strong application of the "explicit *quid pro quo*" standard. *Skilling* emphasized due process in interpretation of criminal laws, in order to give fair warning of what is covered and to reduce the likelihood of arbitrary enforcement. These concerns should lead this Court, on reconsideration, to reject the discussion in the prior opinion holding that a mere "implied" agreement or "state[] of mind" is enough to constitute an "explicit *quid pro quo*."

By the same token, *Skilling* should lead to reversal on the § 666(a)(1)(B) count concerning the C.O.N. Board appointment. In emphasizing the due process concerns of fair warning and avoidance of arbitrary enforcement, *Skilling* teaches that § 666(a)(1)(B) should receive the same narrow construction as the "honest services" statute does in this context.

Likewise, *Skilling*'s discussion of due process and the rule of lenity should lead to reversal on the sole remaining count, under 18 U.S.C. § 1512(b)(3). The panel previously affirmed on that count, but in doing so the panel did not adhere to the words of the statute. Instead of focusing on the particular intent that the statute requires – the intent to "hinder, delay or prevent" communications to law enforcement – the panel focused on the nonstatutory colloquialism "coverup." *Skilling* reminds us the criminal laws must not be expanded through loose interpretation of that sort.

Argument

Under the principles discussed in *Skilling*, Governor Siegelman is entitled to a judgment of acquittal, or at least a new trial with correct jury instructions, on all of the charges upon which he was convicted.

1. *Skilling* requires reversal on all the "honest services" counts for Governor Siegelman.

Skilling requires reversal of the convictions on all the "honest services" counts (including the conspiracy count, which was premised on "honest services"), all of which have to do with the C.O.N. Board appointment and the contributions to the pro-lottery advocacy campaign.[6]

The end result of *Skilling*, with regard to "honest services" law under 18 U.S.C. § 1346, is that the statute survived a constitutional challenge for vagueness only because the Supreme Court pared the statute down to its "core." *See Skilling*, 130 S.Ct. at 2928. No longer is the law of "honest services" allowed to remain in a state of "chaos," as it had been. *See Sorich v . U.S.*, ___ U.S. ___, 129 S.Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari). The statute is no

[6] The panel recognized that there was an absence of evidence to support Governor Siegelman's conviction on counts 8 and 9. The Government did not seek certiorari review of this conclusion. The conclusion is surely not subject to question at this point. *Skilling* makes it all the more clear that those convictions cannot stand, since the allegations underlying those charges (about alleged "self-dealing" by Scrushy while on the C.O.N. Board, *see Siegelman*, 561 F.3d at 1232) are outside the "core" of the "honest services" crime that *Skilling* preserved.

longer interpreted, as many lower courts had done before *Skilling*, as covering a wide array of many sorts of putative ethical lapses or improprieties committed by public officials or private citizens. Instead, the statute covers *only* "bribes and kickbacks." *Skilling*, 130 S.Ct. at 2928.

The prosecutors, we expect, may say that this is a bribery case and that it survives *Skilling*. The question therefore becomes: what does "bribery" mean, as the Supreme Court used the word in *Skilling*, and does it encompass this case? The answer is that this case falls outside the now-limited scope of "honest services" doctrine. "Bribery," as the Supreme Court used the word in *Skilling*, does not encompass the allegation that a public official took action because of a contribution to an issue-advocacy, referendum election campaign. Or at the very least, following *Skilling*, if such conduct is ever covered by "honest services," it is only upon proof of a truly explicit *quid pro quo* – with the word "explicit" here being used in its ordinary sense, as meaning "express" or actually stated, rather than being a matter of a mere state of mind or implied.

In considering these questions, the Court should also be guided by the arguments presented by a bipartisan group of ninety one former State Attorneys General, and several professors of constitutional law, in *amicus* briefs in this case (both in this Court and in the Supreme Court). As the former Attorneys General put it in the Supreme Court, the panel decision "create[d] extreme uncertainty

regarding the breadth of criminal liability in campaign contribution cases, and the potential for the arbitrary and discriminatory enforcement of anti-corruption statutes raises serious First Amendment concerns." *See* Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, in *Siegelman v. U.S.* (No. 09-182), p. 5. As the law professors explained in a similar vein, the panel decision "create[d] a genuine uncertainty for public officials and potential contributors to political campaigns," which was "especially dangerous in the context of this case because of the great danger … of the abuse of power in prosecuting political opponents." *See* Brief of Law Professors as *Amici Curiae* in Support of the Petition for a Writ of Certiorari, in *Siegelman v. U.S.* (No. 09-182), p. 15. With guidance from *Skilling*, those dangers should be eliminated in this case.

A. The history of "honest services" doctrine, and the Supreme Court's holdings in *Skilling*.

In order to understand *Skilling*, it is helpful to start with its precursor, which was Justice Scalia's dissent from denial of certiorari in *Sorich v. U.S.*, ___ U.S. ___, 129 S.Ct. 1308 (2009). In *Sorich*, Justice Scalia described and decried the "chaos" of existing "honest services" doctrine. *Id.*, 129 S.Ct. at 1311. He noted how the "honest services" doctrine leant itself to prosecutorial abuse in high-profile cases (of which our case, frankly, is one of the highest-profile). "[T]his expansive phrase ["honest services"] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who

engage in any manner of unappealing or ethically questionable conduct." *Id.* at 1310. Justice Scalia pointed out the fundamental unfairness of convictions gained under such a vague, malleable, and unsettled legal standard. "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Id.*

The Supreme Court agreed to consider a constitutional challenge to the "honest services" law a few months later in *Skilling*. And when the Court issued its opinion, the Court's approach echoed the concerns that Justice Scalia had raised in *Sorich*: the concern about the possibility of prosecutorial abuse, and the concern that the criminal laws must be clear in advance (so that people can know, before they act, what the law forbids), rather than being developed after the fact through prosecutorial advocacy. Both of those concerns, as the Court recognized in *Skilling*, are a matter of constitutional due process.

> To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Skilling, 130 S.Ct. at 2927-28.

In the end, the Supreme Court in *Skilling* did not go so far as to hold the "honest services" law unconstitutionally vague. Instead the Court saved the law by dramatically cutting back its scope.

