IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:10-cr-186-MHT**
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

TOM COKER'S REPLY TO THE GOVERNMENT'S RESPONSE TO COKER'S MOTION FOR JUDGMENT OF ACQUITTAL AFTER DISCHARGE OF THE JURY

Tom Coker, by and through his undersigned counsel, submits the following brief in response to the Government's opposition to his Motion for Judgment of Acquittal and Motion to Dismiss. At issue are: 1) Coker's Motion for Judgment of Acquittal After Discharge of the Jury (Doc. 1748) and 2) Coker's Motion to Dismiss Counts 1, 8 and 31 of the Indictment (on Double Jeopardy grounds) (Doc. 1869)[1]. These motions are due to be granted.

Argument

Having been acquitted by the unanimous verdict of the jury on 11 of the 14 counts he faced, this brief concerns the only three counts remaining against him: 1) Count One (conspiracy); 2) Count Eight (bribery-Preuitt); and 3) Count Thirty-One (honest services wire fraud).

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[1] Coker originally raised the Double Jeopardy issue, among other issues, in his Motion for Judgment of Acquittal. (Doc. 1748 filed on 8/25/11). The Government responded. (Doc. 1852 filed on 9/30/11). Thereafter, Coker filed a Motion to Dismiss (and Brief) exclusively related to the Double Jeopardy issue. (Doc. 1869 on 10/3/11).

Standard for Granting

The Government's brief string cites numerous snippets from cases, wherein it asserts, in effect, that a Motion for Judgment of Acquittal should never be granted. In support of its argument for this insurmountable burden, the Government writes:

> [a] defendant carries a heavy burden in challenging the sufficiency of evidence under Rule 29. *See, United States v. McCarrick,* 294 F.3d 1286, 1290 (11th Cir. 2002) (noting the defendant's sufficiency of the evidence burden on appeal).

Government's Brief p.4 (Doc. 1852). While it is admittedly a heavy burden, it is not an impossible one. In fact, in *McCarrick* the Eleventh Circuit actually reversed convictions (not hung jury counts) and the full quote is as follows:

> While we recognize that McCarrick shoulders a heavy burden in challenging the sufficiency of evidence supporting his convictions, **we must nevertheless be satisfied that, after drawing all permissible inferences in favor of government, the jury was rationally able to find that every element of the charged crimes was established by the government beyond a reasonable doubt**.

Id. at 1290 (emphasis added). The Court went on to write:

> Although a jury has wide latitude to determine factual issues and to draw reasonable inferences from circumstantial evidence, this power is not without limits, and this Court cannot affirm a criminal conviction by an unlimited application of a jury's 'power to infer' no matter how attenuated the link between the evidence and the defendant's guilt on a necessary element of the offense of conviction.

Id. at 1293-94.

Furthermore, Rule 29 is an essential tool in the Federal Rules of Criminal Procedure to prevent injustice and "must" be utilized by this Court under the circumstances similar to those presented in this case.

> We are aware that in evaluating the sufficiency of the evidence the reviewing court must view the evidence in the light most favorable to the government.... Nonetheless, a trial judge **has the duty to grant the motion** for judgment of acquittal when the evidence, viewed in the light most

> favorable to the government, is so scant that the jury could only speculate as to defendant's guilt.

United States v. Herberman, 583 F.2d 222, 231 (5th Cir. 1978) (reversing convictions where the Government's proof depended primarily on the testimony of patients of Dr. Herberman which was clearly insufficient) (emphasis added). The evidence against Coker was so scant that the jury could only speculate as to his guilt.

Interestingly, all thirteen cases cited by the Government in its brief involved appeals from convictions. Therefore, those defendants were faced with seeking reversals of unanimous verdicts of guilt by juries who heard the testimony, examined the evidence, assessed credibility and determined the defendants were guilty. In the instant action, no such verdicts exist. The Government is not defending verdicts in its favor, but rather, this motion is assessed within an environment in which the jury found Coker not guilty on 11 counts and could not reach a verdict on 3 others. Without further knowledge, these remaining counts could have been on votes of 11-1 in Coker's favor (or vice versa). However, as noted in *Yeager v. United States*, 129 S.Ct. 2360 (2009), a hung jury is a "nonevent". The Court noted "a hung count hardly makes the existence of any fact ... more or less probable. A host of reasons–sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few–could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork." Id. at 2367. Unlike all the cases cited by the Government, this case does not have the unanimous verdict of a jury to support its position. Therefore, the Government must defend on the facts presented at trial–facts woefully insufficient to require a retrial of this matter. Coker's motion is due to be granted.

Argument

Consistent with its presentation at trial, the Government has not and cannot produce any evidence sufficient to require Coker to be submitted to a retrial as to any of the remaining counts against him. Hidden among its 64 page brief are few references to Tom Coker. The portions of the Government's brief that relate to Coker are 2 ½ pages as to the bribery of Preuitt (pp. 31-33); one paragraph as to the conspiracy count (p. 44); and one paragraph as to the honest services fraud (p. 49). When Tom Coker's conduct is viewed in light of the specific evidence against him, the Government's case miserably fails to provide sufficient evidence.

