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(a), F.R.Crim.P.

Defendant Joseph R. Crosby, by and through counsel, moves this Court for entry of an order, pursuant to Rule 29(a), F.R.Crim.P., granting him a judgment of acquittal as to each count against him in this case. The evidence is insufficient to sustain a conviction. No rational juror could conclude beyond a reasonable doubt that he committed the crimes charged against him.[1]

There is not a shred of evidence that Crosby knew about, much less participated in, any conspiracy to buy votes or bribe any legislator. Thus, this filing summarizes the failure of the Government's evidence specifically relating to Crosby's drafting work at the Legislative Reference Service.

I. Section 666 "coverage"

The Government has not met its burden of proof on all the

[1] As to any count that the Court is not convinced to enter a judgment of acquittal at this time, the Court should defer ruling rather than denying the motion. That would allow the Court to revisit the issue, on the adequacy of the Government's proof, when the Court has more time to consider. Rule 29, F.R.Crim.P. specifically allows this.

"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.[2]

The evidence shows 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 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 is that the Legislature did not receive federal funds. Nor did LRS. Therefore, as to Crosby, there is 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

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

funds.' 219 F.3d 404, 411 (5th Cir. 2000).") And as to both Crosby and Legislators, there can be no charges 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 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 as a whole, where the person worked in a constitutionally separate branch of State government that receives 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.

II. Section 666 – no "bribery"

There is no evidence of a corrupt agreement that Crosby would alter his conduct in regard to drafting bills 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, see Indictment, Doc. 3, p. 51, ¶ 218, is: "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." Paying Crosby for reasons other than official acts as they pertained to drafting legislation would not be a federal crime, and certainly is not what is charged.

The evidence does not show a quid pro quo agreement to affect Crosby's actions with regard to drafting gambling legislation. The evidence does 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 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"); § 666(c) (statutory bona fide (i.e., good faith) compensation exclusion).

The Government alleged that Crosby engaged in some wrongdoing in drafting a bill for Senator Beason in early 2010, suggesting that Crosby was doing his job "wrong" in a way to help McGregor.[3] 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 is no evidence that Crosby was at fault. Beason did not talk with Crosby in connection with the 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.

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

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 claims 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 did bill drafts 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 is 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 prove the existence of a corrupt quid pro quo agreement. 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 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.[4] 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 and 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 is therefore no evidence of a corrupt agreement. And there is 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 Mask, those things are constants. The Government tried to suggest, through Jarrod Massey's

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

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 this 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.

III. "Honest Services"

The Government must prove both "bribery" and "fraud." "Fraud" without "bribery" would not survive Skilling; and "bribery" without "fraud" would not be mail or wire fraud.[14] Because there was no "bribery" as explained above, the Court should enter a judgment of acquittal on all "honest services" counts.

"Honest services" fraud is a species of fraud. All that "honest services" does, in the definition of the crime, is to constitute the object of a scheme to defraud. (In that sense, it substitutes for the money or property that is the object of traditional fraud.) See, e.g., United States v. DeVegter, 198 F.3d 1324, 1327, 1328 n.9 (11th Cir. 1999). "Bribery" only satisfies the "object" element of the "honest services" variety of the crime. But, whatever the object, there still must be fraud. This means that there must be material falsehood. See

id., 198 F.3d at 1328 n.9.

The only type of fraud alleged in the Indictment is "concealment of material information." *See* Indictment, Doc. 3, p. 58 ¶ 234. These charges are not premised on any false statement or even misleading half-truth; it is concealment-type fraud. Near trial, the Government stated what "concealment of material information" these charges were premised on: (1) PAC-to-PAC transfers; (2) the Geddie ledger; (3) "drop phones." None of those involves proof that Crosby concealed material information, and that he did so in circumstances where there was a duty to disclose. Demonstration of a legal duty to disclose is required, and is absent here. See United States v. Browne, 505 F.3d 1229, 1265 (11th Cir. 2007) ("a defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation may constitute a violation of the mail fraud statute where the defendant had a duty, explicit orimplicit, to disclose material information."); American United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1065 (11th Cir. 2007) (in civil RICO case premised in pertinent part on mail/wire fraud: "if the insurers intended to assert a claim for fraudulent concealment, or nondisclosure, they needed to plead

that the receivership entities had a duty to disclose.") Thus, the Government has not shown that Crosby had the "specific intent to defraud." United States v. Hasner, 340 F.3d 1261, 1269 (11th Cir. 2003) (recognizing this requirement of proof of specific intent to defraud, in "honest services" case). There is also no showing that Crosby had the specific intent that anyone else should fraudulently conceal that type of information, certainly not under circumstances where there was a duty to disclose. See DeVegter, 198 F.3d at 1328 n.9 ("The elements of a § 1343 wire fraud offense are that the defendant "(1) intentionally participated in a scheme to defraud …") (emphasis supplied). See DeVegter, 198 F.3d at 1328 n.9 ("The elements of a § 1343 wire fraud offense are that the defendant "(1) intentionally participated in a scheme to defraud …") (emphasis supplied).