In narrowing "honest services," the Supreme Court looked back to the development of the doctrine. "Honest services" doctrine was, at first, a judicial and prosecutorial creation that developed through caselaw; it was a way of broadening the mail- and wire-fraud statutes to cover cases in which no one was defrauded of money or property, by asserting that the defendant had defrauded someone (the public, or a private-sector union or employer) of its intangible "right to honest services." But in 1987, the Supreme Court put a stop to this, and held that the fraud statutes were limited to the protection of property rights, not such intangible things as "honest services." *McNally v. U.S.*, 483 U.S. 350, 107 S.Ct. 2875 (1987). Congress responded by enacting § 1346, giving new statutory life to the "honest services" doctrine; but the statute itself offered practically no detail or clarity about what was covered. And then, over the next couple of decades, prosecutors argued and courts held that an astounding variety of situations were covered by the doctrine. This led to *Sorich* and ultimately to *Skilling*.

In dramatically narrowing the scope of "honest services" in *Skilling*, the Supreme Court declared that the statute could be saved from concerns about unconstitutional vagueness by "par[ing]" the statute's coverage down to its pre-*McNally* "core." This, the Court said, was "bribes or kickbacks," of the sort that formed the bulk of pre-*McNally* reported decisions.

> We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an

> endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

Skilling, 130 S.Ct. at 2928. The Court said that it had "surveyed" "the body of pre-*McNally*" caselaw, *see Skilling*, 130 S.Ct. at 2929. The Court described the results of its survey:

> While the honest-services cases preceding McNally dominantly and consistently applied the fraud statute to bribery and kickback schemes -- schemes that were the basis of most honest-services prosecutions -- there was considerable disarray over the statute's application to conduct outside that core category.

Id. at 2929. The Court pointed to a catalog of dozens of pre-*McNally* cases that appeared in the Government's brief; this catalog reflected what the "solid core" of pre-*McNally* law consisted of.

> The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels*, 833 F.2d 1183, 1187 (CA6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).

Skilling, 130 S.Ct. at 2930.

Thus, the Court concluded, "Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications." *Id.* at 2931.

The Court expressly tied this, again, to the due process concerns of providing fair notice, and confining prosecutorial discretion, that the Court had discussed earlier in its opinion.

> Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To 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.

Id., 130 S.Ct. at 2931 (emphasis in original, footnotes omitted); *see also id.* at 2933 (again noting the dual concerns of due process: "(1) fair notice and (2) arbitrary and discriminatory prosecutions.") Likewise, the Court tied its decision to the longstanding "rule of lenity" in the interpretation of unclear criminal laws. *Id.* at 2932.

The Court understood that there were *some* pre-*McNally* cases that did not fall within that "solid core," *Skilling*, 130 S.Ct. at 2930. The Court did not ratify *every* pre-*McNally* case, because there was "considerable disarray" about the doctrine's pre-*McNally* content outside the solid core. *Id.* at 2929. For instance, the Court knew that there were some "relative[ly] infrequen[t]" pre-*McNally* cases based on conflicts of interest; but the Court did not allow that part of the doctrine to survive. *Id.* at 2932. The Court allowed only the true "solid core" to survive, the area in which – as reflected by the "dozens" of cases that the Government had cited in its brief to the Court, *id.* at 2930 – there was broad pre-*McNally* consensus

as developed through consistent and repeated application. This was "bribes and kickbacks" of the sort reflected in case after case before *McNally*.

B. An alleged connection between official action and a campaign contribution – especially a contribution to an issue-advocacy or referendum-election campaign, like this one – is not a "bribery" case within *Skilling*'s surviving "solid core."

The term "bribery," as that word is used in *Skilling* to refer to the remaining "solid core" of "honest services" doctrine, does not encompass political contributions – especially not issue-advocacy referendum election contributions. This is the best understanding of what "bribery" means in this particular context, because of (a) pre-*McNally* history, as relied upon in *Skilling*, (b) the due process concerns identified in *Skilling*, and (c) the important First Amendment implications of political contributions, as contrasted with the utter absence of First Amendment concerns in the context of true bribery. Because a campaign contribution is outside the sensible definition of *Skilling* "bribery," all of the honest-services charges against Governor Siegelman must fall.[7]

There is a significant difference between giving money (or some other thing of value) to an official personally, and making a contribution to an issue-advocacy campaign that an official supports. This statement is obvious, but is very

[7] Governor Siegelman raised this contention – the contention that charges under the statutes involved in this case simply cannot be premised on an issue-advocacy-campaign contribution – in his prior briefing to this Court. *See* Siegelman opening brief, filed May 2008, p. 34.

important. There is, for that matter, a significant difference between giving money to an official personally, and making a contribution to the official's own election campaign. The law recognizes this difference, even with regard to officials' own election campaigns; contributions are different from personal payments. And contributions to issue-advocacy campaigns, we submit, are even a step farther removed from personal enrichment.

The difference is so great, as a matter of law, that contributions and other political advocacy expenditures are protected by the First Amendment to the Constitution – while, of course, there is no First Amendment protection for a personal payment to an official himself. Just this year, the Supreme Court emphasized and expanded the First Amendment protections for political spending. *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010). This is not to say that the First Amendment protection of political spending or contributions is absolute; but it is to say that there are vital First Amendment interests at stake in cases involving campaign contributions and issue-advocacy contributions, issues that make such cases very different from cases involving payments to officials personally.

The panel, in its original opinion in this case, echoed these points. The opinion recognized that the "honest services" charges in this case "are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such,

they impact the First Amendment's core values -- protection of free political speech and the right to support issues of great public importance." *Siegelman*, 561 F.3d at 1224 (footnotes omitted). "Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does." *Id.* at 1224 n.13.

Given this very large distinction between personal enrichment and campaign contributions, it is unsurprising to find that cases involving campaign contributions are not encompassed within *Skilling*'s "solid core" of pre-*McNally* "honest services" doctrine. There was no pre-*McNally* settled understanding that an official could be charged with mail- or wire fraud based on an alleged connection between true campaign contributions and an official action. Certainly, there was no such settled understanding with regard to the type of contributions at issue in our case, i.e., contributions that are not even for the official's own election campaign but are for an issue-advocacy campaign that the official supports. As noted in the prior opinion in this case, "Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions." *Id.*, 561 F.3d at 1224 n.13.

