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**
	)	
LARRY P. MEANS,	)	
	)	
Defendants.	)	

DEFENDANT LARRY P. MEANS' BRIEF IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL AFTER MISTRIAL

Defendant Larry P. Means was charged in the Indictment in sixteen (16) Counts. On August 11, 2011, a verdict of not guilty was rendered as to Defendant Means on Counts 7, 19, 20, and 23 through 33 of the Indictment. No verdict was reached as to Means on the Conspiracy, Count 1, and the federal program Bribery Count, Count 6. Under Rule 29(c)(2), "If the jury has failed to return a verdict, the Court may enter a judgment of acquittal." The evidence presented by the Government as to each of these Counts was insufficient for a reasonable jury to find Defendant Means guilty beyond a reasonable doubt. Defendant Means adopts by reference the arguments and citations in Briefs filed by other Defendants.

FACTS

To the demonstrate the insufficiency of the Government's case the testimony of each of the Government's witnesses will be reviewed.

Scott Beason

Alabama State Senator Scott Beason described no conduct of any sort or type of Larry

Means which supported the argument that he was involved in the conspiracy alleged in Count 1, or the Bribery alleged in Count 6.

Barry Mask

No mention of Means.

Debra Moore

No mention of Means.

Gayle Traylor

No mention of Means.

Cheryl Ferrell

No mention of Means other than his name being listed in Bob Geddie's ledger reflecting campaign contributions previously made from Milton McGregor.

Benjamin Lewis

No mention of Means.

Lynn Byrd

No mention of Means.

Jim Sumner

No mention of Means.

Ronnie Gilley

The Government played J75 and J76 which were recordings of telephone conversations between Massey and Gilley. Gilley testified that Massey told him that Means

asked for $100,000.00 to vote for SB 380. In a subsequent telephone conversation Gilley told Massey that Means could count on it 100 percent (Vol. 11-B, 50). Gilley said he told McGregor about this when McGregor said he had been telling him do not worry about Means he "was going to come around. That he would be a yes vote" (Vol. 11-B, 50-51). Gilley was then asked on direct examination if McGregor told him that Means had already committed to vote "yes" why did he give him $100,000. Gilley's response was because Means asked for $100,000 (Vol. 11-B, 51). However, as the testimony showed Gilley did not give Means a $100,000 campaign contribution or for that matter any campaign contribution.

On cross examination, Gilley admitted : (1) No $100,000 campaign contribution was made to Larry Means, (2) he was not a party to and was not present when Jennifer Pouncy had whatever conversation she had with Larry Means, (3) he was not a party to and was not present when Jennifer Pouncy had whatever conversation she had with Jarrod Massey, (4) he had no telephone conversations with Larry Means, (5) he had no personal contact with Larry Means, and (6) to his recollection he had never even met Larry Means (Vol. 17, 204, 205).

Bryant Raby

No mention of Means.

FBI Agent John McEachern

McEachern referred to Means in the context of the recording between McGregor and

Means and the recording between Massey and Gilley re: Means. He acknowledged certain background information of Means.

Jarrod Massey

Jarrod Massey testified that his first illegal conduct was bribing Representative Terry Spicer for Massey's own personal gain, and that of his clients (Vol. 24, 68-69). Massey admitted that between 2001 and 2009 he was committing criminal acts and that there were a number of innocent people he involved in his activities (Vol. 24, 75-76).

Gilley paid him $16,500 per month in 2010. Massey testified that if he wanted to keep getting paid he needed to produce results (Vol. 24, 69-70). He also had an incentive contract that he got 2 percent up to $100,000 per year for each electronic bingo location/license. Gilley had to be involved in the locations (Vol. 24, 70-71).

According to Massey, Means did not attend any strategy meetings regarding gaming conducted by Paul Hubbard, and was not at the strategy meetings at Garrett's Restaurant, or at any of the six to nine meetings held on the issue (Vol. 24, 75-77).

Massey acknowledged that electronic bingo had some very valued aspects such as creating jobs, contributing to the economy, providing new tax revenue for schools, and entertainment for the community (Vol. 24, 77). He acknowledged that he had seen polls that 80 percent of the people wanted to vote on the issue (Vol. 24, 80-81).

Massey admitted he had an interest in being successful in getting votes for the bill (Vol. 24, 95).

In working to get SB 380 passed in Etowah County, Massey worked with Lobbyist Ferrell Patrick, not directly with Senator Means (Vol. 24, 114-115). In his discussions with Ferrell Patrick, they agreed that the final draft of SB 380 was about the best they could get (Vol. 24, 116-117). He was aware that the women lawyers representing CBS Supply in Etowah County had some reservations about the bill (Vol. 24, 117). He was working with Ferrell Patrick on behalf of Houston County because he felt it was best for both to try to get destinations for gaming (Vol. 24, 118). Massey felt that the bill as drafted was the best Etowah County was going to get. It was his belief that the new bill was a better scenario for Etowah County that the old bill (Vol. 24, 118-119).

During the 2010 legislative session Massey had very little personal contact with Means (Vol. 24, 119). He said that he believed to get Means support he needed to get the Etowah County people satisfied, and believed that they had with the last bill, in that he believed that was the best Etowah County was going to get (Vol. 24, 118).

