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' RESPONSE TO UNITED STATES' COMBINED OPPOSITION TO DEFENDANTS' POST-TRIAL MOTIONS FOR JUDGMENT OF ACQUITTAL AND MOTIONS TO DISMISS ON DOUBLE JEOPARDY GROUNDS

COMES NOW the Defendant, Larry P. Means, and for reply to the Government's Combined Opposition to Defendants' Post-Trial Motions for Judgment of Acquittal and Motions to Dismiss on Double Jeopardy Grounds (hereinafter referred to as "Combined Opposition or Government's Brief") says as follows:

1. Motion to Dismiss on Double Jeopardy Grounds

a. Conspiracy (Count One) - 18 U.S.C. § 371

While the Government acknowledged on page 1 and footnote 1 of its Combined Opposition that Defendant Means had filed a Motion to Dismiss (doc. 1749), and a Brief in Support of the Motion to Dismiss (doc. 1750), in the body of its response, paragraph III, it addresses the Double Jeopardy arguments of other Defendants, but does not mention or directly respond to Defendant Means' argument set forth in his Motion and Brief. To the

extent that the Government intended its Brief to apply to Means, it does not address Means' arguments. In fact, the Government chooses not to even discuss *Yeager v. United States*, 129 S.Ct. 2360 (2009) merely citing it in footnote 13, page 58 of its Brief, saying it is not applicable. It is submitted that the Government has missed the point and that *Yeager* is applicable and the Motion to Dismiss should be granted.

Contrary to the Government's argument that the Defendants' did not identify which issues were to be precluded, Defendant Means did do that. The lesson of *Yeager* is that it is necessary to focus on the counts for which the Defendant was acquitted. Means was acquitted on the eleven (11) honest services counts which incorporated as the requisite scheme the "conspiracy" alleged in Count 1. The Government cannot seriously dispute that. Further, there was no dispute as to the mailings or the wirings. Likewise, there was no dispute regarding interstate commerce. The issue was whether there was a scheme, and specifically, a scheme to engage in an explicit *quid pro quo.* Those are precisely the essential elements of the conspiracy charge. Because Means was acquitted of eleven (11) counts in which the same key elements necessary for a conviction under the conspiracy count the Government is precluded from retrying those counts. Consequently, the conspiracy count, Count one, is due to be dismissed.

b. Bribery Count - 18 U.S. C. § 666 (Count 6)

The same logic applies to the Count 6 as it relates to the extortion count, Count 20 on which Defendant Means was acquitted. The only real element in dispute under the Court's

charge was whether there was an explicit *quid pro quo*. That was precisely the issue in the § 666 Count, Count 6, on which the Jury did not reach a verdict. Whether Larry Means entered into an explicit *quid pro quo* agreement with Pouncy, Massey or Gilley was a central issue of ultimate fact in both Counts 6 and Count 20. In *Yeager*, *supra*, the possession of insider information was a crucial fact in all of the charges against the defendant. The Court held that a jury verdict that necessarily decided that essential issue in his favor protected the defendant from prosecution for any charge for which that is an essential element where a jury acquits on some counts and hangs on others. *Id*. at 2369. For the reasons set forth in Defendant's Brief the Motion to Dismiss is due to be granted.

Motion for Judgment of Acquittal

The Government devotes only approximately five (5) lines to its argument that the Motion for Judgment of Acquittal as to the Conspiracy Count should be denied. However, it has no cites to the record and states that "Means' participation in the conspiracy is established in several ways." The Government argues, "not only did he seek bribes from Defendant McGregor and Defendant Coker, he also independently carried out the $100,000 shake-down of Pouncy, Massey, and Gilley." First of all, Defendant Means was found not guilty as to any bribe regarding Defendant McGregor. He was not charged with any bribe involving Coker, and there was no evidence of any seeking of a bribe from Coker.

As to the alleged "$100,000 shake-down of Pouncy, Massey, and Gilley," all the evidence actually showed was that there was a request for a $100,000 campaign contribution

made to Pouncy. She *assumed* that it was a request in exchange for his vote. However, she admitted that he did not say that. and it was she who added that in her communication to Massey - who in turn added in his communication to Gilley that there was a "shake-down to some degree." These "assumptions" were not "reasonable inferences." The Court must accept only reasonable conclusions of the evidence and "reasonable inferences." *See United States v. Hernandez*, 433 F.3d 1328, 1334 (11th Cir. 2005).