Even the Government, in its brief to the Supreme Court in *Skilling*, framed its suggested understanding of "honest services" bribery doctrine in terms of *personal enrichment* of officials – without any hint that campaign contributions, much less issue-advocacy campaign contributions, were at the core of what the doctrine covered. The Government argued in *Skilling*, "Schemes to deprive others of 'the intangible right of honest services' require that a public official, agent, or other person who owes a comparable duty of loyalty breaches that duty by secretly acting in his own financial interests while purporting to act in the interests of his principal." *See* Government Brief in *Skilling*, p. 39 (emphasis supplied).[8] At the same page of the Government's brief, the Government described the impermissible motivation as a "personal financial interest." *Id*. (emphasis supplied). And on the next page: "his [i.e., the defendant's] own interests," id., p. 40. And page 42: "whether the office-holder has placed his self-interest above that of the public."

And at page 51 of the Government's brief, and perhaps most strikingly given the way the Supreme Court ultimately disposed of the case, the Government conceded: "the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes." (emphasis supplied). The Government thus admitted that the pre-*McNally* caselaw was almost entirely, and maybe even literally entirely, about "self-enrichment schemes." *Id.* This would make up the

[8] <http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1394.mer.aa.pdf>.

"core" as the Supreme Court described it in *Skilling*. Even according to the Government's own description, there was no settled pre-*McNally* understanding that an official could be jailed on account of a connection between a campaign contribution (much less an issue-advocacy campaign contribution) and an official act. Most, if indeed not literally all, of the pre-*McNally* "bribery" cases were about personal "self-enrichment" of officials; they were not about campaign contributions, much less issue-advocacy contributions.[9]

This is further borne out by the long footnote in the Government's *Skilling* brief, which the Supreme Court then expressly invoked in its discussion of the pre-*McNally* "bribery" caselaw. In the words of the Supreme Court, the Government "cit[ed] dozens of examples" of pre-*McNally* "bribery or kickback" honest services cases. *Skilling*, 130 S.Ct. at 2930, citing Government Brief p. 42 and n.4. This, according to the Court, was a reflection of the doctrine's "solid core," which is what the Court allowed to survive. *Skilling*, 130 S.Ct. at 2930.

Looking to the cited portion of the Government's brief, we find those dozens of examples, elucidating what the pre-*McNally* "solid core" was. These are the cases that the Government itself chose to identify as representing "bribes or

[9] A cynic, we suppose, might say that a candidate seeking funds for his election is thinking of his own self-interest (getting a job with a salary) rather than the public interest. But an official such as Governor Siegelman, when fundraising for an issue-advocacy referendum campaign, is quite plainly pursuing the public good as he perceives it. Even a cynic would recognize that this case is different from cases about "self-enrichment schemes" as the Government called them in *Skilling*.

kickbacks" cases prior to *McNally*, *see* Government Brief p.42; and the Supreme Court relied on this listing. And here is the striking and dispositive thing: none of them was a case charging a campaign contribution as a bribe or kickback (much less a contribution to an issue-advocacy campaign). They were, in the phrase quoted above from the Government's brief, self-enrichment cases – envelope-full-of-cash cases, and the like. Twenty-nine cases, selected by the best minds in the Justice Department as representing bribery and kickback "honest services" cases pre-*McNally* – and none of them held that a true campaign contribution amounts to an "honest services" bribe.[10]

It is conceivable that the Government will now cite, in this case, to some pre-*McNally* case that actually did involve a real campaign contribution (not an

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[10] Some of them mention campaign contributions, but not in ways inconsistent with our statements in the text above. *See*, *e.g.*, *U.S. v. Pecora*, 693 F.2d 421 (5th Cir 1982) (a brief mention of a conversation about possible contributions regarding a millage campaign, though with no finding or holding of any relationship between that and the $9,000 cash bribe to the Sheriff and District Attorney); *U.S. v. Craig*, 573 F.2d 455 (7th Cir. 1977) (tens of thousands of dollars in cash-stuffed envelopes, given to officials in exchange for legislation); *id.* at 494 (reflecting the Government's theory was that this was *not* campaign contributions, and the Government's argument to the jury that a defendant's assertion that he received money as a campaign contribution was a fabrication); *U.S. v. Barrett*, 505 F.2d 1091, 1094-97 (7th Cir. 1974) (reflecting that the case was about payments given to the official personally in valises and envelopes full of cash; there seems to have been a request above and beyond that for a political contribution, followed by the funny retort (met with a smile by the official) that the valises and envelopes full of cash were political contributions); *U.S. v. Isaacs*, 493 F.2d 1124, 1132, 1134 (7th Cir. 1974) (occasionally mentioning campaign contributions, though noting that none of them was charged as having been improper).

envelope or valise full of cash given to the official personally) as the premise for an "honest services" bribery charge. If there is any such case, it would have been outside the "core" of honest services bribery as the Government identified it, and as the Supreme Court accepted it, in *Skilling*. After all, the Supreme Court recognized in *Skilling* that there were some pre-*McNally* cases that were outside the "core." Not every pre-*McNally* case survives *Skilling*; only the "core" survives.

Therefore, based on *Skilling*, the proper holding in this case is that a contribution to an issue-advocacy campaign is just not an "honest services" bribe after *Skilling*. The application of "honest services" law to campaign contribution cases, through the assertion that someone linked an official action too closely to a political contribution, is one of those aggressive post-*McNally* prosecutorial arguments that the Supreme Court buried in *Skilling*.[11] (This is certainly true in the issue-advocacy campaign context; for as the panel recognized, this seems to be the first-ever prosecution in this sort of case.) The "bribery and kickbacks" core of pre-*McNally* law, which the Supreme Court allowed to survive, was a core of cases

[11] The Government may point to some discussions in a few cases before *McNally*, dealing with the possibility of prosecutions based on campaign contributions under *other* statutes, such as the Hobbs Act. Any such argument would miss the mark, because it would be an attempt to evade the Supreme Court's reasoning in *Skilling*. In *Skilling*, the Supreme Court saved the "honest services" statute by attributing to Congress an intent to resuscitate the pre-*McNally* solid core of "honest services" law – not an intent to use "honest services" to cover things that had previously been prosecuted instead under *other* laws.

about personal self-enrichment, not about campaign contributions much less issue-advocacy contributions. And as we have shown, the two types of cases are very different in their legal implications, largely by virtue of the fact that the First Amendment interests that are so important in contribution-related cases are absent in cases about rank personal enrichment. There is no reason to allow prosecutors to gloss over that important distinction, in support of a prosecutorial effort to expand the core of "bribery" to include cases involving contributions.[12]

