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

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| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **V.** | ) | **CR NO. 2:10cr186-MHT** |
| | ) | |
| **LARRY P. MEANS,** | ) | |
| | ) | |
| **Defendant.** | ) | |

**MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE**

Comes now the Defendant, Larry P. Means, and pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, the Government having rested, moves for a Judgment of Acquittal as to this Defendant and as to each count of the Indictment, on the ground that the evidence presented as to each count is insufficient to sustain a conviction. In support thereof, Defendant Means would show unto the Court as follows, separately and severally:[1]

**Introduction**

1. In considering a Motion for Judgment of Acquittal, the Court reviews the evidence presented by the Government to determine whether a reasonable jury, when reviewing the evidence in the light most favorable to the Government, could find that the Government has proved each and every element of a specific offense beyond a reasonable

[1] In some instance quotation marks are included by counsel in this motion. These are based on counsels' recollection of testimony.

doubt. Defendant Means submits that the evidence presented was insufficient to sustain a conviction and the Government failed in this respect as to each offense.

**Adoption of Motions of Co-Defendants**

2. Defendant Means hereby adopts the various arguments and authority in any Motion for Judgment of Acquittal filed by any Defendant herein.

**General**

3. The Court has stated that it is familiar with the law and did not require a restatement in the Motion for Judgment of Acquittal. However, in a pretrial proceeding, the Court, the Government and defense counsel agreed that all counts (other than the alleged payments to Mr. Crosby) involved campaign contributions, whether allegedly solicited, offered, or accepted or agreed to accept. It was further stated that the *McCormick* standard of an explicit *quid pro quo* was applicable to each count of the Indictment.

4. Because the conspiracy charge involves alleged violations of § 666 as its object, elements of that charge also are necessary to the Government's proof, as to the conspiracy charge and the § 666 charges, e.g., that one of the alleged co-conspirators was an "agent" of the State of Alabama (paragraph 3, Indictment), and that SB380 would have generated over "$5000 in annual state and local tax revenue" (paragraph 26, Indictment).

5. As to the "agent" requirement, there is new case law showing that State legislators do not act "on behalf of" the State (18 U.S.C. § 666(d)(1), definition of "agent"). *Nevada Comm'n on Ethics v. Carrigan*, ___ U.S. ___, 2011 U.S. LEXIS 4379

(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.

6. As stated in *Carrigan*, 2011 U.S. LEXIS 4379, *15, 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.

7. 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 alleged influence of state legislators especially when the State Legislature itself receives no federal funds.

8. Means submits that all of his actions were lawfully protected acts of legitimate involvement in legislative matters.

9. There is a statutory requirement under § 666 that for the Federal Court to have jurisdiction, the alleged bribe must have been in connection with "any business, transaction, or series of transactions "involving anything of value of $5000 or more." In paragraph 26 of the Indictment, in an effort to meet that requirement, it is alleged that SB380 would have generated over "$5000 in annual state and local tax proceeds." There was a complete absence of proof of that allegation. SB380 did not generate any revenue, even if it had been passed by the House. The only actions alleged in the Indictment and the only evidence presented related to efforts to pass SB380, a bill which, if passed by both Houses, would have only authorized a vote by the people on whether to authorize electronic bingo with certain specified guidelines. It would be total speculation to say that the Constitutional Amendment would have passed and thus resulted in annual state and local tax revenue. The Government has wholly failed to meet this burden.

**Conspiracy Count**

10. Defendant Means is charged in Count 1 with conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 666.

11. Defendant Means submits that there was no evidence presented by the Government that established the necessary elements sufficient to sustain a conviction of

conspiracy.

12. There was no evidence Means was aware of any unlawful agreement or unlawful conspiracy. There was no evidence that Means discussed or knowingly and willfully joined any unlawful agreement with any of the alleged co-conspirators to commit any criminal offense, and there was no evidence that he knew of the alleged unlawful purpose of whatever agreement may have existed, if one did.

13. 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.

14. 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.

15. 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 should be

modified, amended, proposed or otherwise. Further, there was no evidence of any oral submissions or written submissions by Means regarding any proposed legislation.

16. 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 but he is charged with conspiracy.

17. Means never knowingly and willfully joined in the conspiracy charged in the Indictment. 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. 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.

18. According to Gilley, he had never met Larry Means. There was no personal contact with Means, no emails, no telephone calls and no contact. There were no recorded conversations and there was no evidence of any attempt at communication between Gilley and Means. Further, he made no payments directly or indirectly to Means or to his campaign.