J75 and J76 are Massey's conversations with Gilley. Massey said that Pouncy told him that Means wanted $100,000 in exchange for his vote (Vol. 24, 119-120). Massey claimed that the money that he gave out for campaign contributions was not Gilley's and that he had free rein to decide how he wanted to give it out (Vol. 24, 122). However, Massey called Gilley for authorization to make the contribution to Means.

Massey admitted that he met with the F.B.I. seven times before he pled guilty and six times after (Vol. 24, 120). On March 31, 2010, in an interview with the F.B.I., Massey stated

that he had no knowledge of any corrupt action involving the recently passed gaming legislation (Vol. 24, 122). He was interviewed by the F.B.I. on October 12, 2010, and at that time told the F.B.I. that he did not even recall a conversation with Pouncy where Means asked for $100,000 campaign contribution, or any conversation with Gilley regarding Means (Vol. 24, 123). Massey testified that, in fact, in 2010 he had very few conversations with Means other than perhaps to ask where he was on the bill (Vol. 24, 123).

When he talked to the Government agents and lawyers on October 15, 2010, Massey did not say that Larry Means asked for $100,000 in exchange for his vote (Vol. 24, 124). On November 9, 2010, he changed his testimony and told the F.B.I. that Pouncy told him that Larry Means had asked for $100,000 in exchange for a favorable vote (Vol. 24, 124). However, he did not dispute that on November 9, 2010, he told the F.B.I. agents that he "assumed" that Means wanted it in exchange for his vote (Vol. 24, 124). Massey acknowledged that the word "assumed" means not based on any facts (Vol. 24, 126). Massey admitted on cross-examination by McKnight that he sometimes takes someone's word and expands on it and what comes out becomes bigger (Vol. 24, 126).

He then claimed that he had not mentioned Means earlier because he was trying to protect him (Vol. 24, 125). However, he gave no reasonable explanation for why he would want to protect Means.

Massey said he does not know if Pouncy accurately reported what Means had actually said to her. He has not heard any recording of it (Vol. 24, 122).

Means did not ask Massey for a $100,000 campaign contribution or any other campaign contribution. Massey never personally offered Means a $100,000 campaign contribution (Vol. 24, 128-129).

Massey testified that no support was given to Means in campaign contributions in 2010 from any of his PAC's, he was given no grass roots support, was not provided any local fund raisers, was not provided any "democracy tours", and was given no in-kind contributions (Vol. 24, 129). Even though Means had a Republican opponent, no effort or action was taken by Massey or anyone on his behalf to convince Means' opponent not to run (Vol. 24, 130). Massey acknowledged that Means had voted yes on every gaming legislation since 1999 (Vol. 24, 130).

Even though Gilley had authorized him to make the $100,000 campaign contribution on 24 March, no contribution was made to Means on the 24th, 25th, 26th, 27th, 28th, 29th, 30th, or 31st of March or after that (Vol. 24, 130-131). Massey acknowledged that he had been successful in business and that when he had reached an agreement he would normally follow-up. However, he admitted that he did not call Means on the 24th, 25th, 26th, 27th, 28th, 29th, 30th, or 31st of March (Vol. 24, 131). He never told Means on any of those days prior to the vote that the money was on the way (Vol. 24, 131). Likewise, he never received a call from Means asking where the money was (Vol. 24, 131).

Means never told him he was not going to vote for SB 380 unless he got a $100,000 campaign contribution, and Means never told Massey that he would vote for SB 380 if

Massey gave him a $100,000 campaign contribution (Vol. 24, 132).

Massey testified that Jennifer Pouncy did not tell him she was getting a "shake down". He said those were his words (Vol. 24, 132). Massey then admitted that he had testified earlier that he sometimes misrepresents things (Vol. 24, 132). And, that he had trouble from time to time telling the truth (Vol. 24, 133). And, he had been able in the past to make people think he was telling the truth even though he was lying (Vol. 24, 133).

George Glaser

No mention of Means.

Jennifer Pouncy

On direct examination; Jennifer Pouncy, a lobbyist who worked for Jarrod Massey, testified that the morning after she had communicated to Senator Prueitt that the previous commitments would be honored if the billed failed in the house and passed in the Senate, she had a text message from Senator Means to come by his office. *[1](RT, 7-19-2011, 26). She said Means told her he had a real tough election campaign and was going to have a real serious opponent and wanted her to ask her employer if he could get a $100,000 campaign contribution. He also stated that Coker was putting a deal together for him for the rest of the "tracks". She understood that to mean other bingo locations, and that they were also going to make contributions. (RT, 1-19-2011, 27). She said that Means needed the money because

[1]The real time transcript produced by the Government on the disk for July 19, 2011, for Pouncy does not have page numbers. Consequently, the page numbers listed are counting the beginning of her testimony page 1.

people in Etowah County, after this legislative sessions would not be supporting him. He said if he voted yes for SB 380 they were not going to support him. Mr. Feaga asked her who he was talking about when he said they would not be supporting him if he voted yes on SB 380 and she replied, "The group that's putting the Bingo destination in Etowah County." Id.

She testified that she did not have the authority to respond at that point so she told Jarrod Massey that Senator Means wanted $100,000 for his vote. She said that is what she "believed." In response to a question by Feaga, "And you based that on your interaction with Senator Means as discussed with this jury the last ten minutes?", she stated, "Yes, sir." She then said she based it on, "The conversation that I had with Senator Means." She testified that she heard Massey's end of the conversation with Gilley. (RT, 7-19-11, 29).