Furthermore, allowing "honest services" to cover this sort of case would raise all the due process concerns that the Supreme Court was trying to eliminate in *Skilling*. It would (as this case itself demonstrates) raise the troubling possibility of arbitrary or discriminatory prosecutorial action. Officials take action benefiting contributors all the time; there is a real danger that prosecutors will investigate

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[12] Prosecutors would gain no ground on this point by arguing that the contributions in this case helped to retire a loan (to the advocacy campaign) that Governor Siegelman had guaranteed. Despite that fact, there is no doubt that these were, in fact, actual campaign contributions rather than personal payments to Governor Siegelman. Prosecutors will not be able to show that there was any pre-*McNally* core understanding that the "honest services" implications of a campaign contribution depended, to any degree, on whether the candidate was personally liable for the campaign's expenses. In other words, even if prosecutors argued that the loan guarantee gave Governor Siegelman some degree of personal financial interest, still the fact would remain that prosecutors would be trying to expand "honest services" beyond the boundaries of the pre-*McNally* core. Such expansion is impermissible under *Skilling*. (For that matter, Governor Siegelman became a guarantor on the loan long *after* the appointment of Scrushy and long *after* Scrushy's pledge of contributions to the lottery campaign, so Governor Siegelman had no personal financial stake *at all*, not even of this indirect sort, at those times.)

officials whom they oppose or distrust, while not even investigating those towards whom they feel more favorably.[13] And allowing "honest services" prosecutions in this area would subject officials and citizens to criminal jeopardy, in an area where the line between constitutionally-protected activity and crime is still the subject of unsettled debate. *Compare U.S. v. Ganim*, 510 F.3d 134, 142 (2nd Cir. 2007) (Sotomayor, J.) (holding that a case involving political contributions requires proof of an "explicit *quid pro quo*," meaning "an express promise"), *with Siegelman*, 561 F.3d at 1226, 1228 (holding that "explicit" in this sense does *not* mean "express," and that an inferable state of mind is sufficient). This raises the fair warning concerns that are central to *Skilling*'s discussion of due process.

Therefore, given *Skilling*'s holding that limits "honest services" doctrine to its pre-*McNally* solid core, Governor Siegelman is entitled to a judgment of acquittal on all the "honest services" counts, including the related conspiracy charge, as a matter of law.

C. If there can be any "honest services" charges based on campaign contributions (especially issue-advocacy campaigns), *Skilling*'s due-process and rule-of-lenity holdings require firm application of the *McCormick* "explicit *quid pro quo*" standard, in the ordinary and undiluted sense of the word "explicit."

Even if political contributions (and in this case, an issue-advocacy

[13] *See* United States House of Representatives, Committee on the Judiciary, "Allegations of Selective Prosecution in Our Federal Criminal Justice System" (Majority Staff Report, April 17, 2008), p. ii (discussing this case).

referendum election contribution) could ever constitute "bribes" after *Skilling*, still *Skilling* should guide this Court to revisit and correct the panel's original holding about the type and degree of connection between contribution and action that must be proven in order to constitute a crime. The proper answer, guided by *Skilling*'s lessons about due process and the rule of lenity, is that a robust and undiluted application of the "explicit *quid pro quo*" standard is required – with "explicit" having its ordinary meaning, and thus requiring proof of an actual, expressly communicated promise or agreement linking the action to the contribution.

This conclusion is based on three premises, of which we believe that only one was disputed by the panel in the original opinion. The premises that we take to be undisputed are:

1. If there can be an "honest services" prosecution for official action taken allegedly in response to an issue-advocacy or campaign contribution, the governing standard is the "explicit *quid pro quo*" standard that comes from *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991) (adopting the "explicit *quid pro quo*" standard for campaign-contribution cases under the Hobbs Act). The panel stopped just short of so holding, but did not dispute the point. *Siegelman*, 561 F.3d at 1224-25. Given *Skilling*'s emphasis on the need for clarity and fair warning in criminal laws, as to where the line is drawn between lawful and unlawful conduct, surely at this point the Government will concede this.

2. If Governor Siegelman is correct that the "explicit *quid pro quo*" standard requires prosecutors to prove an express statement, promise or agreement – if "explicit" means "express" or "actually and clearly stated" in this context as it ordinarily does – then he is entitled to reversal. He would be entitled to a judgment of acquittal since there was no evidence that he made any "explicit *quid pro quo*" statement, promise or agreement in that sense. And he would at least, and solely in the alternative be entitled to a new trial, since the jury was not instructed in the "explicit *quid pro quo*" standard in this sense. The jury instructions allowed conviction without a finding of any explicitness in this sense. We take this premise to be undisputed, because the panel did not dispute it. If the panel had believed we were wrong on this point – that is, if the panel had thought the convictions could stand even if we were right on the legal issue about what the *McCormick* standard is – the panel surely would have said so. For this reason, it is unnecessary to belabor the point now.

Rather than disputing either of these premises, the panel's crucial step in its opinion on these charges was to disagree with us on the substance of the *McCormick* standard, and to deny that *McCormick*'s "explicit *quid pro quo*" standard requires proof of an express, or actual and clear, communication.

When the Supreme Court laid out the standard in *McCormick*, the Supreme Court's choice of words indicated that the standard truly does depend on whether

there was an actual and clear, express, *quid pro quo* communication. Recognizing that campaign contributions are a constant in the real life of politicians, the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n.9, 111 S.Ct. at 1815 & n.9 (formulating the question in that way). The Court declared:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only 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. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

500 U.S. at 273, 111 S.Ct. at 1816 (emphasis supplied). The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for the contribution, in which "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id*. (emphasis supplied).

Justice Stevens in dissent would have allowed conviction based on an "implicit" *quid pro quo* linkage between a contribution and a "specific" official action. *McCormick*, 500 U.S. at 282-83, 111 S.Ct. at 1821 (Stevens, J., dissenting). But the Court's opinion used a stricter standard. Not just the word "explicit," but also the word "asserts," indicate that the line as laid down by the Supreme Court

was the line between cases involving an overtly and expressly stated *quid pro quo* on the one hand, and cases involving only the potential for an implied linkage on the other.