There was no showing of any duty to disclose anything that was not disclosed, with regard to PAC-to-PAC transfers. The testimony of Representative Mask, among others, repeatedly confirmed that PAC-to-PAC transfers were legal during the period in question. Though the Court has indicated that such transfers might in some circumstances demonstrate "intent," that is a

different question from whether there was a legal duty to disclose anything that was undisclosed. There was also no evidence that Crosby took part in concealing anything regarding PAC-to-PAC transfers implicated in any bribery scheme.

Geddie's ledger, too, was not in violation of any duty to disclose. It was not a ledger that the law requires. There is no evidence that it was changed because of a grand jury subpoena. And there is no evidence that Crosby had anything to do with, or knew of, or even had reason to expect, that it would be changed. Moreover, even if this were fraud (which it is not), it would only have to do with contributions to Rep. Mask; and none of the mailings or wirings were in furtherance of any bribe + fraud with regard to Rep. Mask.

There is no duty to keep the same phone number, and no duty to use only phone numbers registered in one's own name. Nor was there evidence that Crosby ever changed his phone number or the like; the evidence was that he did not or knew that others had changed phones for any illicit purpose.

The Government has also failed to prove that Crosby was complicit, in the necessary sense, in the use of mail or wire in furtherance of an unlawful scheme. The Government cannot get by

with claiming that some interstate conversations, for instance, were in furtherance of overall efforts to gain passage of a bill; the required proof is that they were in furtherance of the bribery + fraud scheme itself.

These points require acquittal on all charges. In addition, the specifics charges (counts 23, 24, 25, and 27) relating to payments by McGregor to Crosby are premised on McGregor mailing checks to Crosby. Those checks could not be in furtherance of any deprivation of the honest services of anyone other than Crosby. And none of the three types of "concealment of material information" that the Government has alleged (supra) have anything to do with any deprivation of Crosby's honest services. Therefore, there was no scheme *to* defraud anyone of Crosby's honest services (even if there were bribery, which there is not). The elements of "fraud," "honest services," and "furtherance" do not coincide, as to these counts.

The Government may say that Crosby's employment-related forms constitute fraud. This should be rejected both because it would be outside the charges as the Government explained them previously, and because it would lack merit even if it were proper for consideration.

IV. Conspiracy

There is insufficient evidence that Crosby entered into an agreement with anyone to violate 18 U.S.C. § 666 through a corrupt quid pro quo agreement. Because (as argued above) 18 U.S.C. § 666 does not cover the matters at issue in this case, there is no conspiracy liability for conspiring to violate 18 U.S.C. § 666 in this situation.

If any conspiracy can be inferred from the evidence, it is not the conspiracy charged in the Indictment, and therefore the Court should grant a judgment of acquittal. If any conspiracy can be inferred from the evidence, it is both (a) substantially smaller in terms of its participants, time, and scope than the conspiracy alleged in the Indictment, and (b) not a single conspiracy as alleged in the Indictment.

Defendant Crosby adopts all specific arguments made above as to the alleged offenses. There was no bribery on his part, and by the same token no conspiracy to bribe. Even if there were an agreement to for McGregor to bribe Crosby (which there was not), no one conspired to that effect other than McGregor and Crosby. The two of them alone could not constitute a conspiracy to this effect. But even if they could, this alleged conspiracy was not proven to be part of an overall larger conspiracy.

For the foregoing reasons, even if there were evidence of

any effort involving Crosby to violate 18 U.S.C. § 666 in any way, the evidence plainly does not support the existence of the overall conspiracy charged.

Had the Indictment charged several separate conspiracies each involving a separate alleged agreement to violate 18 U.S.C. § 666 as to a specified legislator or legislative staff, then the Government could have made its case without proving a general overall conspiracy. But, as the Government chose to proceed by charging one single conspiracy, and failed to prove the large single conspiracy that it alleged, a judgment of acquittal is appropriate. There was no single general conspiracy as alleged in the Indictment. The "single conspiracy" charge cannot be justified in this case on the theory that all efforts were towards the single goal of passing legislation. That is, single-conspiracy charges are upheld in some cases that involve multiple transactions, on the grounds that all transactions were in furtherance of the same overall unlawful object of the conspiracy. E.g., United States v. Richardson, 532 F.3d 1279, 1284 (11th Cir. 2008).

Based upon the foregoing, Defendant Joseph R. Crosby urges the entry of a judgment of acquittal on all counts relating to him.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 26th day of July, 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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