And as to the Government's comment that, "Perhaps most importantly, the record contains overwhelming evidence that Defendant Means and Defendant Prueitt were also communicating regularly regarding SB 380 in a concerted effort "to secure the best possible deals," there was no evidence of that. The only evidence was that they were communicating with regard to how they were going to vote, and that Prueitt was going to follow Means' lead. "[G]uilt of a conspiracy cannot be proven solely by family relationship or other type of close association." *United States v. Ritz*, 548 F.2d 510, 522 (5th Cir. 1977). The Government's case insofar as the conspiracy against Means was based wholly on speculation and surmise. There was no evidence from which a reasonable jury could be convinced beyond a reasonable doubt.

The Government argues on page 26 that "As long as there is <u>any</u> evidence in the record to support the charge, all contradictory evidence should be disregarded." That is simply not the law, and the Government cites none. The standard is whether a reasonable jury could be convinced beyond a reasonable doubt based upon the evidence presented. That

requires a review of all the evidence, but in the light most favorable to the Government. It does not mean that all contradictory evidence should be disregarded. The Government cites no authority for that proposition.

"Although circumstantial evidence alone can support a conviction, there are times it amounts to only reasonable speculation and not to sufficient evidence." *Newman v. Metrish,* 543 F.3d 793,796 (6th Cir. 2008); *United States v. Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004) (evidence found insufficient where government asked the jury to make a series of inferences on weak facts where "countless other scenarios that do not lead to the ultimate inference the government seeks to draw" were also plausible).

While a jury may draw reasonable inferences from the evidence, it may not engage in speculation or conjecture, especially as to the issue of the Defendant's knowledge or intent. *United States v. Autuori*, 212 F.3d 105 (2nd Cir. 2000), *United States v. Schuchmann,* 84 F.3d 752 (5th Cir. 1996). Viewing the evidence in the light most favorable to the Government does not mean accepting every possible conclusion the Government suggests. In *United States v. Recognition Equipment Incorporated (REI),* 725 F.Supp 587 (D.D.C. 1989) the Court held, "Although the evidence must be viewed in the light most favorable to the government, the Court is obligated to take a hard look at the evidence and accord the government the benefit of only 'legitimate inferences.' In other words, this court will not indulge in fanciful speculation or bizarre reconstruction of the evidence ... which otherwise can be explained as equally innocent." *Id.* at 588.

Rule 29 motions have been granted where the jury engaged in impermissible speculation or conjecture. *United States v. Hernandez*, 304 F.3d 886 (2nd Cir. 2002). Here the jury did not do that and reached no guilty verdicts. The Government is now asking the Court to engage in impermissible speculation and conjecture.

The Government's statement that "Pouncy's testimony only alone is therefore sufficient to sustain Count 6" simply does not make sense. There is no basis for the Government's argument that it was reasonable to conclude that Means was asking for a contribution in exchange for his vote. Means had always supported gaming legislation in the past, and contrary to the Government's statement that he "abstained" on an earlier vote on SB 380, he did not. The evidence reflected that he simply did not vote. And, the evidence was clear that the bill which finally passed was far better in terms of giving Etowah County at least an opportunity to get a destination than did the original bill. The Government's witness acknowledged that. The Government had the burden to prove corrupt intent and there simply was no evidence of any corrupt intent.

The Government has asked the Court to somehow assume that because of Pouncy's conversation with Prueitt, that that led to Means' request. The standard applicable is that there must be an "explicit *quid pro quo*." There was neither an "explicit *quid pro quo*," nor an "express *quid pro quo*."

As to the alleged conversation between Pouncy and Means, the Government's Brief points out that all Pouncy said was, "They said, 'Yes'." And that Larry Means responded,

"Are we talking about the same thing?" (Tr. Vol. 26, 196:16-18, July 19, 2011). She said she confirmed that they were. However, there was absolutely no explicit statement of what they were talking about. The Government's Brief states that, "She *believed* they were referencing the exchange of Defendant Means' vote for $100,000 in campaign contributions." (emphasis added) However, Ms. Pouncy's speculation about what Means meant is not a sufficient basis upon which a reasonable jury could be convinced beyond a reasonable doubt.