But the panel in this case disagreed with this understanding of *McCormick*; the panel's view of the law echoed the *McCormick* dissent more than it did the *McCormick* majority. The crucial step in the panel's reasoning was the denial that "explicit," as used in *McCormick*, means "express." To the panel, there need not have been proof of any actually and clearly communicated *quid pro quo*. It is enough, according to the panel's view, if the jury can infer the existence of an unspoken agreement from the surrounding circumstances. "Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Siegelman*, 561 F.3d at 1226 (emphasis in original). The panel stated "Furthermore, an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* at 1226 (brackets in original). Likewise the panel insisted that the evidence was sufficient to prove the requisite "state[] of mind," regardless of whether a quid pro quo promise was made expressly. *Id.* at 1228.

It was this step in the argument – the panel's conclusion that when the Supreme Court in *McCormick* said "explicit *quid pro quo*," it meant to accept an implied agreement and state of mind rather than requiring any actual express

communication - that led to affirmance of Governor Siegelman's convictions. Without this step divorcing "explicit" from "express," the jury instructions were plainly inadequate; and the evidence was insufficient as well.

But with guidance from *Skilling*, it should be recognized that "explicit" in this sense really does mean the same thing as "explicit" in its ordinary usage – that is, actually and clearly stated, or express, not a mere "state of mind" or an inference about something "implied" and unspoken. The guidance from *Skilling*, again, is the Supreme Court's discussion about due process and the rule of lenity.

As the Supreme Court said in *Skilling*, one of the due process concerns in interpreting criminal laws is the importance of reducing the chance of prosecutorial arbitrariness or discrimination. *Skilling*, 130 S.Ct. at 2927-28; *id.* at 2933. That concern is very important here. All politicians must raise funds, and all politicians do things that benefit their supporters. This is the reality that the Supreme Court recognized in *McCormick*. If a criminal prosecution can be undertaken without proof of an explicit *quid pro quo*, and if instead an implicit connection between contribution and official action is enough to make out a crime, prosecutorial discretion will be markedly expanded. Prosecutors will then, in deciding whom to seek to indict, be in the position of inferring the unspoken mental states of elected officials – inferring which of them took action for "good" reasons (such as a belief that an appointee will be a valuable member of the board in question) and which of

them was motivated by "bad" reasons (contributions).

A robust application of *McCormick* requiring an actually explicit *quid pro quo* is particularly important here, since the First Amendment is implicated in both sides of the alleged connection between the contributions and the appointment. By accepting appointment to the C.O.N. Board, Scrushy was seeking to take part in the formulation and execution of public policy, through public service. By arranging for contributions to the lottery campaign, Scrushy was engaging in conduct squarely within the core of the First Amendment. Governor Siegelman, too, was engaged in conduct protected by the First Amendment, by raising funds to support the Education Lottery issue-advocacy campaign. "First Amendment freedoms need breathing space to survive." *Citizens United*, 130 S.Ct. at 892. "An intent test provides none." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 469, 127 S.Ct. 2652, 2666 (2007) (plurality opinion).

It is no answer to hypothesize that if these prosecutors ever find some other official about whom the evidence is exactly the same as it was against Governor Siegelman, they might prosecute that person as well. That is not an answer, because that is not the way high-profile prosecutions work. Cases do not knock on prosecutors' doors fully grown, asking to be prosecuted or not based on evidence already compiled. Instead, prosecutors choose which cases to *build*. Prosecutors (and their investigatory colleagues) start building cases when the evidence is only

embryonic, and is just enough to make them believe that there is something worth investigating. Then they cajole and subpoena and dig and convince, to *make* the case. The first crucial step, and the step where arbitrariness and discrimination can first take root, is the step of deciding whether a given official is worth *investigating* or not.

A governing legal standard that allows conviction of officials based not on words but on state of mind, therefore, will allow prosecutorial arbitrariness and discrimination free rein. If that is the standard, then prosecutors' initial judgments about which officials are trustworthy and which are shady – which can, too often, be an intuition that is itself tainted by political feelings – will make the difference as to which ones get investigated, and then prosecuted. Most who raise money and then take action benefiting their contributors will never even have a file opened on them in a U.S. Attorneys' Office. But those whom prosecutors distrust from the outset will be investigated, and cases will be vigorously constructed against them, if prosecutors have been told by the courts that "states of mind" are enough for conviction in this realm. A governing legal standard that requires proof of actual *communication* – a true application of the "explicit *quid pro quo*" standard – would lessen this danger appreciably.

The other aspect of *Skilling*'s due process holding – its emphasis on the importance of fair warning in criminal statutes – is also central here, as a reason to

reject the panel's reading of the *McCormick* standard. *See Skilling*, 130 S.Ct. at 2927 ("To satisfy due process, 'a penal statute [must] define the criminal offense … with sufficient definiteness that ordinary people can understand what conduct is prohibited."); *id.* at 2932 ("Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"). This area of official action, fundraising, and contributing truly is an area in which responsible officials and citizens try to know in advance, and need to know in advance, what the law is. Officials *must* raise funds; it is not optional. Similarly, officials *must* take actions of all sorts that may either help or harm the interests of those who support them; again, deciding what to do as an official, deciding whom to appoint, deciding what laws to support, these things are not optional either. These things are inherent in our democracy. Both officials and citizens want (and even need) to be able to exercise their constitutional rights, and their official powers, to the fullest; and they need clear warning in advance about where those constitutional rights end and where criminal jeopardy begins.

A person in Governor Siegelman's position – faced with the necessity of fundraising, and also with the task of making appointments – could not have known or understood in advance that this Court would eventually declare that "explicit," in the *McCormick* standard, does not mean "express." A person in that

position could not have known that a court would accept an "implied" agreement, inferred as a "state of mind," to be an "explicit" agreement.

A person hoping to understand the law in advance, to predict what was permitted and what was not, could have reasonably believed and understood that when the Supreme Court used the word "explicit" in *McCormick*, it meant what the word ordinarily means: clearly and actually stated, or in other words, express. The Oxford dictionary, for instance, defines "explicit" as "stated clearly and in detail, leaving no room for confusion or doubt."[14] For that matter, some courts have taken the word "explicit" to require even *more* overtness, clarity and directness than the word "express." *See U.S. v. Figueroa*, 105 F.3d 874, 877 (D.C. Cir. 1996). This underscores the point that it could never have been clear, in advance, that a panel of this Court would eventually adopt exactly the opposite conclusion as the justification for a criminal conviction. And other courts have taken the word "explicit" in the *McCormick* formulation to mean just what we are arguing here: express, or spoken outright. *See*, *e.g.*, *Ganim*, 510 F.3d at 142 (holding that a case involving political contributions requires proof of an "explicit *quid pro quo*," meaning "an express promise") (Sotomayor, J.).

