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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

MOTION FOR JUDGMENT OF ACQUITTAL AFTER TRIAL

Pursuant to Fed. R. Crim. P. 29(c)(1), Milton McGregor respectfully moves for judgment of acquittal on the remaining counts against him. Mr. McGregor readopts all grounds previously argued, orally and in writing. Mr. McGregor further adopts all arguments of other defendants in their post-trial renewals of their motions under Rule 29. Further, Mr. McGregor states as follows.

Count 1 (Conspiracy)

The evidence did not prove the existence of the conspiracy alleged in the Indictment.

Mr. McGregor did not conspire with anyone to violate § 666 as to Mr. Mask. This conclusion follows not only from the judgment of acquittal on Count Three, but also from the complete lack of evidence of any such conspiracy. There was no evidence, for instance, of any conspiratorial agreement between Mr. McGregor and Mr. Geddie regarding Mr. Mask – neither about the $5000 campaign contribution that was the gravamen of failed Count Three, nor about anything else. There was no evidence that

Mr. McGregor and Mr. Geddie discussed pursuing or seeking any explicit *quid pro quo* agreement with Mr. Mask (or with anyone else for that matter) involving any campaign contribution. There is likewise no evidence that they discussed pursuing or seeking any other sort of *quid pro* quo agreement with Mr. Mask. There is no evidence of any conspiracy with anyone else regarding Mr. Mask, either.

Mr. McGregor did not conspire with anyone to violate § 666 as to Senator Beason. This has been explained in the earlier written Rule 29 motion and will be addressed again below. Even if the Court disagreed, this one sliver of the case would not constitute the overall single conspiracy charged in the Indictment.

Mr. McGregor did not conspire with anyone to violate § 666 as to Senator Means. There was no evidence that there was such a conspiracy, regarding a violation of § 666 as to Senator Means. And there was certainly no conspiracy with Senator Means himself to violate § 666, a conclusion that is bolstered by Senator Means's acquittal on Count Six.

Mr. McGregor did not conspire with anyone to violate § 666 as to Senator Preuitt. This has been explained in the earlier written Rule 29 motion and will be addressed again below. Even if the Court disagreed, this one sliver of the case would not constitute the overall single conspiracy charged in the Indictment.

Mr. McGregor did not conspire with anyone to violate § 666 as to Senator Ross. As the jury correctly concluded, discussions with and about Senator Ross did not amount to a crime under Count Ten. Nor was there any conspiracy to do anything regarding Senator Ross, beyond what was charged substantively in Count Ten.

Mr. McGregor did not conspire with anyone to violate § 666 as to Mr. Crosby. No other defendant or "unindicted coconspirator" was even shown to have known about payments to Mr. Crosby; certainly there was no evidence of any conspiracy in that regard. Nor was there evidence that Mr. McGregor conspired with anyone to violate § 666 as to any other legislative staff. Thus, even if only on this basis alone, the Government failed to prove the conspiracy that the Indictment charged. The Indictment charged (¶ 28) a single conspiratorial agreement to violate § 666 as to legislators and staff. The evidence failed to prove that. *See, e.g., United States v. Calderon*, 169 F.3d 718, 723 (11th Cir. 1999) (conviction reversed where evidence failed to show that defendant conspired for the purpose alleged in the indictment).[1]

Count 4 (§ 666 regarding Senator Beason)

In the Court's instructions to the jury, as contrasted with the Court's first draft of instructions, the Court treated Count 4 as being not about campaign contributions at all, but about personal enrichment of Senator Beason. Thus, at the Government's request, the Court instructed the jury that an "explicit" *quid pro quo*, of the sort required for campaign contributions, was not required under Count 4. This made the Government's burden lighter than it would have been, had Count 4 been treated as involving campaign

[1] As noted previously, this argument is not refuted by the caselaw suggesting that where a conspiracy is alleged to have had two unlawful goals, i.e, the violation of two statutes, the Government may prevail by proving one of those goals. Instead, as to each of the alleged unlawful goals of the conspiracy charged in this case (i.e., § 666(a)(1)(B) and § 666(a)(2)), the Government alleged a particular scope and nature of those alleged unlawful goals: they were both, allegedly, to cover bribery of both Legislators and staff. The Government failed to prove the truth of its allegations in that regard, as to either of the alleged unlawful goals of the conspiracy.

contributions.