19. 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.

20. 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.

21. 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.

22. Of the some 12,000 recorded telephone conversations, there is only one where Larry Means is a participant. Gov't. Ex. 146, J-146. This is the conversation between Means and Milton McGregor. It in no way is sufficient to support any notion that Means knowingly and willfully joined any conspiracy. He told McGregor that he could not commit to support SB380 until Etowah County was taken care of.

23. 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 SB380. There were no emails, no letters, and no communications whatsoever with him

regarding the alleged conspiracy.

24. Finally, there was no evidence presented from which a reasonable jury could determine that the object of the alleged interactions involving campaign funds involved an explicit *quid pro quo*, or even any *quid pro quo*.

**Bribery Counts**

25. Defendant Means is charged in Counts 6 and 7 with violating 18 U.S.C. § 666(a)(1)(B) and 2, Federal Program Bribery and Aiding and Abetting.

26. Count 6 relates to allegations that Mr. Means did "corruptly solicit, demand, accept and agreed to accept something of value intending to be influenced and rewarded in connection with the business, transaction and series of such transactions... namely, Means agreed to accept approximately $100,000.00 in campaign contributions from Gilley, Massey and Lobbyist "A" [Pouncy] intending to be influenced and rewarded in connection with an upcoming vote on pro-gambling legislation".

27. Count 7 relates to allegations that Mr. Means did "corruptly solicit, demand, accept and agreed to accept something of value intending to be influenced and rewarded in connection with the business, transaction and series of such transactions agreed to accept an unspecified amount of campaign contributions from Defendant McGregor intending to be influenced and rewarded in connection with an upcoming vote pro-gambling legislation."

28. As to the allegations regarding developer Gilley and his lobbyists, Massey and

Pouncy, it is alleged in paragraph 76 of the Indictment that Jennifer Pouncy testified that Means asked her to ask Massey if they would contribute $100,000.00 in campaign contributions. The Indictment does not allege and she did not testify that Means said that if the contribution were made he would vote any particular way.

29. According to Ms. Pouncy, Means said he was going to have a tough election and asked Pouncy if she could get Massey or Gilley to contribute $100,000. She indicated Means said he was going to face a difficult race and that is why he needed $100,000. The evidence of Agent McEachern was that Means did have a difficult opponent who also in fact beat him in the general election. Ms. Pouncy converted Means "request" in her conversation with Massey to "Means wants $100,000 for his vote". On direct examination she testified that is what she "believed," and on cross-examination admitted that her statement that the request was in exchange for his vote was an "assumption" on her part. There is no evidence that this is what Means said or what he intended or meant. Massey then called Gilley and converted the request from Ms. Pouncy to a "shakedown." Pouncy admitted that she never used the word "shakedown."

30. It is submitted that the self-serving statements of the lobbyists and their employer, all of whom have pled guilty, may demonstrate a corrupt intent on their part to enter into a *quid pro quo* agreement, but it is submitted that there is insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was an explicit *quid pro quo* agreement entered into by Larry Means.

31. Massey admitted that he never discussed these issues with Defendant Means. In fact, he acknowledged he had very little contact with Means. Massey testified that he "took it," or "understood" Means was demanding $100,000.00 for his vote. Only because of Massey's and Pouncy's internal presumption of their own guilty intent and assumption that others possessed his same guilty mind could Massey infer that a legitimate campaign request was a "demand" or a "shakedown." Massey admitted he told FBI Agent McEachern that he "assumed" the request was in exchange for Means' vote. But this testimony was not supported by any evidence that would attribute this assumption to any statement or action by Means. It is not the guilty mind of Massey that is at issue. He has already admitted to, and plead guilty of possessing the requisite criminal intent. It is the intent of Mr. Means which is the issue before the Court. Merely because Massey has a guilty mind or criminal intent does not impute the same criminal intent to others. Merely because he and Pouncy "assumed" something does not mean that is evidence of someone else's intent.

32. Ms. Pouncy also claims that Means told her that the people in Etowah would not support him if he voted yes. However, she acknowledged that on April 28, 2010, when she was interviewed by ABI Agent Herman she told him that Means had asked her to ask if Means could get a $100,000.00 campaign contribution, and that Coker was doing something also. She said nothing about Means telling her the people in Etowah County would not support him if he voted yes. She admitted that she told the agent that she had told Massey, "Means has asked me to ask you for a $100,000 campaign contribution, and that Massey was

not going to get the money unless Means voted." And, Pouncy acknowledged on cross-examination that Massey would not make a contribution unless there was a "yes" vote for the bill. However, there was a "yes" vote, and there was no contribution made.

