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,	)	
	)	
Defendant.	)	

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

Comes now the Defendant, Larry P. Means, (hereinafter referred to as "Means") pursuant to Rule 29(c)(2), Federal Rules of Criminal Procedure, and respectfully renews his Motion for Judgment of Acquittal made at the close of the Government's case, and at the close of all the evidence, citing the same grounds as previously stated, and further moves the Court for a Judgment of Acquittal as to Counts 1 and 6 of the Indictment, separately and severally, on the following grounds, separately and severally, including those grounds raised by any co-defendant:

Adoption of Motions of Co-Defendants

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

General

2. On August 11, 2011, a verdict of not guilty was entered as to Defendant Means on Counts 7, 19, 20, and 23 through 33 of the Indictment. No verdict was reached as to Means on Counts 1 and 6.

3. Rule 29(c)(2) provides, "If the jury has failed to return a verdict, the Court may enter a judgment of acquittal."

4. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant Means was guilty of the offenses charged in Counts 1 and 6 of the Indictment.

5. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any alleged request for a campaign contribution was not made in good faith and in a lawful manner.

6. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant Means acted with the requisite criminal intent as to Counts 1 and 6 of the Indictment.

Conspiracy Count

7. Defendant Means is charged in Count 1 with conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 666. He is due to be acquitted of the charge under the double jeopardy provision of the Fifth Amendment. Defendant incorporates by reference the citations and arguments set forth in his Motion to Dismiss and Brief in support thereof.

8. Defendant Means submits that there was no evidence presented by the Government that established beyond a reasonable doubt the necessary elements sufficient to sustain a conviction of conspiracy.

9. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Means was guilty of the offense charged in Count 1 of the Indictment in that there was insufficient evidence that Defendant Means came to any agreement or mutual understanding with anyone to accomplish any unlawful plan, or any illegal purpose.

10. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Defendant Means knowingly and willfully intended to voluntarily join in and participate in the conspiracy attempted to be alleged in Count 1 of the Indictment. Further, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was a conspiracy in progress at the time.

11. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Means was guilty of the offense charged in Count 1 of the Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the purpose of the alleged conspiracy was that the defendants allegedly "corruptly gave, offered, and agreed to give money and other things of value to Alabama

State legislators and legislative staff as agents of the State of Alabama with intent to influence and reward them in connection with pro-gambling legislation."To the extent the Government offered any evidence of an alleged agreement, it was merely an agreement to, through lawful means, work toward the passage of SB 380.

12. 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 in which Defendant Means was involved in that the circumstantial evidence presented was inconsistent with an obvious and reasonable interpretation of the evidence and would be no more than speculation and conjecture to support a reasonable jury's finding of guilt.

13. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Means was guilty of the offense charged in Count 1 of the Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that Means knowingly, willfully and voluntarily participated in any conspiracy with any person as part of a single plan that ran from "on or about February 2009 through on or about August 2010."

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. There is 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. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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. The jury found Means not guilty of the substantive § 666 offense based on this conversation. (Count 7).

25. 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.

26. 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 Count

27. Defendant Means was 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. The jury found him not guilty of Count 7 allegedly involving Mr. McGregor and not guilty of the extortion charges, Counts 19 and 20. For the reasons set forth in Defendant's Motion to Dismiss and Brief filed in support thereof any prosecution of Defendant Means as to Count 6 is barred by the double jeopardy provision of the Fifth Amendment.

28. As to Count 6 of the Indictment, there was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that Means knowingly and willfully had any corrupt intent whatsoever, or that any alleged request for a campaign contribution was done knowingly and willfully with any corrupt intent to influence or to be influenced and rewarded in connection with an up coming vote on pro-gambling legislation.

29. Insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that the Defendant Means was guilty of the offense charged in Count 6 of the Indictment in that insufficient evidence was presented by the Government from which a reasonable jury could be convinced beyond a reasonable doubt that any request for a campaign contribution by Means was in exchange for his vote in favor of SB 380. The only evidence before the jury as to this Count came from

Government witness Jennifer Pouncy who had entered into a plea agreement with the Government to plead to only the conspiracy count. She admitted that Defendant Means did not explicitly ask for a campaign contribution in exchange for his vote, or explicitly agree to accept a campaign contribution in exchange for his vote. Both Massey and Gilley acknowledged that they had no discussions of any sort with Means regarding campaign contributions or for that matter anything else. Gilley had never even met Means.

30. As to the allegations regarding developer Gilley and his lobbyists, Massey and Pouncy, Jennifer Pouncy testified that Means asked her to ask Massey if they would contribute $100,000 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.

31. 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, or that her conclusion was a

reasonable inference. Massey then called Gilley and converted the request from Ms. Pouncy to a "shakedown." Pouncy admitted that she never used the word "shakedown," and Massey admitted he did not talk to Means about the campaign contributions at all.

32. 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.

33. 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," to mean or "understood" Means was demanding $100,000 for his vote. Only because of Massey's and Pouncy's internal presumption of their own guilty intent and assumption that others possessed this 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.

34. 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 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 she further told Agent Herman, 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.

35. 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 in exchange for his vote. In fact, she testified that Means did not make an explicit request for a $100,000 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 understood or assumed that his request was in exchange for his vote.

36. 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. A reasonable jury could not be convinced beyond a reasonable doubt that this few second conversation was an agreement to accept a campaign contribution in exchange for his vote. To do so, would be conjecture and speculation.

37. 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.

38. The Government did not produce sufficient evidence from which a reasonable jury could find an explicit *quit pro quo*, in the two brief conversations, between Means and Pouncy. There simply was no reasonable evidence from which a reasonable jury could make the finding necessary for a conviction of Count 6.

Counts 1 and 6
(Agency)

39. Count 1, the conspiracy count, alleges as the two objects of the conspiracy violations of 18 U.S.C. § 666. Count 6 also alleges a violation of 18 U.S.C. § 666. 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.

40. 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).

41. 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. ___, 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.

42. 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.

For the reasons stated above, separately and severally, Defendant Means respectfully moves the Court for a judgment of acquittal as to Courts 1 and 6 of the Indictment.

Dated this 25th day of August, 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 25th day of August, 2011.

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