The Court's decision in that regard was necessarily based on the way Count 4 is framed in the Indictment. The Indictment charges that the alleged bribe was a particular amount in a particular form: "$1 million to Legislator 2, for use at Legislator 2's discretion, which money would be provided to Legislator 2 as income from, or an equity interest in, a public relations entity." (Indictment, ¶ 196, p. 42).

With the Government having gotten the benefit in jury instructions of this framing of Count 4, the same framing must necessarily apply when Count 4 is considered in the Rule 29 context. No offer of campaign contributions to Senator Beason could be the basis for denying this motion for judgment of acquittal. The relevant inquiry is whether the Government proved Mr. McGregor's culpability, beyond a reasonable doubt, for the alleged bribe that is set forth in the Indictment.

The Government did not meet that burden. There is no evidence sufficient to make Mr. McGregor criminally liable for some offer of "$1 million to Legislator 2, for use at Legislator 2's discretion, which money would be provided to Legislator 2 as income from, or an equity interest in, a public relations entity."

There is no evidence that Mr. McGregor made such an offer. He certainly did not make such an offer to Senator Beason as a *quid pro quo* for a vote on SB 380, as the Indictment further charges. No such offer was made, not by Mr. McGregor or even by anyone else, in the single meeting that Mr. McGregor had with Senator Beason. The Court may conclude, on the Rule 29 standard, that there was some discussion of public relations and of supporting Senator Beason's involvement in that industry. But the

Government presented no evidence that the offer identified as the alleged bribe, in Count 4, was offered by Mr. McGregor in the February 18 meeting or at any other time.

There is also no evidence that Mr. McGregor aided or abetted anyone else in making the offer that is alleged as the bribe in Count 4. There is, for that matter, no evidence that Mr. McGregor even *knew* that anyone else had made any such offer. But knowing, or even knowing and approving, would not be enough. "Aiding and abetting" requires action on the defendant's part, to further the offense. *See, e.g., United States v. Lozano-Hernandez*, 89 F.3d 785, 790 (11th Cir. 1996). Mr. Massey did not tell Mr. McGregor what he had done, in Mr. Massey's subsequent meetings with Senator Beason in Mr. McGregor's absence. No one testified to having told Mr. McGregor that they were going to offer Senator Beason $1 million for use at his discretion, as income from or an equity interest in a PR firm. Both of the people involved in making that alleged offer – Mr. Massey and Mr. Gilley – were testifying for the Government, after extensive pretrial preparation and with every incentive to please. If they could have testified to having told Mr. McGregor about the offer alleged in the Indictment, they would have. They didn't. Mr. McGregor simply was not involved in any such offer, neither directly nor as an aider/abetter.

Nor can Count 4 be salvaged on a *Pinkerton* theory. Even if *Pinkerton* liability were permissible in this case (which it is not, for reasons previously discussed), it would not attach here. There was no conspiracy involving Mr. McGregor, with Mr. Gilley and Mr. Massey, that would then encompass this alleged bribe as a *Pinkerton* consequence. Mr. McGregor had not conspired with them to bribe anyone with personal enrichment.

The Government may contend that there was a conspiracy between Mr. McGregor and Mr. Gilley, before their meeting with Senator Beason, to influence legislators *with campaign contributions*. The proof was not sufficient to show any such conspiratorial agreement. But even if there had been such an agreement involving campaign contributions, that is different from the subsequent attempt by Mr. Massey and Mr. Gilley to influence Senator Beason in the particular way charged in Count 4. There is no evidence that Mr. McGregor conspired with them or with anyone to offer that sort of personal enrichment as a *quid pro quo* for a vote. So, Mr. McGregor cannot be subjected to *Pinkerton* liability for this alleged personal-enrichment bribe of Senator Beason by Massey and Gilley. *See, e.g., United States v. Silvestri*, 409 F.3d 1311, 1335 (11th Cir. 2005) (no *Pinkerton* liability for an offense that "did not fall within the scope of the unlawful project").

Count 5 (§ 666 regarding Senator Means)

Count 5 is a pure "campaign contributions" count, charging Mr. McGregor only with his own conduct and not with liability on account of anyone else's.[2] The charge is that Mr. McGregor promised "unspecified amounts" of campaign contributions.

Since this Count was last discussed with the Court, the jury has acquitted Senator Means on the parallel charge against him, Count Seven.

It is inconceivable that Mr. McGregor could be guilty of a crime based on the conversation at issue, J-146, where Senator Means committed no crime in that

[2] As shown in previous submissions, this undisputed limitation arises from the "duplicitousness" problem in Count 5 as originally framed.

conversation. This is especially inconceivable, where it was Senator Means and not Mr. McGregor who brought up the topic of campaign support. *See* J-146, p. 14 line 9.

