UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
v.	)	Case No. 2:10-cr-00186-MHT
	)	
MILTON E. MCGREGOR, et. al.	)	
	)	
Defendants.	)	

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STATE OF ALABAMA'S MOTION TO QUASH SUBPOENAS TO TESTIFY AT TRIAL OR IN THE ALTERNATIVE TO LIMIT SCOPE OF TESTIMONY

COMES NOW, the State of Alabama by and through its Attorney General, Luther Strange, and moves this Honorable Court to quash, or in the alternative, to limit the "Subpoena to Testify at a Hearing or at Trial of a Criminal Case" served by Defendant Milton McGregor ("McGregor") on Charles R. Malone, Chief of Staff to Governor Robert Bentley or Custodian of Records Alabama Governor's Office requesting "[a]ll documents relating to Governor's Task Force on Illegal Gambling from its inception to February 1, 2011" and "[a]ny documents regarding, concerning and/or relating to any meetings between Governor Riley and/or anyone else concerning, relating and/or regarding the federal investigation into the Alabama State Legislature and/or Senate Bill 380 and/or" the defendants in this matter. Absent the Defendant showing that the individuals under subpoena have direct knowledge about issues relevant to this criminal proceeding, the state officials can provide no admissible testimony. But, even if certain officials did have knowledge relevant to this matter, information and testimony related to

ongoing state criminal investigations would be privileged from disclosure. In support of this motion, the State of Alabama asserts the following:

BACKGROUND

The indictment alleges that the defendants conspired to bribe and otherwise corruptly influence certain Alabama State legislators to secure the passage of pro-gambling legislation from February 2009 to August 2010. (Indictment ¶28). The indictment further alleges that this conspiracy was executed by telephone conversations among the conspirators. The state officials subpoenaed by the defense should be required to have personal knowledge of the truth or falsity of the allegations of bribery and conspiracy in the indictment before their testimony is admissible.

During his term in office, former Alabama Governor Bob Riley "ma[de] a judgment that the laws concerning illegal gambling were not being enforced in certain counties in this State" and "directed certain law-enforcement officers who have been placed at his disposal by law to investigate and prosecute alleged gambling activity" by establishing the Governor's Task Force on Illegal Gambling. *Riley v. Cornerstone Community Outreach, Inc.*, --- So. 3d ---, 2010 WL 2034825, *12 (Ala. 2010). The investigations and other law enforcement actions that were initiated continue under the direction of Alabama Attorney General Luther Strange. *See* Governor Bentley's Executive Order No. 1, January 18, 2011, available at http://governor.alabama.gov/news/news_detail.aspx?ID=4299 (last visited May 9, 2011).

THE SUBPOENAS SHOULD BE QUASHED

The Court should quash the subpoenas directing top executive officials and state law enforcement officers to testify at the trial of this matter. "Although Rule 17(a), which governs such subpoenas, does not provide explicitly for quashal or modification, courts routinely have

entertained motions seeking such relief and decided them by reference to comparable principles." *See Stern v. United States Dist. Court for Dist. of Mass.*, 214 F.3d 4, 17 (1st Cir. 2000). The subpoenas should be quashed for two reasons. First, testimony about state law enforcement procedures, tactics, and official executive decisions are privileged. Second, even if the officials under subpoena had personal knowledge about any non-privileged fact at issue in this case, surely the evidence could be introduced without their testimony.

I. Any Facts That State Officials Might Know Are Privileged.

The State's investigation into illegal gambling is not relevant to an allegation or defense in this case. But, even if the State's investigation of illegal gambling were relevant to this political corruption case, testimony about the investigations would be privileged and the defendants should not be allowed to elicit privileged information and material through a subpoena.

A. The Law Enforcement Investigation Privilege

Any information about law enforcement operations or investigations is protected from disclosure by the law enforcement investigation privilege. "[T]he government is entitled to protection when the probative value of [investigatory] evidence is outweighed by the risks of exposing incomplete investigations." *Abston v. State*, 548 So.2d 624, 628 (Ala. Crim. App. 1989) (quoting *Young v. State*, 469 So. 2d 683, 688 (Ala. Crim. App. 1985)). *See also United States v. Winner*, 641 F. 2d 825, 831 (10th Cir. 1981) ("The law enforcement investigative privilege is based primarily on the harm to law enforcement efforts which might arise from public disclosure of [investigations]."). "An investigation, however, need not be ongoing for the law enforcement privilege to apply as the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information is revealed to the public." *In re The City of New York*, 607 F. 3d 923, 944 (2d Cir. 2010) (internal quotation marks omitted).

Information protected from disclosure includes "law enforcement techniques and procedures," information that would undermine "the confidentiality of sources," information that would endanger "witness and law enforcement personnel [or] the privacy of individuals involved in an investigation," and information that would "otherwise . . . interfere[ ] with an investigation." *Id.* State officials should not be compelled to testify about the actions, techniques and procedures they employed as part of their effort to enforce Alabama's prohibition on slot machine gambling, nor should they be compelled to testify about the information that those investigations uncovered.