Ms. Pouncy said that the next day she went to Means' office and told him they said, "Yes", and in response he said, "Are we talking about the same thing?" And she said, "Yes, I believe so." She then over objection, said "she understood that to mean he was going to vote yes for the bill." (RT, 7-19-11, 31).

Mr. Feaga then asked her if she knew how Senator Means voted on the bill on March 30th and said, " he voted yes." Feaga then asked her if she knew how Means had voted earlier on the BIR. She testified that he voted no and that she was sure he voted no. When Feaga pressed her by asking if she was sure he did not vote yes, then whether she knew whether he voted yes, she said, "Actually I can't remember. I thought he voted no." (RT, 7-19-11, 31).

During the questioning by Mr. Feaga the recording J75 between Massey and Gilley, was played. Pouncy testified that she did not use the word "shake down." Over objection she was allowed to testify that she told Massey that Means asked for $100,000 for his vote for SB 380 (Vol. 27, 50-52).

Feaga then played J186 a conversation between Pouncy and Gilley on March 22, 2010. She testified that Prueitt told Means why they were calling. However, the transcript (lines 3-16) does not say that. It only says that Prueitt told Means that he knew that Ronnie Gilley had called and he had not called back. (J186 at 2).

In the cross-examination of Ms. Pouncy by Susan James, Pouncy admitted that she had been offered $100,000 by Massey as a bonus if she could secure Prueitt's vote (Vol. 27, 85).

She testified that she lied to agents on March 31, 2010, when she said she had no knowledge of Senators asking anybody for anything. However, she has not been charged with lying to the F.B.I. (Vol. 27, 89). She admitted that when she was talking to the agents she was worried about her child, her parents, and herself and did not want to go to jail (Vol. 27, 90-91). She made the decision to cooperate to avoid going to jail (Vol. 27, 91).

During cross-examination by Mark Englehart on behalf of Senator Ross, Pouncy said she believed Massey viewed Gilley as his means for a step up, his ticket to the big leagues (Vol. 29, 41). She had heard that Gilley had some doubts whether Massey could handle the business. Consequently, it was important for Massey to prove himself to Gilley, i.e., that he

could deliver the goods insofar as the passage of SB 380 (Vol. 29, 42).

Ms. Pouncy testified that there was a difference between "ask" and "demand". She said asking means, "I need a contribution for my election – re-election campaign." She said, "demanding" is little bit more stern you know just more hostile in an agitated voice." (Vol. 29, 48).

She testified on direct examination that Senator Ross was "demanding" campaign contributions. However, she told the F.B.I. on April 28, 2010, he "asked" for the contributions. (Vol. 29, 49). She was asked whether the first time she used the word "demanding" was in the plea agreement. She claimed that she had told the F.B.I. that in an interview but there was no evidence of that. (Vol. 29, 50).

Ms. Pouncy admitted in a response to a question by Feaga that as to both Means and Prueitt there was no "explicit or express statement" by them or her that I will do this if you will do that. (Vol. 29, 95-96).

On cross-examination, Ms. Pouncy testified she did not actually know whether state senators were agents of the State of Alabama. She also said that she had no personal knowledge whether the State of Alabama received $10,000 in 2009 and 2010 from the Federal Government (Vol.29 ,112-113).

With regard to a question from Mr. Feaga about whether her believing that the request from Means for $100,000 was in exchange for his vote, Pouncy admitted on cross-examination that it was "an assumption or [her] feeling or opinion." (Vol. 29, 113-114).

She realized at the time that Massey had a guilty mind. She said Massey began to feel that whenever someone asked for a campaign contribution he considered it more than that. And, she admitted that she had reached the point where she "assumed" a request for a campaign contribution was more than that. (Vol. 29, 115).

On cross-examination by Larry Means' attorney, she testified that she went to work for Massey based upon a recommendation from Representative Terry Spicer. She claimed that she did not know Massey was paying money to Spicer. (RT, 7-21-11, 139-140). However, she admitted that she had answered earlier in a response to Mr. McKnight's questions that she had concerns about Massey and his honesty and integrity and he would do anything to try and please Gilley. (RT, 7-21-11, 141).

She was paid $65,000 a year even though she only worked during the session during the first part of the year. The job was important to her. (RT, 7-21-11, 140).

Her first contact with the F.B.I. was on March 31 when ABI Agent Joe Herman and FBI Special Agent George Glaser pulled up behind her in the parking lot of her office. (RT, 7-21-11, 140-141). She went with the agent to the F.B.I. office. She testified that they asked her whether she had any knowledge whatsoever of anything being offered by anyone in her office, or anyone in the legislature to influence their vote on bingo legislation, and she said she did not. She did say she did not remember saying that she wasn't for sure what Massey was doing. She then was shown the F.B.I. 302 and said it refreshed her recollection (RT, 7-21-11, 142-43).

She remembered that there were a number of versions of SB 380 but she did not know exactly how many (RT, 143). She did remember before the BIR vote on March 3rd it was a long bill that had some areas grandfathered in, but it did not include Etowah County (RT, 144). She acknowledged that that was one of the issues for Senator Means (RT, 144).