Mr. McGregor had initiated the call. His purpose, as he stated at p. 1 lines 33 *et seq.* and over the next several pages of the conversation, was to talk about the bill from a merits perspective. This was pure constitutionally protected activity.

After many minutes of that discussion, Senator Means briefly turned the conversation to his concern about his upcoming election. He said "I'm gonna probably need a bunch of help now" (p. 14 lines 17-18) and Mr. McGregor vowed his continued support for Senator Means in non-specific terms. (p. 14 line 47 to p. 15 line 11). Senator Means said that he hadn't been worried about whether Mr. McGregor would continue to support him. (p. 15 lines 2 to 3); of course he was not, since Mr. McGregor had been a long-time supporter.

That is the substance of the Government's case on Count 5.

This simply cannot be a crime on the part of Mr. McGregor – to respond, when asked, that one will continue to support an elected official whom one has supported in the past. It cannot be a crime, where Mr. McGregor said nothing – and for that matter Senator Means said nothing – conditioning the support on an official action, or conditioning an official action on the support. The Government's view, boiled to its essence, is that Mr. McGregor's legal duty was to say to Senator Means, "I cannot discuss campaign contributions with you in this call, since we already talked about the merits of a bill that I care about." That is not the law.

The Court has briefly indicated the view that *Evans* governs "agreements" regarding campaign contributions, while *McCormick* governs offers or requests. In other words, a bilaterally-shared understanding of an exchange would be criminal even if it was not explicit; but a unilateral proposal of an exchange, by contrast, would have to be proven to have been explicit in order to make it criminal. (If we have misunderstood the Court, we apologize, and we ask the Court for clarification on the Court's views as the case moves forward.) While we respectfully disagree with that view, even that view requires a judgment of acquittal here.

There certainly was no "agreement," whether explicit, express or otherwise, exchanging future unspecified campaign contributions for a promise of a vote on SB 380. Clearly the jury agreed with that assertion, because the jury acquitted Senator Means on Count Six, which paralleled the charge against Mr. McGregor under Count Five. The jury's verdict on Count Six establishes that there was no bilaterally-shared understanding of a criminal exchange with Senator Means. (The verdict on Count Six could not possibly have been based on any other element of the offense; this is demonstrated by the fact that the jury reached no verdict on Count Seven. All elements of Counts Six and Seven were the same, except for the central element of whether there was a "bribe" on Senator Means's part.)

This would mean that Count Five could only survive, against Mr. McGregor, if there was proof beyond a reasonable doubt of a criminal offer by Mr. McGregor, unaccepted by Senator Means. This would require proof an explicit *quid pro quo* offer within the meaning of *McCormick*, even according to the Court's view as we understand

it. And there certainly was no such explicit *quid pro quo* offer by Mr. McGregor in J-146.

Count 8 (§ 666 as to Senator Preuitt)

For reasons previously briefed, the evidence was insufficient to show any bribe by Mr. McGregor with regard to Senator Preuitt. The Government apparently does not even contend that he was aware of anything regarding money or trucks, done by Mr. Gilley or his colleagues. What Mr. McGregor is said to be liable for, it seems, is country music campaign support. But there is no evidence that Mr. McGregor made, or aided or abetted anyone else in making, any offer about country music campaign support that rose to the level of an explicit *quid pro quo* under *McCormick*. Furthermore, *Pinkerton* liability is inappropriate here, as there was no conspiracy to bribe Senator Preuitt, and no reason on Mr. McGregor's part to foresee any offers by Mr. Gilley *et al.* that crossed the "explicit *quid pro quo*" line into unlawfulness.

Count 15 (§ 666 regarding Mr. Crosby)

The Government simply did not prove that payments to Mr. Crosby were a *quid pro quo* exchange for influencing "his official acts as they pertained to drafting gambling legislation, including SB380" (Indictment, ¶ 218). The Government's burden was to prove beyond a reasonable doubt that particular *quid pro quo*, involving Mr. Crosby's acts as they pertained to drafting gambling legislation.

Even the Indictment itself alleges (¶ 156) that the payments began in May 2008, with no showing that there was any relevant legislation contemplated at that time, and certainly not that the payments were a *quid pro quo* exchange at that time.