In divorcing "explicit" from "express," the panel quoted a Sixth Circuit case. *Siegelman*, 561 F.3d at 1226, *citing and quoting U.S. v. Blandford*, 33 F.3d 685,

[14] <http://www.oxforddictionaries.com/definition/explicit?view=us>.

696 (6th Cir. 1994) ("*Evans* [*v. United States*, 504 U.S. 255, 112 S. Ct. 1881 (1992)] instructed that by 'explicit' *McCormick* did not mean express"). But even in the Sixth Circuit, *Blandford*'s treatment of *quid pro quo*, *McCormick* and *Evans* is now recognized as *dicta* and is not followed. *U.S. v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009). The Sixth Circuit recognizes that, rather than diluting the word "explicit" in campaign-contributions cases, "*Evans* modified the standard in non-campaign contribution cases." *Abbey*, 560 F.3d at 517. In any event, even if the Sixth Circuit had not later abandoned *Blandford* (as it has), still *Blandford* as contrasted with *Ganim* would at least demonstrate that there is ambiguity and lack of clarity here.

Due process as explained in *Skilling* does not allow a conviction under these circumstances. The panel's interpretation – that "explicit" does not mean "express," and that an implied agreement or state of mind can count as an explicit *quid pro quo* – is an example of what Justice Scalia rightly warned against: "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich*, 129 S.Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Under *Skilling*, honest services convictions are supposed to be limited to what has been well understood by long consensus as being covered. Therefore, even if a campaign- or issue-advocacy contribution case can be an "honest services" case at all, a conviction certainly cannot be justified on

the basis of a surprising, and (to say the least) reasonably disputable, interpretation of the "explicit *quid pro quo*" standard.[15]

2. *Skilling* requires reversal of the conviction on the § 666 charge as well.

Besides the "honest services" charges, the only other charge relating to the C.O.N. Board appointment was count three, under 18 U.S.C. § 666(a)(1)(B). With guidance from *Skilling*, reversal of the conviction on this count should follow as well.

Skilling is relevant to this charge for two reasons. First is the passage of the *Skilling* opinion, manifesting the Court's expectation that (at least in some respects) "honest services" law and § 666 would receive similar interpretations. *See Skilling*, 130 S.Ct. at 2933. Second, and as we have discussed above, the lesson of *Skilling* is not just about "honest services" in particular. It is about fair warning, and due process, in the interpretation of criminal laws in general. The

[15] As explained above in Section 1(b), here again prosecutors would gain no ground by pointing to the fact that – long *after* the appointment of Scrushy to the Board – Governor Siegelman became a guarantor of a loan to the pro-lottery campaign. It is not uncommon for candidates or officials to personally guarantee loans to their campaigns, or even to loan money of their own to their campaigns, and then to retire those loans with campaign contributions. (Recall, for instance, now-Secretary of State Clinton's multi-million dollar loan to her own campaign in the 2008 Presidential primary battle.) We are not aware of any case, from any court, holding that the existence of such an arrangement changes the *McCormick* standard for that particular candidate or official. If prosecutors tried to make such an argument, they would be doing precisely what due process and *Skilling* forbid: making up the criminal law as the case goes along.

criminal law is supposed to give notice of what is covered, in advance, so that people can know – before they act – where the line is drawn that makes the difference between liberty and prison. Furthermore – and particularly important to a case like this one, that demonstrates the danger of prosecutorial power to pick and choose which elected officials are to be targeted for years of intense investigation and which are not – the laws must be clear enough to reduce the danger of arbitrary or discriminatory prosecutorial choices.

> To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Skilling, 130 S.Ct. at 2927-28. The operative due-process concerns, as the Supreme Court stated again in *Skilling*, are "(1) fair notice, and (2) arbitrary and discriminatory prosecutions." *Id.*, 130 S.Ct. at 2933.

Here, § 666(a)(1)(B) itself does not speak with clarity as to whether an appointment influenced by an issue-advocacy contribution is *ever* a violation. Much less does § 666(a)(1)(B) itself speak to *when* such an appointment or receipt of such a contribution is a crime, if it ever can be. These are questions that the words of the statute do not answer. The problem inheres, especially, in the statute's word "corruptly." There is a crime under § 666 only if (among other elements) a thing of value is solicited or accepted received "corruptly." What is

the legal definition of what constitutes "corruption," in the realm of contributions to issue-advocacy campaigns (or even to ordinary electoral campaigns)? The statute does not say. Just as we have discussed with regard to "honest services" above, the better answer therefore is that the receipt of such contributions is wholly outside § 666(a)(1)(B).

But if the solicitation or acceptance of campaign contributions (with all their First Amendment implications, as discussed above) is ever to be a crime under § 666, then surely at least the reasonable understanding is that prosecutors must satisfy the *McCormick* "explicit *quid pro quo*" standard – with "explicit" here having its ordinary meaning, rather than an unusual and diluted meaning in which it is equivalent to "implied." As we have explained above, it was and is certainly impossible for any reasonable person to know, with the clarity required by due process and fair warning, that the solicitation or receipt of campaign contributions could be a crime on anything less than a truly "explicit," meaning express or actually communicated, *quid pro quo*. No one could be charged with the duty to have foreseen that the panel, in its prior opinion in this case, would treat "explicit" as including a mere inferred state of mind. And allowing prosecutors to target officials for conviction based on attribution of unspoken thoughts, without proof of explicit communications, raises the due process concerns about arbitrary enforcement that the Supreme Court warned of in *Skilling*. All of these are the

due-process concerns that derive from *Skilling*, and that affect the § 666 charge just as they do the "honest services" charges. Having explained these points at greater length in Section 1(c) of the Argument above, we will not repeat them here.

