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

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CASE NO. 2:10cr00186-MHT-WC
	)	
JOSEPH R. CROSBY	)	

DEFENDANT JOSEPH R. CROSBY'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29(c), F.R.Crim.P.

Defendant Joseph R. Crosby moves this Court for entry a judgment of acquittal pursuant to Rule 29(c), F.R.Crim.P. as to count 16 in this case. The evidence is insufficient to sustain a conviction. No rational juror could have concluded beyond a reasonable doubt that he committed the crime charged against him in count 16.

Defendant Crosby adopts all arguments made in his previously filed motions for judgments of acquittal as well as arguments made in open court, and, additionally adopts all grounds and arguments put forward by other defendants which may be to his benefit. Without limiting the foregoing, Defendant Crosby points to the following failures of the government's evidence.

The Government did not meet its burden of proof on all the "coverage" elements of the statute, including agent status, receipt of federal funds, "business" as not including the drafting and voting on legislation, and involvement of a thing

of value greater than $5,000.00. While the Court denied the motion to dismiss raising these grounds, the arguments are improved by new case law and by the evidence and lack of evidence on these points.

New case law shows that legislators do not act "on behalf of" the state (18 U.S.C. § 666(d)(1), definition of "agent"). Nevada Comm'n on Ethics v. Carrigan, 131 S.Ct. 2543, ___ U.S.___, ___ L.Ed.2d ___(2011), indicates that legislators hold authority on behalf of their constituents, or of the people, rather than "on behalf of" the State as an entity. When a legislator votes on, or drafts, legislation, he or she is not acting "on behalf of" the State. The individual's vote, or the drafting, do not constitute acts that bind the State in an agency sense. Only (at most) the aggregate act of the Legislature as an entity enacting a law might be said to be "on behalf of" the State (and even that would be a linguistic stretch as well as a legal stretch, since the Governor is involved in creation of laws as well), not the individual acts of legislators.[1]

[1] As stated in Carrigan, 131 S.Ct. 2343, a "legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people." (emphasis supplied). The "legislator casts his vote 'as trustee for his constituents …,'", not as an agent of the State as an entity. "A legislator voting on a bill … is performing a governmental

The evidence showed that Crosby was not an "agent" in that he did not act "on behalf of" the State either; he worked for members of the Legislature (who, as noted above, are not "agents"). Also, there is a lack of evidence that Crosby was "authorized to act on behalf of" the State (see 18 U.S.C. § 666, definition of "agent"), in any meaningful agency sense; he could not bind the State with anything that he did that is pertinent to this case, as he only drafted bills and did not commit the State to them in any sense whatsoever.

The evidence was that the Legislature did not receive federal funds. Nor did the Alabama Legislative Reference Service. Therefore, as to Crosby, there was a lack of evidence that he was an "agent" in the required sense of having responsibility for the expenditure of funds, see United States v. Whitfield, 590 F.3d 325, 344 (5th Cir. 2009) ("In United States v. Phillips, we held that for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.' 219 F.3d 404, 411 (5th Cir. 2000).") And, as to both Crosby and Legislators, there can be no conviction under 18 U.S.C. § 666 where the person allegedly "bribed" worked in a branch of government that received no federal funds. There is no case law

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act as a representative of his constituents," (emphasis supplied).

clearly establishing that the Government can spread the reach of 18 U.S.C. § 666 merely by charging everyone as an agent of the undifferentiated State of Alabama as a whole, where the person worked in a constitutionally separate branch of state government that received no federal funds. Such application would go beyond the proper reach of the statute and would go beyond proper boundaries of federal Spending-Clause power.

When these points are combined with the fact that the Congress chose not to specifically say that legislators are covered by 18 U.S.C. § 666 – as contrasted with the Congressional decision to specifically cover Members of Congress in 18 U.S.C. § 201 – the best logical conclusion is that 18 U.S.C. § 666 does not cover alleged influence of state legislators especially when the State Legislature receives no federal funds.

There is insufficient evidence that Crosby violated or agreed to violate 18 U.S.C. § 666 through a corrupt quid pro quo agreement as alleged in the indictment. It is axiomatic that as a matter of due process, the government is required to prove beyond a reasonable doubt every element of a charged crime. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This applies to the requirement of proof of a quid pro quo as alleged in the indictment in this case. It was for the government to prove beyond a reasonable doubt that there was a

quid pro quo as alleged in the indictment. It was not up to Crosby to prove to any degree that there was not.

There is no evidence of a corrupt agreement that Crosby would draft gambling legislation favorable to Defendant Milton E. McGregor in exchange for payments, or that the payments were in exchange for his drafting at all. The requirement of proof of these sorts of corrupt agreements is supported by United States v. Siegelman, 640 F.3d 1159 (11th Cir. 2011) (hereinafter "Siegelman II")(continuing to reflect that an "agreement" that is the essence of the offense and emphasizing that "quid pro quo" includes not only the quid and the quo but also the "pro the corrupt agreement to make a specific exchange."). The opinion further holds that the quid pro quo agreement must be for a "specific" official action, in order to constitute a crime. See Siegelman II ("The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.") As to Crosby, the Government had to prove a quid pro quo. United States v. Kummer, 89 F.3d 1532, 1540 (11th Cir. 1996)("The 'with intent to be influenced' language prohibits a bribe, which involves a quid pro quo"; "a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."). The

alleged quo in this case was that Crosby supposedly altered his conduct by drafting gambling legislation favorable to McGregor. Paying Crosby for reasons other than that is not what was charged.