Moreover, there was no evidence that Mr. Crosby did anything for Mr. McGregor that was more than what he (and other LRS staff) did and what they were supposed to do, for those persons authorized by a bill sponsor. Therefore, one cannot say that the evidence demonstrated any favoritism by Mr. Crosby towards Mr. McGregor; nor was there evidence that any such favoritism was contemplated as the reason for the payments.

All that there is against Mr. McGregor on Count 15, really, is the fact that the payments were made. This is not enough to meet the Government's burden of proof. There is no proof beyond a reasonable doubt of any corrupt intent, nor of any *quid pro quo*, nor of any agreement or intent that Mr. Crosby would alter his official drafting-related acts in return for payment. The Government's case was only enough to create suspicion and questions at most, and does not amount to proof beyond a reasonable doubt.

Counts 23 through 28, 30 through 32 (honest services)

In addition to arguments previously made (which are hereby renewed) on the "honest services" counts, Mr. McGregor states as follows.

* All "honest services" counts against Mr. McGregor, or at least Counts 28 and 30-32, are barred by the issue-preclusion component of Double Jeopardy law, by virtue of Mr. McGregor's acquittal on Count 29. Under *Yeager v. United States*, 129 S.Ct. 2360 (2009), in determining the issue-preclusive effect of that acquittal on Count 29, this Court looks only to the acquittals and does not try to divine any meaning from "hung" counts. The only plausible inference, from the acquittal on Count 29, is that the jury found the Government's proof inadequate on one or more elements that are common to Count 29

and to the other counts as well. There was not some unique factor on Count 29 that would yield the conclusion that the acquittal on Count 29 was on a factual basis unique to that count alone. It was an interstate call to which Mr. McGregor was a party, and it bore a connection to the vote on SB380. The jury must have decided, in acquitting Mr. McGregor on this count, that the Government's proof had failed on some substantive aspect of the elements of the honest services charges. It is not necessary to decide exactly which of those elements was fatally absent in Count 29; all that must be recognized is that there was not something unique about Count 29, in that regard, that would allow Count 29 to fall while other counts survive.

* The acquittal of most defendants on all "honest services" counts shows that there simply was not a scheme that was substantially similar to that charged in the indictment. As the Court instructed the jury (Doc. 1640, p. 33), "The government must prove that the scheme was substantially the same as the one charged in the indictment." The scheme charged in the indictment – if any scheme at all can be inferred from the very vague allegations, by virtue of adoption of previous paragraphs in the indictment – was a single one involving all defendants and involving the deprivation of the honest services of all public-sector defendants. The Government failed to prove a scheme substantially similar to that. (Here, too, the issue-preclusion component of Double Jeopardy law is implicated by the various not-guilty verdicts.) Accordingly, no defendant was shown to be guilty beyond a reasonable doubt on these charges. The Government's decision to plead all "honest services" charges as one single undifferentiated scheme – rather than tying each alleged mailing or wiring to particular defendants' alleged deprivation of a particular

person's "honest services" – has led to the failure of proof on all such charges.

* Under the Eleventh Circuit's decision in *United States v. Langford*, ___ F.3d ___, 2011 U.S. App. LEXIS 16131 (11th Cir. 2011), a "bribery" honest services charge must include (at least) proof that there was a scheme or intent that the payment would be hidden. Even if nothing more than that is required to constitute the "fraud," still at least that much is required even under *Langford*: secret payments. *See Langford*, *23 ("the government had to prove beyond a reasonable doubt that Langford was in fact a public official and that he accepted bribes that he did not disclose to the public"); *id.* *24 n. 7 ("the scheme to defraud the public of honest services can be proven when a public official accepts a bribe and fails to disclose it to the public"); *id.* *26 ("Langford failed to disclose the receipt of these bribes to the public -- all that is required under *Lopez-Lukis*"). There was no proof in this case that Mr. McGregor hid any payment to any Legislator, or that he schemed to do so in any unlawful or fraudulent way. Accordingly, there was no proof that he intentionally entered into a scheme with the specific intent to defraud.