She clarified that when she testified in response to Mr. Feaga's questions about Senator Means voting no on the BIR she said her "mind failed" her. She said that she thought he voted no and then remembered that he "passed". She acknowledged that "passed" means he simply did not vote, and did not abstain, he just did not vote (RT, 7-21-11, 144). She acknowledged that when she said "no" yesterday it was a mistake. Because the BIR did not pass there was no vote on the bill (RT, 7-21-11, 144-145).

She was aware that there were multiple efforts to try to come up with a bill that would satisfy everyone's concern, and that Massey had conversations with a fellow named Patrick in Etowah County. Massey told her that. She did not participate. Those discussions were largely between Massey and Patrick and not Larry Means. (RT,7-21-11, 145) It was her understanding throughout the efforts to pass the bill till the time it passed that Larry Means wanted to do what was best for the people of Etowah County (RT, 7-21-11,145-146). She said that Means made that clear, and that the negotiations among the different interests went pretty much up to the wire (RT, 7-21-11, 146). She also recalled on the 23rd of March Senator Keahey introduced another bill that dealt with providing some special connection for Native Americans (RT, 7-21-11, 146).

Ms. Pouncy testified that on the morning of March 24, 2010, she was walking around the Senate halls and offices which was one of the things she did. She then said she was in Senator Means office between 10 and 11, closer to 11 a.m. His office is in a suite (RT, 7-21-11, 147). She said that it is fair to say people were coming up and down the hallway outside the suite and it is a very busy area when the legislature is in session (RT, 7-21-11, 148). She described the suite as having offices for Senator Means, Senator Keahey, Senator Sanford, and Senator Holly with Senator Sanford's secretary's desk in the open area along with another secretary's desk and chairs and a table. She said she frequently along with other lobbyist came and sat in the chairs waiting to see one Senator or another, and that was pretty common because it was a good size suite (RT, 7-21-11, 148-149).

Ms. Pouncy said that she had testified earlier that she went to Means office because she had a text from him. However, when shown the notes of April 28, 2010, of Agent Herman when he interviewed her she acknowledged that she had said she had a small conversation with Larry Means in the hallway a week before the vote and then he called her into his office and that's when the conversation occurred. While she admitted that that is what she told Herman, she said she made a mistake (RT, 7-21-11, 150-151).

Ms. Pouncy again admitted that on the 31st of March when she was interviewed by Agents Herman and Glaser she denied that any Senator had offered or asked her for something in exchange for a vote. She also acknowledged that at the end of that interview or some point in it on the 31st the Agent warned her that a false statement to a federal agent

was a felony. And, she admitted at that time she had not done anything improper, and did not participate in giving anything of value to legislators to influence their vote (RT, 7-21-11, 151-152).

She also made another proffer on April 19, 2010. After reviewing the proffer, she acknowledged there was nothing in there about Senator Means making a request for a campaign contribution. The only reference to Senator Means and Etowah County was the effort of a company seeking to get a permit there (RT, 7-21-11, 153-154).

Ms. Pouncy admitted that on April 28, 2010, when she was interviewed by the F.B.I. she told them that Means asked her if he could get a $100,000 campaign contribution. She told them it was clear that he was asking for a campaign contribution (RT, 7-21-11,155-156). This was the first report of this type she had made.

Ms. Pouncy acknowledged that when she was interviewed on April 28, 2010, she also told the agent that Senator Means had said Tom Coker was doing something also. She said nothing about "tracks." (RT, 7-21-11, 157-158). Ms. Pouncy admitted that while she told Massey that Larry Means wanted $100,000 in exchange for his vote, Larry Means did not say that (RT, 7-21-11, 159). She also admitted that on April 28 she had told the F.B.I. agent that it was her conclusion that Jarrod Massey was not going to make a campaign contribution unless he felt he was sure that there was going to be a vote in exchange for it. However, she again acknowledged that that is not what Senator Means said (RT, 7-21-11, 159-160).

Ms. Pouncy testified that when she went back the next day she told Means that they

had said "Okay." And that Senator Means said are we talking about the same thing and she said "Yes, I believe so".

After the brief conversation on the 25th of March regarding whether they were talking about the same thing, nothing else was said by either of them. She also testified that after that conversation, she did not recall having any further conversation with Larry Means on the 25th, 26th, 27th, 28th, 29th, 30th or any other time about a campaign contribution. (RT, 7-21-11, 171). She also testified that to the best of her knowledge no campaign contribution was made to Larry Means.

She said that Senator Means had also told her he was not going to get local support if he voted for the bill. She testified that what she was talking about was that Senator Means was saying that he wanted to be sure that the people in Etowah County were taken care of and he wanted a bill if it were passed to be the best that could be done for Etowah County. She said it was clear that Senator Means position was that he wanted the people to have an opportunity to vote (RT, 7-21-11, 171-172). She also said that as far as she knew the people in Etowah County, County Commission and others wanted the opportunity to have a site. (RT,7-21-11, 172). She also acknowledged that he did not explicitly say to her that if they gave him a campaign contribution he would vote yes on SB 380, and that the next day when she told him that they would make the contribution she did not say explicitly if you will vote yes they will make the contribution (RT, 7-21-11, 172). (Real Time transcript has a typographical error on page 172, line 13-14. (The transcript states, Q. – Did he not say

explicitly say to you if you gave me a campaign contribution I will vote yes on Senate Bill three-eighty, did he? A. No. Sir. In fact the question was "He did not explicitly say to you if you gave me a campaign contribution I will vote yes on Senate Bill three-eighty, did he?")