The jury instructions in this case did not convey the principle that the prosecutors must prove a truly "explicit *quid pro quo*"; and furthermore, prosecutors did not prove such a thing beyond a reasonable doubt. Therefore, the due process considerations discussed in *Skilling*, and the rule of lenity that was reaffirmed in *Skilling*, require that Governor Siegelman receive a judgment of acquittal on this count, or at the very least a new trial at which the jury is instructed definitively that prosecutors must prove a truly "explicit" *quid pro quo*.[16]

3. Guidance from *Skilling*, about the importance of fair warning in the interpretation of criminal laws, requires reversal of Governor Siegelman's conviction under 18 U.S.C. § 1512(b)(3).

Skilling should also lead to reversals of Governor Siegelman's conviction on the only charge that was not about the C.O.N. Board appointment: the 18 U.S.C. § 1512(b)(3) charge, relating to Bailey's purchase of the remaining interest in the motorcycle.

As we have discussed above, the Supreme Court's decision in *Skilling* was not just a matter of what "honest services" means. Beyond that, and even more

[16] As we have also noted above, Governor Siegelman continues to rely on arguments previously made during the original briefing. This includes the argument that the § 666 charge against him was barred by the statute of limitations.

importantly, *Skilling* was an important lesson about the importance of restraint in interpreting criminal statutes. It was a lesson about what courts must do, in the too-frequent situations in which prosecutors try aggressively to read criminal statutes broadly. When prosecutors do that – either by taking an unclearly-written statute as far as it can be stretched (as in the "honest services" or § 666 context), or by ignoring the limitations of a clear statute (as in this present issue) – the judicial role involves reining them in. That is an important part of due process, as *Skilling* teaches.

The panel opinion did not uphold these principles, and instead affirmed the conviction on the § 1512(b)(3) charge in an opinion that strayed from the plain language of the statute. With guidance from *Skilling*, and therefore returning to the plain language of the statute, Governor Siegelman should receive a judgment of acquittal on this count as well. He simply did not violate this law as it is written.

Count 17 charged Governor Siegelman under a particular subsection of one of the many "obstruction of justice" statutes that appear in the U.S. Code: 18 U.S.C. § 1512(b)(3). That subsection provides in pertinent part for criminal liability on anyone who "knowingly … corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to … (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or

possible commission of a Federal offense …"

The panel upheld the conviction on this count, portraying the evidence as allowing the inference that Governor Siegelman took part in an effort to create documents (including the check that was the gravamen of this count) to "cover up" an earlier, allegedly improper, payment. *Siegelman*, 561 F.3d at 1235. (As noted above, though, the jury rejected the charges relating to the earlier payment itself.) That non-statutory term – "coverup" or "coverup," repeated at least 15 times in the panel opinion – was the centerpiece of the opinion's reasoning on this charge.

The reasoning's focus on that non-statutory word, to the exclusion of the statute's precise language about the required proof of a particular intent, led to an impermissible broadening of the scope of the statute. If the panel had focused instead on the actual language of the statute, including the requirement of proof of "intent to … hinder, delay or prevent communications" to law enforcement, it would have been clear that Governor Siegelman is entitled to a judgment of acquittal. There was simply no evidence that Governor Siegelman harbored that intent.[17]

The theory of the prosecution was that Governor Siegelman "persuaded"

[17] We do not agree that Bailey's purchase of remaining interest in the motorcycle was even a "coverup." But, as discussed in the argument above, that is not the issue from a legal perspective; and so we focus our argument on the applicable legal standard, not on the question of whether there was a "coverup" in the colloquial sense.

Bailey to write the check and that he and Bailey misled Bailey's counsel about the nature of it. (The statute, as noted above, requires proof that the defendant persuaded, misled, or did some other specified things to another, with the requisite intent.) Neither of those assertions, we believe, can fairly be inferred from the evidence. There was literally no evidence that Governor Siegelman persuaded Bailey. Bailey was on the witness stand as the Government's star witness, testifying under an agreement whereby he had to, and would, give the Government everything he could. He said nothing supporting the inference that Governor Siegelman persuaded him; his testimony, as recounted above, was just the opposite. If review of factual issues means anything on appeal, then the § 1512(b)(3) count must be reversed on this basis.

But whether the charge was that Governor Siegelman "persuade[d]" or "engage[d] in misleading conduct," the statute also required proof of a particular intent: the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." And there was literally no evidence that would reasonably allow the inference that Governor Siegelman had that intent with regard to Bailey, or Bailey's counsel (or, for that matter, Young). There was no reason to believe that any of them had the slightest thought of making any communication to law enforcement, such that Governor Siegelman

would have developed the intent to hinder, delay, or prevent them from doing so. There is no evidence to support the view that, in regard to this check, Governor Siegelman had that particular intent – the intent to hinder, delay or prevent Bailey, or Bailey's counsel, or Young, from communicating information to law enforcement.

This statute, in other words, prohibits efforts to stop or keep people (by persuasions, threats, or trickery) from providing information to law enforcement, or at least to slow them down from doing so. That is the plain meaning of the "intent to hinder, delay or prevent" portion of the statute. There are a whole array of other obstruction statutes, including various other subsections of § 1512 itself, that are meticulously written to cover other sorts of situations. Some of those might perhaps be said, colloquially, to cover many varieties of "coverups" in some defined types of situations. But the statute at issue in this case has a narrow focus, by its plain terms.

As originally drafted, § 1512(b)(3) might well have covered anything coming within the colloquialism "coverup." That is, the original version contained a catch-all provision reaching anyone who "corruptly … intentionally influences, obstructs, or impedes or attempts to influence, obstruct, or impede the … enforcement and prosecution of federal law." S. 2420, 97th Cong., 2d Sess., sec. 201(a), § 1512(a)(3), 128 Cong. Rec. S11, 439 (daily ed. Sept. 14, 1982). But

Congress did not pass the statute in that form. Instead, it enacted a law that omitted the catch-all provision. The change was intentional, precisely because the Congress did not want a catch-all provision in this law. 128 Cong. Rec. S13063 (*daily ed*. October 1, 1982), *quoted in U.S. v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984). Prosecutors in this case should not be allowed to treat § 1512(b)(3) as if it were the "catch-all" obstruction law that Congress decided not to make.