The "additional evidence" which the Government claims supports Means' guilt simply does not do that. First, they cite his conversation with McGregor (Ex.J-146). However, again, the Government overlooks that Means was acquitted of that charge. It is not proper to assume a corrupt intent as the Government does. And, the argument that he said Coker was putting together something to raise funds does not in any way state that any funds Coker might contribute were in exchange for Means' vote. Again, it is simply speculation on the part of the Government.

The Government's effort to say that Means was "coordinating with Defendant Prueitt to cash in on SB 380" has no basis in fact. All the evidence reflected was that Means assisted Pouncy in getting in touch with Prueitt. The Government speculates that Means was trying to get "deals." The only thing that the evidence reflects is that Means was requesting campaign contributions - which is not illegal, and which is his First Amendment right. This is, in fact, essential in our democratic system of Government where there are not publically

financed campaigns.

Finally, the Government again states that, "after abstaining from the March 3 BIR vote, Defendant Means cast his vote in favor of SB 380." He did not abstain; he simply did not vote. The Government's citation to the television broadcast of Means' statement is in no way a basis upon which to support a finding that there was sufficient evidence. Means' statement at that time was based upon a bill that included specific destinations which were being grandfathered in, and did not include Etowah County. The bill which was finally voted upon had no specific destinations that were grandfathered in. It gave every county or district an opportunity to seek a destination. Even the Government's own witnesses, including Massey, acknowledged that the bill which passed was better for Etowah County than the original bill. Again, the Government is attempting to speculate. The concept of viewing the evidence in the light most favorable to the Government must be a reasonable light not speculation, surmise and guess work, which is precisely that in which the Government is engaged.

The jury which this Court numerous times properly credited as being an excellent and rational trier of fact could not find Larry Means guilty of a single count of the sixteen counts presented and in fact found him not guilty of all but two counts. The standard of review for the sufficiency of the evidence in the face of a Rule 29 challenge is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 US 307, 317-318 (1979). Here the rational tier of fact that did hear

the evidence could not find that Larry Means had committed any crime. Defendant Means therefore, respectfully submits that the Government is wrong to suggest that this Court has previously denied the Motion for Judgment of Acquittal and nothing has changed. A careful and thoughtful analysis of the Government's case against Larry Means is especially appropriate now, given the circumstances of this case. Absent a careful review and analysis, Larry Means and his family, are faced with another stressful and financially draining trial on charges the Government wholly failed to prove in the first trial and for which he is entitled to a judgment of acquittal.

Conclusion

The Government did not really respond to Defendant Means' Motion to Dismiss and his Brief submitted in support thereof. For the reasons stated in that Brief, and expanded upon here, the Motion to Dismiss as to both Counts 1 and 6 is due to be granted. As to the Motion for Judgment of Acquittal, the Government's key witness, Jennifer Pouncy, admitted that she *assumed* that Larry Means was asking for a campaign contribution in exchange for his vote. She acknowledged that he did not actually say that at any time and never asked her explicitly for any campaign contribution in exchange for his vote. And, nothing that was said would permit a reasonable Juror to draw that inference. It can only be drawn by speculation and guess work. That is not a proper basis on which a Motion for Judgment of Acquittal should be denied. It is due to be granted as to both Counts 1 and 6.

Dated this 7th day of October, 2011.

Respectfully submitted,

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/s/ William N. Clark
William N. Clark (CLA013)
Stephen W. Shaw (SHA006)
Attorneys for Defendant Larry P. Means

OF COUNSEL:
REDDEN, MILLS & CLARK, LLP
940 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 322-0457
WNC@rmclaw.com
SWS@rmclaw.com

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 7th day of October, 2011.

Justin V. Shur
US Department of Justice
Public Integrity Section
1400 New York Avenue, NW
Washington, DC 20005

Louis Franklin
Steve Feaga
US Attorney's Office
131 Clayton Street
Montgomery, AL 36104

/s/ William N. Clark
OF COUNSEL