Steve French

No mention of Means.

Phillip Harrod

No mention of Means.

FBI Agent Nathan Langmack

No mention of Means other than to identify a video recording and telephone records.

Richard Whitaker

No mention of Means.

CONSPIRACY - COUNT 1

Means was charged in Count 1 with conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §§666(a)(1)(B) and 666(a)(2). Defendant incorporates by reference the citations and arguments set forth in his Motion to Dismiss and Brief in support thereof. He is due to be acquitted of the charges under the Double Jeopardy provision of the Fifth Amendment as set forth in that Brief.

To sustain a conviction under 18 U.S.C. §371 the Government must prove beyond a reasonable doubt (1) the existence of an agreement to achieve an unlawful objective; (2)

knowing and voluntary participation in the agreement; and (3) the commission of an overt act by a co-conspirator in furtherance of the agreement. *United States v. Atkinson*, 158 F.3d 1147 (11th Cir. 1998). The Eleventh Circuit has emphasized that the agreement to commit an unlawful act is the "essential element of the crime." *United States v. Chandler*, 388 F.3d 796, 806 (11th Cir. 2004). Direct evidence of an agreement to commit an unlawful act is the exception rather than the rule, but in the absence of direct evidence, the conspiracy conviction must be reversed or a Motion for Judgment of Acquittal granted if the circumstantial evidence of the agreement is insufficient to support a reasonable inference. *Id*. at 806. The jury is not permitted to merely speculate when the proof rests on circumstantial evidence; there must be "reasonable inferences" to support a jury's verdict. *United States v. Perez-Tosta*, 336 F.3d 1552, 1557 (11th Cir. 1994). It is important that the Government be held to its burden - proof of guilt beyond a reasonable doubt. Mere proof that participation in a conspiracy is possible or even plausible is not enough. *United States v. Hardy*, 895 F.2d 1331, 1334 (11th Cir. 1990). The Government must prove that two or more people intended to agree to commit a crime, it must also prove that the Defendant had the state of mind to commit the subsultive crime which is the object of the alleged illegal agreement. *United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986).

The Government had the burden to prove beyond a reasonable doubt that a conspiracy existed, and that Larry Means knew about it, and that he voluntarily agreed to join. *United States v. Chandler*, 388 F.3d 796, 806 (11th Cir. 2004). An inference of participation from

presence and association with co-conspirators alone does not suffice to convict. *United States v. Perez-Tosta*, 36 F.2d 1552, 1557 (11th Cir. 1994). Even "close association" with a co-conspirator present at the scene of an alleged crime is insufficient evidence of knowing participation in a conspiracy. *United States v. Vera*, 701 F.2d 1439, 1357 (11th Cir. 1983).

Here, the only possible evidence of an "agreement" involving Larry Means was that he was in favor of allowing the people of Etowah County to vote on the issue of electronic bingo. There is no evidence that he had any agreement with anyone that votes for SB 380 would be exchanged for campaign contributions. The only witnesses who testified regarding the alleged campaign contribution in exchange for a vote involving Pouncy, Massey and Gilley were those three. The Government presented 15 witnesses. The Government spent weeks laying out what it contended to be the conspiracy through the testimony of Scott Beason, Barry Mask, Benjamin Lewis, Ronnie Gilley, and Jarrod Massey. None of these witnesses had any conversations directly with Larry Means that in any way supported any argument that he was a part of any alleged conspiracy. Jarrod Massey acknowledged that Means was not at any of the strategy sessions or other meetings in which plans were made for the passage of SB 380.

The Government reported over 12,000 recordings of conversations. Larry Means was on only one of those conversations. That conversation was with Milton McGregor. It formed the basis of the charge in Count 7. The jury found Larry Means not guilty of that charge. And, rightly so, the conversation merely reflected that Means indicated the need for

campaign contributions support, and McGregor indicated that he supported Means. They also discussed SB 380 and its passage. There is no law which prohibits such discussions. Means contends that the very dangerous aspect of this prosecution is that it infringes on the First Amendment rights of those who seek campaign contributions and those who choose to make them. That is why the Supreme Court in the *United States v. McCormick*, *500 U.S. 257 (1991),* required that there must be an explicit *quid pro quo* where campaign contributions are involved. This Court adopted that position in its instructions to the jury. There was no proof of any intent to enter into any agreement for any explicit *quid pro quo* of which Defendant Means was a knowing and wilful participant. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was in fact any conspiracy as alleged in Count 1 of the Indictment, and there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that Means knowingly, wilfully, and voluntarily participated in any conspiracy with any person as a part of any single plan that ran from "on or about February 2009 through on or about August 2010." The Government attempted to show Means association with an alleged co-conspirator (McGregor, Gilley, Massey and Pouncy) in an effort to prove conspiracy. However, the Eleventh Circuit has repeatedly held that mere association is insufficient to prove conspiracy. *United States v. Perez-Tosta*, 36 F.3d. 1552, 1557 (11th Cir. 1994); *United States v. Vera*, 701 F.2d. 1349, 1357 (11th Cir. 1983).