33. It is important to remember that neither Massey or Gilley had any conversation with Mr. Means regarding this alleged request for campaign funds. And it is unequivocal that Pouncy has in no statement claimed Means said he wanted $100,000.00 in exchange for his vote. In fact, she testified that Means did not make an explicit request for a $100,000.00 campaign contribution in exchange for his vote, and that she did not offer a $100,000.00 campaign contribution in exchange for his vote. And, she said several times during her testimony that she only "assumed" that his request was in exchange for his vote.

34. As to Pouncy's claim that when she told Means they had said "Ok", he asked "are we talking about the same thing" as somehow forming the basis for his accepting the offer of a bribe, such would be pure speculation. It is not a reasonable inference. She admitted there was nothing else said between either of them, then or later, about the request for a campaign contribution.

35. And the evidence is unequivocal that no campaign contribution was made and that there was no conversation after March 24 between Massey and Means or Pouncy and Means.

36. The Government did not produce sufficient evidence from which a reasonable jury could find an explicit *quit pro quo*. An agreement to exchange Means' vote for a

campaign contribution can only be found by pure speculation. There simply was no reasonable evidence from which a reasonable jury could make the finding necessary for a conviction.

37. Count 7 charges Mr. Means under § 666 in connection with allegations of bribery between Means and Mr. McGregor based upon one telephone call between Mr. Means and Mr. McGregor. Gov't. Ex. 146, J-146. Upon a review of the entire recording and transcript it is clear that the sole interest of Mr. Means was to do what was best for the citizens of his county. And that fact has been endorsed by all witnesses who have been asked the question, and there is no evidence to the contrary.

38. The plain understanding of that portion of the recording with Mr. McGregor was simply a general statement suggesting a need for more campaign funds. There was not even a specific request. A candidate has a constitutionally protected right to be able to request a campaign contribution. There was no evidence that there was a request for a campaign contribution in exchange for any official act. This statement of need merely being "close-in-time" to a discussion regarding campaign contributions is not sufficient evidence. McGregor's support was not conditioned on anything. Therefore, there was no corrupt agreement or exchange between Means and McGregor. Means did not promise his vote, and there was no corrupt agreement or exchange between Massey and McGregor.

**Extortion Counts**

39. Defendant Means is charged in Counts 19 and 20 with extortion and aiding and abetting extortion under 18 U.S.C. § 1951 and 2.

40. Counts 19 and 20 charge extortion based upon the same circumstances upon which the Government relies upon for the § 666 count. Count 19 allegedly involved McGregor, and Count 20 allegedly involved Gilley, Massey and Pouncy.

41. Means submits that all of his actions were lawfully protected acts of legitimate involvement in legislative matters. There was no evidence as to either count that Means in any way pressured anyone. At most there was a request for a campaign contribution as to Massey, et. al. And as to McGregor a suggestion of a need for a campaign contribution. The Government has the burden as to each count to prove an "explicit" *quid pro quo*. There was no evidence Means agreed with anyone, either explicitly or otherwise, to join together in any illegal acts or conspiracies, nor was there any evidence of any explicit *quid pro quo*. A "*quid pro quo*" allegation requires "a promise of official action or inaction in exchange for a payment."

42. According to *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2010), under §666, where campaign contributions are involved, an "explicit *quid pro quo*" is required. *Id*. at 16-18. This Court has adopted that same standard for all counts in this case. In *Siegelman* the Court noted that in criminal cases where legislative action and campaign funds are involved they "impact the First Amendment's core values - protection of political

speech and the right to support issues of great public importance." *Id*. at 15. The Court went on to say, "It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities." *Id*. at 15. "In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed." *Id.* at 15-16. After discussing the United States Supreme Court decision in *McCormick v. United States*, 500 U.S. 257 (1991), the Court concluded that an explicit *quid pro quo* is required. The Court then went on to say that "explicit" does not mean "express," citing *Evans v. United States*, 504 U.S. 255 (1992). *Id*. at 18. The Eleventh Circuit held that as long as there is evidence that a public official demanded or accepted money in exchange for a specific requested exercise of his or her official power such a demand or acceptance would violate the Hobbs Act. *Id*. at 19. The Eleventh Circuit noted that there must be an agreement by the official to "take or forego some specific action" in order for the doing of it to be criminal under §666. "In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice." *Id*. at 19-20.