* As to the checks to Mr. Crosby, i.e., Counts 23, 24, 25 and 27, the Court's rulings at trial now lead to the conclusion that those checks were not in furtherance of any proven scheme to defraud. The Court granted Mr. Crosby's motion for judgment of acquittal on all "honest services" counts, reflecting the fact that bribery of him was *not* the object of any scheme to defraud. (Had bribery of him been the object of a proven scheme to defraud, then he would have been an appropriate defendant.) The Court nonetheless allowed these counts to proceed against other defendants, but the Court

should reconsider and correct that ruling. While we recognize the Court's point that even non-fraudulent and otherwise lawful mailings can be the premise for mail fraud counts if they further the scheme, still the fact is that checks to Mr. Crosby did not further the deprivation of honest services of legislators. If there were a scheme to deprive the public of legislators' honest services, that would be separate from Mr. Crosby's actions in drafting bills. The putative connection would only be that both Mr. Crosby's actions, and legislators' actions, would have something to do with enactment of SB380. But enactment of SB3380 is not the "scheme" at issue in any of the honest services counts. The alleged scheme was bribing people – and now we know from the Court's ruling on Mr. Crosby's Rule 29 motion that the scheme (at most) was bribing only legislators – and payments to Mr. Crosby did not further that alleged scheme.[3]

* As to Count 26 (which is based on the checks sent to PACs pursuant to some discussion between Mr. Gilley and Senator Smith), Mr. McGregor had nothing to do with any scheme involving those checks, or any scheme involving any deprivation of Senator Smith's honest services. Nor did this mailing further any scheme involving the deprivation of any other person's honest services. The jury's not-guilty verdict for Mr. McGregor on Count 33 (a call between Mr. Gilley and Senator Smith) establishes at least that Mr. McGregor was not complicit in any unlawful aspect of their relationship. This requires an acquittal on Count 26 as well, under the issue-preclusion component of

[3] While this is true as to all of the counts based on checks to Mr. Crosby, it is even more obviously true as to the counts based on checks in January and February. There is no way that those were in furtherance of a scheme to bribe legislators that did not even exist, as far as Mr. McGregor's actions were concerned, at that time.

Double Jeopardy as discussed in *Yeager*, *supra*.

* As to Counts 28 and 30-32, the telephone calls involving Mr. McGregor, those were not in furtherance of any bribery scheme. We ask the Court, in considering this issue, to ask itself: in furtherance of which legislator's "honest services" deprivation, were these calls? No answer can be found, not even on a broad definition of what it means for a wire communication to be "in furtherance of" an alleged scheme. Certainly these calls were not in furtherance of any scheme to deprive the public of Senator Beason's honest services – he was not expected to be a "yes" vote at the time of these calls. Likewise, certainly not Senator Preuitt's or Senator Means's; there is no hint that Mr. McGregor was pursuing any scheme of bribery of them, at the time of these calls. And no other legislator's, either, according to the evidence. This should lead the Court to the conclusion that these calls were not in furtherance of any honest services fraud scheme. They may have been in furtherance of getting a bill passed, but as we have stated before, getting the bill passed is not (and cannot be) the crime or the "scheme" charged.

Conclusion

A judgment of acquittal should be entered on all remaining counts.

Respectfully submitted,

s/ Benjamin J. Espy
Benjamin J. Espy (ASB-0699-A64E)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Joe Espy, III (ASB-6591-S82J)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 S. Shackleford Road
Little Rock, AR 72212
Telephone: (501) 954-7878
rwhitney@inveritasinfo.com

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin V. Shur
Eric Olshan
Barak Cohen
Brenda K. Morris
Emily Rae Woods
John L. Smith
Edward T. Kang
US Department of Justice
1400 New York Avenue
Washington, DC 20005
justin.shur@usdoj.gov
eric.olshan@usdoj.gov
barak.cohen@usdoj.gov
brenda.morris@usdoj.gov
rae.woods@usdoj.gov
edward.kang3@usdoj.gov

Louis V. Franklin, Sr.
Stephen P. Feaga
US Attorney's Office
Post Office Box 197
Montgomery, AL 36101-0197
steve.feaga@usdoj.gov
louis.franklin@udsoj.gov

David McKnight
William J. Baxley
Joel E. Dillard
Stewart D. McKnight, III
Baxley, Dillard, Dauphin, McKnight & James
2008 Third Avenue South
Birmingham, AL 35233

bbaxley@bddmc.com
jdillard@bddmc.com
dmcknight@baxleydillard.com

William N. Clark
William H. Mills
Stephen W. Shaw
Glory R. McLaughlin
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
whm@rmclaw.com
sws@rmclaw.com
grm@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwwise@aol.com

J. W. Parkman, III
Richard M. Adams
Joshua L. McKeown
William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com
adams@parkmanlawfirm.com
jmckeown@parkmanlawfirm.com
wwhite@parkmanlawfirm.com

Susan G. James
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Jeffrey C. Duffey
Law Office of Jeffrey C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

_s/ Benjamin J. Espy_____
Of Counsel