The Court has stated in its order that Defendant's Motion for Judgment of Acquittal

was inadequate because it did not cite to the record. An effort to correct that deficiency is made in this Brief. However, much of Defendant's argument with regard to the conspiracy count is based upon not just the insufficiency of the evidence, but the absence of any evidence. A defendant in a criminal case has no burden to put on any evidence and no adverse inference can be drawn from the fact that no evidence was presented by Defendant. Likewise, where a Government witness testifies and his or her testimony in no way implicates the defendant, the defendant has no obligation to specifically ask the witness on cross-examination whether he or she had any contact with the defendant, or whether something was said or not said. It was noted earlier with the exception of Pouncy, Massey, Gilley, and the one telephone recording with McGregor, there was hardly any mention of Means.

Below is a summary of what the Government did not prove:

- There was evidence that beginning in 2009 there were multiple meetings between Gilley and Massey and others regarding an overall plan to pass legislation to authorize a vote on a constitutional amendment to permit electronic bingo. However, there was no evidence that Means participated in any manner. The Government offered testimony regarding strategy sessions for upcoming legislation in 2009 and 2010, but there was no evidence that Means was invited to, or participated in, any of these meetings whether in person or through a representative.

- There was no evidence that Means had any connection with the meetings at

Garrett's Restaurant or any follow-up meetings. There was no evidence of any attempt to convince Means to change his historic view of gambling legislation. Means was only mentioned in passing during the Government's efforts to prove the alleged unlawful conspiracy plan.

- There was no evidence that Means participated in the drafting of any legislation or had any input as to portions of any gaming legislation which was modified, amended, proposed or otherwise. Further, there was no evidence of any oral submissions or written submissions by Means regarding any proposed legislation.

- There was no evidence that Means joined any discussions on how the bill was to be drafted, negotiated, modified or amended, except to state that he wanted Etowah County to be provided for. The Government's evidence of any such discussions did not include Mr. Means. Mr. Means is not charged with working to pass legislation; he is charged with conspiracy to corruptly influence legislators, or to be influenced.

- There was no evidence Means knowingly and willfully joined in the conspiracy charged in the Indictment. The evidence showed only that Means was simply working for what he thought was in the best interest of Etowah County. This fact was confirmed by the testimony of Mr. Massey and Ms. Pouncy. Further, Massey testified that the final bill which was voted on by the State Senate improved the position of Etowah County, a County included in Means' Senate District.

- Gilley testified he had never met Larry Means. There were no recorded

conversations and there was no evidence of any attempt at communication between Gilley and Means. There was no personal contact with Means, no emails, no telephone calls, simply no contact. Further, he made no payments directly or indirectly to Means or to his campaign.

- There is no testimony Mr. Means was involved in any fund raisers planned by Mr. Gilley or participated in the "democracy tour." Mr. Gilley said he had provided money and he had contacts with various legislators, had music and entertainment and people booked to come in with artists to be paid. However, there was no evidence of any such actions being offered to Mr. Means, and no evidence of any being held.

- The Government offered testimony regarding fund raisers proposed for other candidates and proposals how talent fees would be paid, political polls could be conducted or products could be purchased. There was no testimony that in any way connected Mr. Means with any of these actions. In fact, there was no testimony of any effort whatsoever to include Larry Means in any of these events.

- There was consistent communication between Massey, Gilley, and others regarding various matters. However, there was very little communication regarding Larry Means and in those instances it did not refer to anything that would touch on a conspiracy or his involvement in one. His communications regarding Mr. Prueitt with Ms. Pouncy were merely to help her get in touch with Prueitt. There was no evidence that Means knew the reason they wanted to contact Prueitt.

• There was no evidence Larry Means was aware of any agreement, either explicit, implicit, express or otherwise to offer or solicit bribes to secure the passage of SB 380. There were no emails, no letters, and no communications whatsoever with him regarding the alleged conspiracy.

Where evidence of a conspiracy has been insufficient, or evidence that a defendant knowingly and voluntarily joined in the conspiracy is insufficient, the Eleventh Circuit has not hesitated to reverse the defendant's conviction. See *United States v. Toler*, 144 F.3d 1423, 1433 (11th Cir. 1998); *United States v. Hardy*, 895 F.2d 1331, 1335 (11th Cir. 1990); *United States v. Johnson*, 440 F.3d 1286, 1294-1296 (11th Cir. 2006); *United States v. Awan*, 966 F.2d 1415, 1435 (11th Cir. 1992); *United States v. Pritchett*, 908 F.2d 816, 820 (11th Cir. 1990); *United States v. Parker*, 839 F.2d 1473, 1477-78 (11th Cir. 1988); *United States v. Palacios*, 556 F.2d 1359, 1365 (5th Cir. 1997). Defendant's Motion for Judgment of Acquittal as to Count 1 is due to be granted.

BRIBERY COUNT 18 U.S.C. §§666 (a)(1)(B) & (2)

Means was charged in Counts 6 and 7 with violating 18 U.S.C.§ §666 (a)(1)(B) & (2), Federal Program Bribery and Aiding and Abetting. The jury found him not guilty of Count 7 allegedly involving McGregor and not guilty of the extortion charges, Counts 19 and 20. The reasons set forth in Defendant's Motion to Dismiss and Brief filed in support thereof are incorporated herein and any prosecution of Defendant Means as to Count 6 is barred by the double jeopardy provisions of the Fifth Amendment.