43. Here, the existence of "close-in-time" conversations concerning legislation and a request for a campaign contribution is not sufficient evidence to meet the Government's burden of proof.

44. Under the extortion charges there was simply no proof produced by the

Government that any of the conversations alleged to have occurred regarding Mr. Means could be proved to a reasonable jury beyond a reasonable doubt, that there was any intent by Mr. Means to pressure Pouncy, Massey, Gilley, or McGregor into making any campaign contributions. The plain understanding of the conversations was merely an attempt to raise campaign funds, a constitutionally protected activity. While there has been testimony that it is not the best method to discuss campaign contributions and legislation in the same conversation, there is no evidence of any rule, regulation or law in Alabama or elsewhere prohibiting discussing campaign contributions and legislation in the same conversation. Again, a "close-in-time" request for a campaign contribution and discussions of legislation is not an unlawful activity.

**Honest Services Counts**

45. Defendant Means is charged in Counts 23 through 33 with Honest Services Fraud and Aiding and Abetting, in violation of 18 U.S.C. §1341, 1343, 1346 and 2.

46. These counts contain allegations that Defendants, including Means, devised a scheme and artifice to defraud and deprive the State of Alabama, the Legislature, the Legislature Reference Service, and the citizens of Alabama, of their right to Honest Services of elected members and employees of the Legislature through bribery and concealment of material information placed and caused to be placed in the post office certain checks. However, the Indictment did not describe the alleged scheme, and the Government's proof has not presented any scheme from which a reasonable jury could be convinced beyond a

reasonable doubt it existed.

47. To the extent the Government contends Defendant Means voting for Senate Bill 380 some how is part of the alleged scheme, the testimony clearly showed that in the version of SB380 which failed to pass the BIR vote on March 3, 2010, Etowah County was not specifically included as a designated location. Means did not support this bill. Later, testimony by Massey revealed that from the original long bill as it existed on March 2 to the final bill or "simple bill" for which Means voted on March 30, 2010, Etowah County's position had improved. There was no evidence that this was a result of any campaign contributions or pressure of campaign contributions or part of any conspiracy or scheme.

48. The mere citation to the overt acts in the conspiracy count does not adequately allege a scheme, and there has been nothing introduced to prove a scheme. All that is described is the alleged object of the scheme. The only testimony was that others worked together to propose amendments to the bill resulting in a final version which was approved on March 30, 2010. According to Massey, Etowah County went from March 3 with very little chance of getting a "destination point" to late March which gave them a chance of obtaining a location in Etowah County. Massey finally conceded that "this was the best Etowah County was going to get" and that "Etowah County's position was in a better scenario", and which put Etowah County in a better position that it would have been had the March 3 version passed.

49. Under the Honest Services Fraud allegations there was simply no evidence to

support the allegations of these counts as to Mr. Means. If the alleged scheme relates to the checks to Mr. Crosby, there is not one iota of evidence that Mr. Means ever knew of the checks or had anything to do with the checks. There is no evidence whatsoever to connect Means to the alleged scheme. The count also alleges telephone calls between McGregor and others. Again, there was no evidence presented by the Government that Means had any direct, or indirect contact with any individuals concerning the mailings or the telephone calls, or had any knowledge of any of these alleged actions.

50. There was simply no evidence of any plan, scheme, or action which involved Mr. Means in any manner to conceal material information, or to engage in bribery. (See paragraph 3). In *Skilling v. United States*, 561 U.S. _____, 130 S.Ct 2896 (2010), the Supreme Court held that Congress intended these statutes to reach only those schemes to defraud the public based upon allegations of bribery and/or kickbacks. See also, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2010). Under the post-*Skilling* interpretation of the Honest Services Statute, the prosecution of a Defendant is limited to those instances involving allegations of bribery or kickbacks. Here there was no evidence of any kickback, and as previously discussed there was insufficient evidence from which a reasonable jury could find an explicit *quid pro quo* as is required for campaign contributions.

**Conclusion**

51. A review of the totality of the Government's evidence reveals the

insufficiency of the evidence to sustain a conviction, or to prove any illegal activity by Defendant Means. This lack of evidence warrants a judgment of acquittal as to all charges against Defendant Means.

DATED this the 26th day of July, 2011.

/s/ William N. Clark
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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 26th day of July, 2011.

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