Bribery: Specifically, with regard to Count 8 (bribery of Preuitt), there is no evidence that Coker gave, offered or agreed to give anything of value to Preuitt. There is no evidence that Coker had corrupt intent. Nor is there any evidence of an explicit *quid pro quo* – that Coker offered anything of value to Preuitt in exchange for his vote. In support of its position, the Government resorts to sound bites, hoping this Court will infer sinister motives where none exist because of the total lack of proof on its behalf. The Government recites the familiar lines of "icing on the cake" and "delivering the cheese", hoping this Court will ignore their context. The "icing on the cake" comment occurred before Coker knew of Gilley's intentions and "I'm spending a lot of your money" (aka the "delivering the cheese" comment) is said to McGregor and keeps being repeated by the Government despite the fact that Coker is not and never has been charged with delivering any of McGregor's money to any of the defendants in this case.

Conspiracy: There is no evidence that Coker had an agreement with anyone to commit any crime nor that he joined into any such agreement. The Government's summary of its evidence amounts to assertions that Coker "the dean of lobbyists" was

having frequent contact with other lobbyists and discussing how senators were posturing with regard to SB380. So was every lobbyist, legislator, special interest proponent/opponent of the bill, news reporter, and anyone else who was interested in the 2010 legislative session. Without more, the evidence against Coker is insufficient.

Honest Services Wire Fraud: There is no evidence that Coker devised or participated in a scheme to defraud anyone of anything. There is no evidence that Coker utilized false or fraudulent pretenses about a material fact, nor is there any evidence that Coker had the intent to defraud anyone. In fact, the entirety of the Government's response as to Coker on the Honest Services count (Count 31) bears repeating here:

> As to defendant Coker, the fact that he was a party to one of those interstate calls, Count Thirty-One, establishes conclusively that the use [sic] interstate facilities was foreseeable to him in the commission of the honest services scheme–certainly in light of the fact that, in the call, he and defendant McGregor discuss defendant Preuitt and his vote.

(Government's Brief p. 49). Merely having a telephone conversation about Senator Preuitt's position on SB380 is insufficient to allow the Government to go forward with a retrial. If it is, then everyone interested in the bingo legislation would be subject to criminal liability as this legislation and how people would vote on it were common topics of conversation. Especially since it was well known that Senator Preuitt was one of the senators that might go either way with regard to this bill.

Evidence at Trial

Tom Coker can get lost in the Government's response which addresses various issues, motions and all remaining defendants. It is therefore essential to refocus on the evidence that dealt specifically with him. The majority of witnesses called in this case did not mention Tom Coker. Those who did mainly testified favorably as follows:

Scott Beason testified that Coker did not have any conversation with him concerning the gambling legislation. (Trial Transcript (hereinafter "TT") 6/13/11 P.94 L.15-17; also 6/15/11 P.218 L.23 - P.219 L.8). **Barry Mask** testified that he had known Tom Coker for a long time and Coker had never asked him to do anything illegal, unethical or improper. (TT 6/20/11 P.238 L.2-14). **Benjamin Lewis** testified as follows on June 23rd:

Q. [by Baxley]. You know who Tom Coker is, my client, don't you?

A. Yes, sir.

Q. You know he's been around up there for thirty, forty years.

A. A long time.

Q. Is that right?

A. Yes, sir.

Q. Has Tom Coker ever asked you to do anything illegal?

A. No, sir, never.

Q. Or improper or unethical?

A. No, sir.

Q. So the first time we're clear that you were offered anything for your vote was by Ronnie Gilley, and you realize not only Tom Coker, but all these other folks have been up there for many terms, hasn't he?

A. Yes, sir.

(TT 6/23/11 P.57 L.2-16). Lewis testified that this was true even though he had received campaign contributions from Coker in the past. (TT 6/23/11 P.76 L.7-16). **Jim Sumner** testified that as long as he had been the Executive Director of the Alabama Ethics Commission (14 years) nobody has "ever filed a complaint against Mr. Coker". (TT 6/23/11 P.221 L.21-24). **FBI Special Agent George Glaser** testified that Senator Preuitt

had told him that Tom Coker was a "dear friend...one of the best lobbyists in the state...." Preuitt further stated that Coker "had said that Preuitt's friendship and reelection were more [important to] him than how he voted on the Bingo bill...." (TT 7/21/11 P.26-27).