The nonstatutory paraphrase "cover up" entered this Court's § 1512(b)(3) caselaw in *U.S. v. Veal*, 153 F.3d 1233 (11th Cir. 1988). But *Veal* does not, and could not, stand for the proposition that the catch-all phrase "cover up" is a valid legal substitute for proof of intent to "hinder, delay or prevent" communications to law enforcement. *Veal* was different from this case, because of the nature of the charges in the *Veal* indictment. The charge in *Veal* was that the defendants had engaged in misleading conduct towards law enforcement investigators, with the intent to hinder, delay or prevent them from discovering inculpatory information and then passing it on to others in law enforcement. Thus, under the particular circumstances in *Veal*, it made sense to speak in shorthand of a "coverup" – because it was the "coverup" (colloquially speaking) that misled law enforcement, and which in turn hindered, delayed or prevented them from making further communications.

This case is different, and the shorthand "coverup" cannot substitute for the required intent in this case, because of the nature of the charges. Governor Siegelman was not charged with engaging in misleading conduct towards law enforcement officers, or with having the intent to hinder law enforcement officers' communications. The people whose communications he allegedly intended to hinder, delay or prevent, according to the indictment, were Bailey, Bailey's counsel, and Young. [R1-61, p. 40]. So speaking colloquially of a "coverup" here does not address the question of whether there was the "intent" that this particular statute forbids.

The panel did not suggest that there was evidence to come within the text of this statute, once the entire text of the statute, including its "intent" clause, is considered seriously. Nor did the prosecution so suggest during prior briefing to this Court, for that matter. There is absolutely no evidence that Bailey would have given information to law enforcement, such that Governor Siegelman's receipt of the check was done with the intent to *hinder, delay or prevent* Bailey from doing so.[18] Nor is it plausible to suggest that Governor Siegelman had that intent as to

[18] It had been Bailey, by his own account, who had the idea and suggestion that he would buy the motorcycle from Governor Siegelman with a loan from Young. It had been Bailey, by his own account, who later decided to repay Young. Bailey was, by his own account and his own actions, fully committed to the proposition that this was truly a purchase of a motorcycle by him, well before the check that was the gravamen of this count. Citation and quotations from Bailey's testimony, confirming these points, appears above in the statement of facts. There was no

Bailey's counsel, the person allegedly misled. There is simply no way that Bailey's own lawyer would have gone to law enforcement to inculpate Bailey and Siegelman, such that Bailey and Siegelman would have misled him *in order to stop him*; that is the antithesis of a lawyer's role. But only that sort of far-fetched suggestion, or something else equally lacking in evidentiary foundation, could bring the case within § 1512(b)(3), once one focuses (as the panel did not) on the words of the statute.

Skilling provides guidance in this part of the case as well. The reason is that *Skilling* stresses the importance of notice and fair warning in the criminal law: statutes must give fair warning of what they prohibit. This is, as *Skilling* notes, a constitutional command. "To satisfy due process, 'a penal statute [must] define the criminal offense … with sufficient definiteness that ordinary people can understand what conduct is prohibited …'" *Skilling*, 130 S.Ct. at 2927. This constitutional command necessarily implies the corollary: if a statute *is* written with sufficient definiteness to give fair warning (as § 1512(b)(3) is), then it must not be expanded through paraphrase to cover things beyond that zone of fair warning. *See Skilling*, 130 S.Ct. at 2931 ("Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.").

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reason for anyone to have had the slightest thought that there was any need to do anything further to commit Bailey and Young to that understanding.

In the earlier briefing, and again in oral argument to the panel, Governor Siegelman repeatedly noted the prosecutors' duty to prove, and their failure to prove, this element of § 1512(b)(3). (*See*, *e.g.*, Siegelman opening brief, filed May 2008 pp. 64, 69; reply brief, filed September 2008, pp. 27, 31-35 & n.8); *see also* (according to recollection of counsel) recording of oral argument). No reasoned opinion could have been written declaring the evidence sufficient to show an actual intent on Governor Siegelman's part to "hinder, delay or prevent" within the statute's actual terminology. Had it been possible to write such an opinion, the panel would no doubt have written it, rather than writing more generically about "coverup." But it was, and it still remains, impossible to put the evidence in this case within the words of the statute.[19]

If the Government fights this conclusion, it will simply be an example of what Justice Scalia was warning about in *Sorich*, and of what the Supreme Court was trying to prevent in *Skilling*: the danger that headlines-seeking prosecutors, having found someone whom they consider to be a wrongdoer, will stretch the law and the facts to get and to keep a conviction. It is the judiciary's role to ensure that the criminal law is not abused in that way.

[19] Even if this issue were for any reason reviewed for plain error, it is plain error to allow a conviction to stand where there is no proof on one of the elements of the crime. *See*, *e.g.*, *U.S. v. Whitfield*, 590 F.3d 325, 347 (5th Cir. 2009).

Conclusion

The impact of *Skilling* on this case comes not only from the Supreme Court's narrowing of "honest services" doctrine. It comes, also, from *Skilling*'s broader lessons about the nature of our criminal law. In our system, the laws are to be clear in advance. If there is a fair question about a law's coverage, the question must be resolved against the prosecutors. These principles are all the more important in a case like this one, which is at the intersection of law, electoral politics, and constitutionally protected activity; in this area above all, the dangers of prosecutorial overreaching are enormous. For the reasons stated herein, the judgment of conviction should be reversed. Governor Siegelman should receive a judgment of acquittal, or at least a new trial.

Respectfully submitted,

Vincent F. Kilborn, III
David A. McDonald
Kilborn, Roebuck & McDonald
Post Office Box 66710
Mobile AL 36606
(251) 479-9010

Redding Pitt
Farris, Riley & Pitt, LLP
Massey Bldg., Suite 400
2025 Third Ave. North
Birmingham AL 35203
(205) 324-1212

Sam Heldman
The Gardner Firm
2805 31st St. NW
Washington DC 20008
(202) 965-8884

Robert D. Segall
Copeland, Franco, Screws & Gill, PA
444 South Perry St.
P.O. Box 347
Montgomery AL 36104
(334) 834-1180

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James K. Jenkins
Maloy & Jenkins
75 14th St. NE, Suite 2500
Atlanta, GA 30309-3676

John Alex Romano
United States Department of Justice
P.O. Box 899, Ben Franklin Station
Washington, DC 20044

Louis V. Franklin, Sr.
Acting U.S. Attorney
P.O. Box 197
Montgomery, AL 36101-0197

Bruce Rogow
Bruce Rogow, PA
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394

_____
Vincent F. Kilborn, III