In the final analysis, the sole basis for the prosecution of Means as to Count 6 is based upon the testimony of Jennifer Pouncy. It is undisputed that when she was first interviewed by the F.B.I. she denied having any knowledge of any offers being made in exchange for votes or any solicitation by Senators or Representatives for any campaign contributions . She admitted that she was warned in that interview that if she made a false statement she could be prosecuted, and reiterated that she had no such knowledge. And, in her first interview with the F.B.I. after she had decided to plead guilty she made no mention of any alleged *quid pro quo* agreement with Larry Means. Although the timing is not clear, the evidence showed that she had originally believed that an agreement had been worked out with the Government so that she would be placed on probation if she pled guilty. Upon a new head of the public integrity division taking office, that agreement was abandoned. She claimed that she had not told the Government about the alleged conversation with Larry Means in her first interviews because they did not have time. However, she had mentioned Means in another context, and it would certainly appear that if there had been some discussion of what might constitute "bribery" she would have mentioned it, if she believed he was trying to solicit a bribe. It is submitted that she did not mention it because there was simply no such solicitation, and as she admitted there was no explicit *quid pro quo,* or express *quip pro quo* for that matter.

Ms. Pouncy acknowledged on several occasions in both direct examination and cross-examination that Larry Means had "requested" a campaign contribution. She specifically acknowledged that there was no discussion that the request was in exchange for his vote, or

that the offer to give the contribution was in exchange for his vote.

She acknowledged that when she told Jarrod Massey that Means had requested a campaign contribution in exchange for his vote she had "assumed" that was what he meant. She also admitted that she never used the word "shake down" with reference to her conversation with Means. Further, she admitted that when she first told the F.B.I. agent about this incident, she did not say that the request was in exchange for his vote, but instead said that she knew Massey and Gilley would not make the contribution unless it was in exchange for his vote. However, at trial, she said that was a mistake.

As noted in the statement of facts, Massey said he reported to Gilley what he said Pouncy told him. However, he did not even mention this incident in his first several interviews with the Government. His effort to suggest that he failed to mention it because he was trying to "protect" Means makes absolutely no sense. He had no prior relationship with Means and admitted that he hardly ever spoke to Means in 2010. It is submitted that the only reasonable interpretation is for the fact that Pouncy and Massey did not mention this conversation earlier is because they knew it simply constituted a request for a campaign contribution and that Pouncy made it more than that in her statement to Massey because she believed that Gilley would not make the contribution unless it was in exchange for his vote. And, Massey then took it a step further by calling the "request" a shakedown. Their change in their stories to the FBI was an effort to attempt to provide evidence that might lead to a conviction and hence a lesser sentence.

Pouncy, Massey and Gilley all acknowledged that no such contribution was made. And, Pouncy and Massey both acknowledged that after the alleged conversations, they had no further conversations with Larry Means about campaign contributions or for that matter anything else. And, Gilley admitted that he had never even met Larry Means or talked to him.

Prosecutor Feaga asked Ms. Pouncy whether there was any explicit or express *quid pro quo* to which she acknowledged there was not.

By agreement at a pre-trial hearing, it was agreed that the *McCormick* standard of an explicit *quid pro quo* was applicable to all of the counts in the Indictment including the §666 Counts where campaign contributions were involved. Only the Crosby count was said not to involve campaign contributions. The Eleventh Circuit has held in the context of campaign contributions that an explicit *quid pro quo* is required in order to prove a crime. See *United States v. Siegelman*, 640F.3d 1159, 1171 (11th Cir. 2011) (on remand). This Court incorporated the explicit *quid pro quo* requirement in its instructions to the jury.

The requirement of an explicit *quid pro quo* is that the Government must prove beyond a reasonable doubt an explicit, and Defendant submits an express agreement, to exchange a campaign contribution for a vote. Defendant submits that the Government failed to produce sufficient evidence from which a reasonable juror could be convinced beyond a reasonable doubt of that element. Despite all of the witnesses and a lengthy trial in this case, the Government's only evidence in support of this count comes from Jennifer Pouncy.

Defendant has set forth her testimony for the Court's review. There was no explicit, or express *quid pro quo* in the conversation between Jennifer Pouncy and Larry Means on the 24th of March or the 25th of March. It would be simply speculation and conjecture to find in those conversations an explicit *quid pro quo*. She admitted that she "assumed" he was asking for the contribution in exchange for his vote. And, the absence of any follow up discussions, and the fact that no campaign contribution was paid further support the argument that there was no explicit *quid pro quo* the evidence was insufficient. The Court should also consider the evidence that Means had consistently supported gamin bills over the years, and both Pouncy and Massey testified that Means wanted a bill which was best for Etowah County. Massey testified that SB380 as passed was better for Etowah County than the original bill. It was the best they could get.

In that there is insufficient evidence that Larry Means violated §666 there is no evidence that he aided and abetted Pouncy, Massey and Gilley. He was not aware of any bribe effort and he did not join in it. The evidence was insufficient as to §2 *United States v. Hamblin*, 911 F.2d 551, 557 (11th Cir. 1990).