Gilley, Massey and Pouncy

If there is "sufficient evidence" to require Coker to submit to a retrial, it must come from Ronnie Gilley, Jarrod Massey or Jennifer Pouncy. The Government correctly notes that this Court "must accept all reasonable inferences and credibility determinations made by the jury". (Government's Brief p.4). However, the only reasonable inference from the jury's verdict is that they determined that Gilley and Massey were not credible witnesses. While Pouncy did not implicate Coker in any of her testimony, she did testify that Massey embellished, exaggerated, lied about a lot of things and in her opinion is not an honest person.[2] (TT 7-21-11 P.85). When asked about his own credibility, Massey testified that he is not an honest person. (TT 7/14/11 P.86). Similarly, Massey testified that Gilley "had issues at time with the truth" and "shown he's not truthful". (TT 7/14/11 P.51). It is in light of these witnesses' credibility that Coker's liability rises and falls.

Coker's involvement with the allegations of the indictment are very limited and short-lived. Coker never offered Senator Preuitt (or any one else for that matter) anything in exchange for his vote. Even in a light most favorable to the Government, the evidence is simply that Gilley offered to support Senator Preuitt in a "significant way" and Coker tried to find out what that meant. (TT 7/7/11 P.148 L.21 - P.149 L.4). There is no evidence that Coker ever offered anything to Preuitt, thought that what Gilley was

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[2] The Government writes in its brief that "Pouncy also testified that defendant Coker was working with with [sic] other bingo operators to put together a deal for defendant Means." (Government's Brief p.44). This is another smoke screen as Coker was not charged with bribing Means, nor is this an overt act alleged in the conspiracy count.

suggesting was a good idea or even passed it along to Preuitt. Most importantly Coker never sought to obtain Senator Preuitt's vote in exchange for anything.

The Government's evidence was that Coker first called **Jarrod Massey** who testified that he did not provide any details to Coker but referred him to Ronnie Gilley so that Coker could hear it from the "horse's mouth". (TT 7/14/11 P.62). Specifically, Massey stated:

> Q. Okay. All right. And so Mr. Coker, you are going to have Mr. Gilley get in touch with Mr. Coker and explain to him what the approach is with regard to Senator Preuitt right?
>
> A. I was going to have Mr. Gilley share with whatever he felt comfortable sharing with Mr. Coker.
>
> Q. And, and Mr. [Gilley] has already testified you weren't a party to that call, correct?
>
> A. I don't know what he's testified to.
>
> Q. Okay. And you weren't a party on the call either.
>
> A. I was not a party to that particular call.

(TT 7/14/11 P.63).

Accordingly, the evidence of what was discussed must come from **Ronnie Gilley** who only had one conversation with Tom Coker in his life. (TT 6/28/11 P.297 L.18 - P.298 L.5). Gilley even acknowledged that he did not have a personal relationship with Coker. (TT 7/6/11 P.202 L.1-3). Agent McEachern clearly testified that the "Gilley folks" included Gilley, Massey, Pouncy and not Tom Coker. (TT 6/30/11 P.34 L.13-18) .

The sole conversation Coker and Gilley had related to Senator Preuitt. Gilley offered to support Senator Preuitt in a "significant way" and Coker called to find out what that meant. (TT 6/28/11 P.299 L.1-3; and 7/7/11 P.148 L.21 - P.149 L.4). Interestingly, Gilley summarized that all he discussed with Coker regarding Preuitt was "The

Democracy Tour". (TT 7/7/11 P.148 L.22). Jarrod Massey testified that he never heard the phrase "Democracy Tour". (TT 7/14/11 P.63). Gilley's only conversation with Coker concerned Gilley offering country music celebrities for Senator Preuitt's election. (TT 6/28/11 P.298 L.21-25). There was no evidence that Coker thought this was a good idea, in fact the inferences were that he did not think so. After this single conversation, Coker never again expressed appreciation for any offers Gilley may have made to assist. Regardless, there was never any explicit *quid pro quo*. There was no meniton that this campaign assistance was being offered in exchange for Preuitt's vote. Nor was there any evidence, other than rank speculation, that Coker ever discussed this conversation with Preuitt. In fact, Preuitt told Gilley that he did not want his campaign support because he financed his own campaigns. (TT 7/7/11 P.93 L.18-24). Gilley never gave Preuitt any money, never put on a concert for him, never provided any country music singers, did not pay for any polls, and did not hire a campaign manager for Preuitt. (TT 7/7/11 P.99 L.19-P.100 L.8). Senator Preuitt was known as being pro-gambling. (TT 7/7/11 P.95 L.13-15). So much so that Gilley admitted the things they tried to do with Senator Preuitt were silly. (TT 7/7/11 P.101 L.13-19). Gilley did not get any commitment from Senator Preuitt. (TT 7/7/11 P.94 L.1-3).

This is the extent of Coker's involvement in the activities set forth in the indictment. Even in a light most favorable to the Government, they are insufficient to allow further proceedings against Coker.

Conclusion

For the reasons stated herein, the Court should grant a judgment of acquittal as to all counts remaining against Tom Coker.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David McKnight
Of Counsel