


TO: Anne Bast Brown, Esq., Levy County Attorney  
President, Florida Association of County Attorneys

FROM: Herbert W.A. Thiele, Esq., Leon County Attorney 

RE: Overview and Analysis of McDonnell vs. United States  
("Honest Services Fraud") Case

As discussed, at the Board of Director's Meeting of the Florida Association of Counties on Wednesday, June 29, 2006, the below is our analysis of the recent McDonnell vs. United States U.S. Supreme Court decision and its impact on "honest services" fraud prosecutions.

From a historical perspective, the Federal Mail Fraud Statutes have actually been around since the 1870's. The Mail Fraud Statute, 18 U.S. Code Section 1341, as well as the companion Wire, Radio, or Television Fraud Statute, 18 U.S. Code Section 1343, together provide that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted" by means of mail, wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned not more than 20 years, or both. Under 18 U.S. Code Section 1346 the phrase "scheme or artifice to defraud" is defined as a scheme or artifice or deprive another of the intangible right of "honest services".

Over the years, the term "honest services", while not defined in the Federal Statutes, has withstood numerous court challenges over void for vagueness claims. In addition, the United State Justice Department, in conjunction with the FBI, have prosecuted many prominent national, state, and local officials, including hundreds in Florida. While the statutes in all states also contain anti-bribery provisions, the significant focus on public corruption by the U.S. Attorneys in jurisdictions across the Country have brought the "honest services" prosecutions to the forefront.

Following the significant reliance on "honest services" prosecutions by Federal Government in the last two decades, the U.S. Supreme Court issued its ruling in the case of Skilling v. United States, 130 S. Ct. 2896 (2010) which involved former Enron CEO Jeffrey K. Skilling. In May of 2006, a jury convicted Mr. Skilling of 1 count of conspiracy, 12 counts of securities fraud, 5 counts of making false representations to auditors and 1 count of insider trading. Part of the conspiracy conviction was premised on "honest services" fraud. On appeal to the United State Supreme Court, the Court upheld the Honest Services Statutes as constitutional, finding that it was not unconstitutionally vague when properly confined to bribery and kick-back schemes. However, the Court did narrow the scope of "honest services" fraud by finding that the non-disclosure of a conflict of interest (or undisclosed self-dealing/self-enrichment) was not a violation of this Statute if there were no underlying bribes or kick-backs from a third party.

Nevertheless, the U.S. Supreme Court did not reverse any of Mr. Skilling's convictions, but remanded the case to the 5<sup>th</sup> Circuit Court of Appeals to determine whether the instructions to the jury about "honest services" amounted to harmless error. Ultimately, the Court of Appeals

affirmed Mr. Skilling's convictions on all counts. He was sentenced to 24 years in prison, and after years of legal negotiations, an agreement was reached which reduced his sentenced to 14 years, in exchange for his forfeiture of certain property and the payment of over \$41 Million Dollars in restitution to the Enron Fair Fund to help the victims of Enron's collapse.

It had been widely speculated that the Skilling decision would significantly reduce the number of "honest services" fraud prosecutions. However, as stated in an article published online in *The National Law Journal*, "(It) appears that rumors of the death of "honest services" fraud cases were greatly exaggerated. Prosecutors continue to prosecute these cases, and Appellate Courts continue to readily uphold these prosecutions."

This then brings us to the case involving former Virginia Governor Robert F. (Bob) McDonnell. On September 4, 2014 the former Governor and his wife, Maureen Jean McDonnell, were found guilty of several counts of public corruption by a federal jury in Virginia. Mr. McDonnell was convicted of 11 of 13 counts, including 3 counts of honest services wire fraud, 6 counts of obtaining property under color of official right, 1 count of conspiracy to commit honest services wire fraud, and 1 count of conspiracy to obtain property under color of official right. Mrs. McDonnell was convicted of 9 of 13 counts, including 2 counts of honest services wire fraud.

It was alleged that the McDonnells participated in a scheme to use the Governor's official position to enrich themselves soliciting and obtaining \$175,000.00 in loans and gifts from the former CEO of a company that sold dietary supplements. In exchange for cash, loans, golf outings, golf equipment, luxury goods, designer clothes, trips, and private plane rides, the former Governor allegedly performed official actions to help legitimize, promote, and obtain research studies for the dietary supplements.

However, the former Governor appealed his convictions all the way to the U.S. Supreme Court, and on June 27, 2016 the Supreme Court made its ruling. Although the Court once again rejected arguments that the Honest Services and Hobbs Acts were unconstitutionally vague, the Court did vacate the Governor's convictions and remanded the case back to the lower court, finding that the instructions to the jury concerning the meaning of the term "official act" were incorrect, and which may have led the jury to convict the Governor for conduct that was not unlawful. The Supreme Court adopted a more limited interpretation of an "official act" by a public official, finding that it was not enough to merely set up a meeting, call another public official, or host an event to discuss a particular issue. Rather, in order to convict Governor McDonnell, the jury had to find that the Governor took action, or agreed to take action, on the issue, such as exerting pressure on other public officials to initiate research studies on the dietary supplements. The Supreme Court thus concluded its opinion as follows:

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

McDonnell v. United States, No. 15-174, SO. at 28 (U.S. June 27, 2016)

While it remains to be seen whether this case will now have an impact on reducing the number of “honest services” fraud prosecutions, it has not been without immediate negative reaction by legal scholars. For example, as was quoted in the publication *Governing Daily* in its June 29, 2016 (article by Alan Greenblatt), a political scientist at the University of Mary Washington in Virginia, Stephen Farnsworth, stated: "The Supreme Court decision really gives a green light to elected officials to solicit whatever goodies they may wish, as long as they're not clear about doing anything in return". While some legal experts thought the ruling was sensible and correct because prosecutors had failed to show he had done favors for a wealthy donor that he might not have done for any other constitute. As also mentioned in the article, Daniel Richmond, a former federal prosecutor who teaches law at Columbia University, stated “When, in the future, prosecutors agree to these instructions, juries might well have no problem convicting in similar cases”.

My office will continue to monitor “honest services” fraud cases as they move forward through the court systems, it will be interesting to see whether the combination of the Skilling decision and the McDonnell decision has a significant impact on the use of “honest services” fraud for bribery and kick-back prosecutions.

If you would like any further information on this matter, please do not hesitate to contact me at the Leon County Attorney’s Office.