The evidence did not show a quid pro quo agreement to affect Crosby's actions with regard to drafting gambling legislation favorable to McGregor. The evidence did not show why Crosby was paid; but more to the point, the evidence plainly does not show that there was any agreement of any sort that Crosby's drafting-related actions, in particular, drafting gambling legislation favorable to McGregor, would be affected in exchange for payment. It further does not show a corrupt intent. See 18 U.S.C. § 666(a)(2) (requiring proof that offer or payment was made "corruptly").

The Government has claimed that Crosby engaged in some wrongdoing in drafting a bill for Senator Scott Beason in early 2010, and has suggested that Crosby did his job "wrong" in a way to help McGregor.[2] But, the Government's proof utterly failed. There was a mistake by either Senator Beason or LRS intake, regarding what bill Senator Beason wanted LRS to model a new bill after. There was no evidence that Crosby was at fault. Beason did not talk with Crosby in connection with the

[2] The evidence was that Crosby had been designated to work on gaming bills for a number of years.

submission of his request. Thus, Crosby necessarily had to rely on what was put on the intake sheet and the government has no basis upon which to say that Crosby was trying to do anything other than to follow his understanding of what Senator Beason wanted. Moreover, the bill that Crosby produced, patterned after a 2006 bill, would have been devastating to McGregor and Victoryland. It would have shut down Victoryland in an expedited manner just as Senator Beason claimed he wanted. After Senator Beason realized the mistake (whosever mistake it was), Crosby promptly prepared another bill at Senator Beason's request that would have again been devastating (even more so) to McGregor and Victoryland. This was what Senator Beason wanted. Crosby did this the very next business day after it was requested. In both instances, Crosby did what was requested.

Moreover, these were not the only times Crosby drafted bills which would have adversely affected McGregor's financial interests. Crosby constructed drafts which would have limited class 3 gaming to the Poarch Creek gaming facilities, which would have paved the way for gaming in Russell County with the result of picking off customers from McGregor's Victoryland facility in Macon County, limiting bingo to paper bingo, and limiting electronic bingo to vessels in international waters.

The Government introduced evidence of discussions with Crosby about drafting SB380. However, there was no evidence

that the nature of the discussion was unusual, in terms of a person authorized by the sponsor of the bill to work with LRS, such that it would have proved the existence of a corrupt quid pro quo agreement as alleged in the indictment. Indeed, Senator Beason said that he, himself, had authorized private individuals to deal with LRS in the drafting process. Senator Beason indicated that private individuals often know more about the subject matter than others. And, former representative and now state District Judge Ben Lewis indicated that it is common for interest groups to drafts bills for introduction. In any event, it is ultimately the sponsor of the bill who decides what the bill will say.[3] In the process of drafting, it is not unusual for a bill's legislative sponsor to orally authorize other people to deal with LRS regarding the drafting of a bill. Moreover, there is nothing wrong with authorizing a private person to work with the LRS on a bill. Private people authorized to work with the LRS can suggest language, even up to suggesting the entire text of a bill. In the end, though, it is the sponsor who decides whether it will be introduced. As confirmed in Agent McEachern's testimony, the contacts in this case were authorized by Senator Bedford. The fact that the discussions took place was, therefore, no evidence of a corrupt agreement.

[3] In this case, Senator Beason said that no one has ever dictated Senator Roger Bedford, the sponsor of SB 380.

And, there was nothing corrupt in the conversations themselves. Nor is there anything untoward in amendments and changes to the language to be included in bills. According to Representative Barry Mask, those things are constants. And, there was no evidence that Crosby "snuck" anything into the final draft of SB380 to benefit McGregor.

The Government tried to suggest, through Jarrod Massey's testimony, that there was something to be inferred from the fact that Massey had a hard time obtaining copies of bills. But, Massey testified at one point that he does not know the protocols of LRS. Based on that, he would have no basis upon which to claim that Crosby was doing anything other than what the rules of his job required him to do in that regard. At another point in his testimony, Massey admitted that drafts are supposed to be confidential unless otherwise authorized by the senator or representative. Moreover, the testimony of Jennifer Pouncy indicated that, in general, Massey's exclusion from discussions with others was not unusual.

The Government introduced evidence that payments to Crosby were listed, in a business ledger, under the heading "lobbying." But, there was no evidence that Crosby had anything to do with that designation, or that it was a designation made by anyone with knowledge of what Crosby was doing, or that it was a designation that has any meaning to the material facts in this

case.

The Government introduced evidence about how Crosby filled out some forms at work about outside income. But, Crosby did later file an amendment to reflect the questioned payments. The Government also made reference that to the fact that Crosby used an acronym for Macon County Greyhound Park (MCGP). However, the use of an acronym does not a crime make. Indeed, the testimony of FBI Special Agent McEarhern was replete with acronyms. And, the same can be said for the testimony of other witnesses as well, e.g., LRS for Legislative Reference Service, BIR for Budget Isolation Resolution, CA for Constitutional Amendment. In any event, as this Court instructed the jury, "the mere fact of a violation of state law or employment rules and regulations is not sufficient for a conviction…." (Doc. 1640, p.p. 11-12)

The government failed in its case against Crosby. Because of that, Defendant Crosby urges the entry of a judgment of acquittal on count 16 against him.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 25th day of August, 2011, electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification to all counsel of record.

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