It is submitted that upon application of the law to the facts, there was clearly insufficient evidence of an explicit *quid pro quo* from which a reasonable jury could be convinced beyond a reasonable doubt. Despite that fact, various issues remain regarding the application of § 666 to the circumstances in this case which render the evidence insufficient. The statute itself and the elements under §666 (a)(1)(B) help demonstrate the insufficiency

of the Government's proof: (1) That the defendant is an agent of an organization, or of a state, local or Indian tribal government or any agency thereof; (2) Corruptly solicits or demands accepts or agrees to accept anything of value intending to be influenced or rewarded in connection with any business, transaction or series of transactions of such organization, government or agency involving anything of value of $5,000 or more; and (3) The organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal Program involving a grant, a contract , a subsidy, a loan, guarantee, insurance, or the form of federal assistance. The statute goes on to define in section (d) the term "agent" to mean a person authorized to act on behalf of another person or government and, in the case of an organization or government includes a servant or employee, and a partner, a director, an officer, manager, and representative. Consequently, apart from the explicit *quid pro quo* issue, other issues which Defendant contends render the evidence insufficient, include but are not limited to, (1) the Indictment is not applicable under the circumstances here because the allegations of the indictment relate to speech, i.e., campaign contributions are protected by the First Amendment; (2) Whether the term used in the statute "corruptly" is unconstitutionally vague when applied to a case involving campaign contributions to an elected representative; (3) Whether the language "in connection with any business, transaction or series of transactions "is applicable to State Legislators in their role solely as legislators"; (4) Whether §666 and the allegations of the Indictment unconstitutionally interfere with and encroach on State sovereignty in violation of the Tenth

Amendment; (5) Whether campaign contributions constitute "a thing of value"; (6) Whether the application of §666 to the circumstances alleged in this case violates the due process clause of the Fifth Amendment when weight against the rule lenity; (7) Whether the Government must prove that the $10,000 requirement actually went to the State Legislature as opposed to the State of Alabama in general; and (8) Whether legislator is an "agent of the State", or instead a representative and agent of his constituents. Defendant Means submits that the evidence was insufficient as to each of the above elements from which a reasonable jury could be convinced beyond a reasonable doubt.

The $10,000 requirement under §666 also was not proven. While there was evidence that the State of Alabama received $10,000 in federal funds, the Indictment in this case involved the Alabama Legislature (Note Paragraphs 29, 30 and 31 of the Indictment). There was no evidence that the Alabama Legislature received any federal funds. Gail Traylor who testified on behalf of the Government admitted that the Alabama Legislature did not receive any federal funding. Consequently, in that this requirement is jurisdictional, the Court is without jurisdiction and the Motion for Judgment of Acquittal should be granted on this basis alone.

Under §666 the Government must prove that the Defendant was an "agent" of the agency receiving the federal funds, and there must be some nexus between the criminal conduct and the agency receiving federal assistance. *United States v. Whitfield*, 590 F.3d 325, 344, 345 (5th Cir. 2009). In *Whitfield* the Court held that two judges who had allegedly

accepted bribes in connection with their judicial functions were not "agents" of the Mississippi Administrative Office of Courts (AOC) which had received federal funds. The Court distinguished an action which might have been done in their administrative role as judges which would have made them "agents" as opposed to their judicial function. Based upon the Court's finding that the judges were not "agents" within the meaning of § 666, it reversed the convictions and directed the district court to enter judgments of acquittal for the § 666 counts of the Indictment. *Id.* at 348.

This same analysis is applicable here in that the Government's evidence showed that the Alabama Legislature received NO federal funds, even though other parts of State government did. Further, there was no evidence that an Alabama State Senator is an "agent" of the State of Alabama. Defendant Means held no position other than his elected position as a representative of the people of his district, not an agent of the State. As one court has observed § 666 was not intended by Congress as a general anti-corruption statute but to protect the integrity of federal funds." *United States v. Frega,* 933 F.Supp. 1536, 1542-43(S.D. Calif. 1996), affirmed in part, reversed in part on other grounds, 179 F.3d 793 (9th Cir. 1999).

That Defendant Means was not an "agent" of the State for purposes of § 666 is further supported by the recent decision of the Supreme Court in *Nevada Comm'n on Ethics v. Carrigan,*___ U.S. ___, 131 S.Ct. 2343(2011). Legislators hold authority on behalf of their constituents, or of the People, rather than acting "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 of legislation, 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 the creation of laws as well), not the individual acts of legislators.

As stated in *Carrigan*, *supra,* 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 …,'" *Id*., 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," *Id*. at n.5, *20 (emphasis supplied), not as an "agent" of the State.

When these points are combined with the fact that the Congress chose not to specifically say that legislators are covered by § 666 – as contrasted with the Congressional decision to specifically include Members of Congress in §201 – the best and most reasonable and logical conclusion is that § 666 does not cover the alleged influence of State Legislators especially when the State Legislature itself receives no federal funds. A State Legislator is not authorized to act "for or in the place of," or even "on the behalf of," the State. The role of a State Senator or Representative is to draft and vote on legislation. When he or she votes the Legislator

is not acting on behalf of the State as an agent. A Legislator is a representative of his or her constituents, not of the State. The evidence is insufficient on this issue, and consequently the proof as to the entire count fails.

In that the two objects of the conspiracy count are to violate 18 U.S.C. §666, the preceding argument regarding agency is applicable to Count 1 as well.

Conclusion

The Government, as to both Counts1 and 6 of the Indictment, did not present sufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt of each and every element of those counts. Defendant is entitled to a judgment of acquittal on each of said counts, and the Court is respectfully requested to enter an order granting Defendant's Motion for Judgment of Acquittal.

Dated this 16th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following and **all counsel** of record electronically on this the 16th day of September, 2011.

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