B. **Executive Privilege**

Testimony about the performance of a state officer's official duties is protected from disclosure by executive privilege. "[T]here is the undeniable interest of the executive branch of government in maintaining confidentiality over certain types of information necessary for the performance of its constitutional duties." *Assured Investors Life Ins. Co. v. National Union Associates, Inc.*, 362 So. 2d 228, 233 (Ala. 1978). *See also United States v. Nixon,* 418 U.S. 683, 708-713 (1974) (apart from policy considerations, "history and legal precedent teach that documents from a former or an incumbent President are presumptively privileged."). Alabama law imposes on the governor the duty to faithfully execute the laws of the State, and it was in that role that former Governor Riley participated in law enforcement activity that affected gambling promoters. *See* ALA. CONST. art. IV, §§ 112, 120; *Riley v. Cornerstone Community Outreach, Inc.*, --- So. 3d ---, 2010 WL 2034825, *12 (Ala. 2010). Similarly, all actions taken by former Alabama Department of Public Safety Director Chris Murphy, current Alabama Department of Public Safety Director Hugh McCall, and current Alabama Department of Public

Safety Executive Counsel Michael Robinson in relation to the State's investigation of gambling activities were within their official duties and are privileged.

C. **Deliberative Process/Consultative Privilege**

Finally, testimony about information gathered and used in the executive decision-making process is protected from disclosure by deliberative process privilege. "The deliberative process privilege is a sub-category of the executive privilege." *Sierra Club v. Alabama Environmental Management Com'n*, 627 So.2d 923, 926 (Ala. Civ. App. 1992). "The deliberative process privilege protects the internal decision making processes of the executive branch in order to safeguard the quality of agency decisions." *Nadler v. United States Dept. of Justice*, 955 F.2d 1479 (11th Cir.1992). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions ... by protecting open and frank discussion among those who make them within the Government...." *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-9 (2001) (internal quotes omitted). Senior state executive branch officials and top state law enforcement officials cannot be called to testify about pre-decisional considerations that were "a direct part of [their] deliberative process" on gambling regulation or other legal or policy matters, including the facts that they relied on in making their decisions. *Nadler v. U.S. Dep't of Justice,* 955 F.2d 1479, 1490-91 (11th Cir. 1992) *abrogated on unrelated grounds, U.S. Dep't of Justice v. Landano,* 508 U.S. 165, 170 (1993). *See also Alabama v. Abbott Laboratories, Inc.*, 2009 WL 692189, *2 (M.D. Ala. 2009) (discussing deliberative process privilege). Procuring this privileged testimony appears to be the object of the subpoena, and it should be quashed.

II. State Officials Must Have Personal Knowledge of Facts Relevant to be Admissible in This Action.

The subpoenas should also be quashed if the officials under subpoena have no personal knowledge of facts relevant to this case. "Top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (quoting *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586 (D.C.Cir.1985)). This prohibition necessarily extends to current and former governors of States. *See Sweeney v. Bond,* 669 F.2d 542, 546 (8th Cir.), *cert. denied,* 459 U.S. 878 (1982) (governor not required to testify absent compelling need) (cited by the Eleventh Circuit in *In re United States*, 985 F.2d at 512); *Thomas v. Cate*, 715 F.Supp.2d 1012, 1049 (E. D. Cal. 2010) (former governor and sitting governor of California could not be deposed absent extraordinary circumstances); *Coleman v. Schwarzenegger*, 2008 WL 4300437 (E.D. Cal. Sept. 15, 2008) (governor not required to testify absent extraordinary circumstances). *See also United States v. Wal-Mart Stores*, No. 01-152, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) ("[i]f the immunity [*United States v. Morgan,* 313 U.S. 409 (1941)] affords is to have any meaning, the protections must continue upon the official's departure from public service").

The defendants must also establish that state executive and law enforcement officials are competent to testify as to any fact relevant to this matter. "[A] subpoena ad testificandum survives scrutiny [only] if the party serving it can show that the testimony sought is both relevant and material." *See Stern*, 214 F.3d at 17. *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (a defendant does not have "the right to secure the attendance and testimony of any and all witnesses . . . He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense."). The defendants must meet this

most basic test. The fact that these state law enforcement officials were investigating illegal gambling at the same time as the alleged vote buying was occurring does not establish the relevance or materiality of their testimony. *See United States v. Dinitz*, 538 F.2d 1214, 1225 (5th Cir. 1976) (affirming denial of motion to produce evidence that was not "used to prosecute the case against [the defendant] but rather . . . used in an investigation into an event which was at best collateral to [the defendant's] case").

But even if the defendants could establish some superficial connection between this case and certain state officials, their testimony cannot be compelled unless the same facts are not available through other sources. "[T]he Supreme Court has indicated that the practice of calling high officials as witnesses should be discouraged." *In re United States*, 985 F.2d at 512 (citing *United States v. Morgan,* 313 U.S. 409 (1941)). Accordingly, the testimony of a high government official about their official duties may be compelled only when the official "ha[s] direct personal factual information pertaining to material issues in an action," and "the information to be gained is not available through any other sources." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir.2007); *Accord In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010) (granting writ of mandamus to quash subpoena against agency director). To prevent the quashal of their subpoenas, the Defendants must establish that these current and former state officials have "direct personal factual information" about a matter that is relevant or material to this case and that such factual information cannot be introduced through other means. Unless and until Defendants make that showing—in camera if necessary—the current and former state officials should be relieved from complying with the subpoena.

CONCLUSION

For the foregoing reasons, the Court should quash or limit the scope of the subpoenas issued to former Alabama Governor Bob Riley, former Alabama Department of Public Safety Director Chris Murphy, current Alabama Department of Public Safety Director Hugh McCall, and current Alabama Department of Public Safety Executive Counsel Michael Robinson.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of June 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

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