

Background

Defendant Means was originally indicted in this case along with ten (10) other Defendants in a multi-count Indictment. Two (2) of those Defendants plead guilty prior to trial leaving nine (9) Defendants who were tried together.

The counts of the Indictments in which Defendant Means was charged were Counts 1, 6, 7, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33. Means was found not guilty of all Counts except Counts 1 and 6 upon which the jury could not reach a verdict. The pertinent Counts for purposes of this argument are as follows:

Count 1 - Conspiracy under 18 U.S.C. §371 along with named Defendants and others, to commit Federal Program Bribery to violate both 18 U.S.C. §666(a)(2) (corruptly giving, offering and agreeing to give campaign contributions to Alabama State Legislators in exchange for their vote in support of the pro-gambling legislation, SB 380), and §666(a)(1)(B) (corruptly soliciting, demanding and agreeing to accept campaign contributions intending to be influenced and rewarded with campaign contributions in exchange for their vote on SB 380). Count 1 in paragraphs 28 through 37 sets forth the alleged conspiracy, i.e., the alleged agreement and plan, and the manner and means in which it was carried out.

Count 6 - Federal program bribery in violation of 18 U.S.C. §666(a)(1)(B), and aiding and abetting in violation of 18 U.S.C. §2, between March 23, 2010 and March 25, 2010, by corruptly soliciting, demanding, accepting and agreeing to accept something of value

intending to be influenced or rewarded in connection with an upcoming vote in the Alabama Legislature on pro-gambling legislation in that Defendant Means, who was a member of the Legislature, agreed to accept approximately \$100,000.00 in campaign contributions from Gilley, Massey, and Pouncy in exchange for his vote in favor of the pro-gambling legislation (SB 380).

Count 20 - Extortion and aiding and abetting extortion in violation of 18 U.S.C. §1951 and 18 U.S.C. §2, in that on or about March 22, 2010 Defendant Means did knowingly attempt to obstruct, delay and affect commerce in the movement of articles and commodities in commerce by extortion in that he, while serving as a member of the Alabama Senate, engaged in a course of conduct whereby he solicited and pressured Gilley, Massey and Pouncy, under color of official right, to provide \$100,000.00 in campaign contributions in exchange for his vote in favor of SB 380.

Counts 23-33 - Honest Services mail fraud and wire fraud in violation of 18 U.S.C. §§1341, 1343, and 1346, and aiding and abetting such violations in violation of 18 U.S.C. §2; in that Defendant Means and the other Defendants named in Count 1 of the Indictment, devised or intended to devise a scheme and artifice to defraud and deprive the State of Alabama and others of the right to the honest services of elected members and employees of the Alabama Legislature through bribery, and executed the said scheme and artifice to defraud and deprive by mailings effected on January 6, 2010, February 3, 2010, March 3, 2010, and March 24, 2010 and by interstate telephone calls between Defendant McGregor

and Defendants other than Defendant Means on March 16, 2010, March 17, 2010 and March 22, 2010.

Count 1 and Counts 23 through 33

The conspiracy charged in Count 1 of the Indictment was the scheme described in Counts 23 through 33 of the Indictment because of the incorporation of the allegations of Paragraphs 28 through 37 of Count 1 of the Indictment into Counts 23 through 33, i.e., the conspiracy and “manner and means” in which it was to be carried out described in Count 1 represent in fact the scheme and artifice to defraud alleged in the Counts 23 through 33. The Government argued in favor of this position at the hearing on Defendant Means’ Motion to Dismiss on the ground that no “scheme” and no “manner and means” as to how the alleged scheme was carried out were included in Counts 23 through 33. The same persons named in Counts 23 through 33 are named as the participants in the conspiracy, and the scheme and artifice described in Counts 23 through 33 are alleged as occurring during the same time period as the conspiracy alleged in Count 1.

For the purposes of the honest services charges, the Court instructed the jury that the jury need only find that the accused, “knowingly” devised or participated in the scheme (p. 30 Court’s charges), while in its charge on conspiracy, the Court charged the jury that to convict the defendant of conspiracy, the Government must prove the defendants “willfully” participated in the alleged conspiracy (p. 45, Court’s charges). At trial the mailings alleged in Counts 23, 24, 25, 26, and 27 and the interstate telephone calls alleged in Counts 28, 29,

30, 31, 32, and 33 were conceded by the Defendants and were not contested. The only factual issue tried by the jury as to Counts 23 through 33 was the existence of the alleged scheme and whether Defendant knowingly participated in it, a lesser burden than the requirement for “willful” participation under Count 1. By finding Defendant Means not guilty of the accusations made against him in Counts 23 through 33 the jury necessarily found as a fact that Defendant Means was not a participant in the scheme alleged in Counts 23 through 33. As noted previously, the “scheme” alleged in Counts 23 through 33 is defined and described by the conspiracy alleged in Count 1. Defendant Means was found not guilty of offenses requiring a lesser burden to prove his participation in the alleged scheme. Therefore, to allow a re-trial of Defendant Means for the charge made in Count 1 would amount to a re-trial of him for a charge on which he has been acquitted, and subject him to double jeopardy in violation of the Fifth Amendment of the United States Constitution.

Count 6 and Count 20

From the allegations of the Indictment and the proof offered by the Government at trial, the transactions and the occurrences on which Count 6 of the Indictment are based are the same transactions and occurrences as those on which Count 20 of the Indictment are based. Both transactions, from the averments of the indictment and from the Government’s proof presented at trial, involve the alleged solicitation by Defendant Means of approximately \$100,000 in campaign contributions for Defendant Means from Pouncy,

Massey and Gilley.

The Court instructed the jury that the same explicit *quid pro quo* was required for bribery under Count 6 as for extortion under Count 20. (pgs. 9-23, 24-25). From the allegations of the Indictment, and the proof presented by the Government at trial, the alleged *quid pro quo* or value to be exchanged for both Count 6 and Count 20 was the same alleged \$100,000 proposed to flow from Gilley to Defendant Means for Defendant Means' vote for the pro-gambling legislation pending in the Alabama legislature., i.e., SB 380. As the Court instructed the jury, the distinction it made in explaining an illegal *quid pro quo* and a legal campaign contribution(s) are exactly the same for the bribery accusations of Count 6 and the extortion accusations of Count 20.

The only rational basis on which the jury could have decided to acquit Defendant Means of the charge made in Count 20 was that the Government failed to prove beyond a reasonable doubt that there was an explicit *quid pro quo* between Pouncy, Massey , Gilley, and Defendant Means, (i.e., the Government failed to prove that the \$100,000 which was discussed was not a legitimate campaign contribution). Rationally, it was the same \$100,000 allegedly discussed by Defendant Means and Pouncy in both Counts 6 and 20, if there was no explicit *quid pro quo* for Count 20 there could not be an explicit *quid pro quo* for Count 6. It is clear that the jury must have decided Count 20 on the basis of whether or not there was a *quid pro quo* because no other elements of extortion were at issue.

Under the Court's instructions to the jury, a reasonable jury could not have rationally

concluded that there was any issue as to the minimal requirement for an effect on interstate commerce, or that Defendant Means was asking for the campaign contribution in his role as a State Senator. The only issue was whether the alleged request was “wrongful” which is where the requirement for the explicit *quid pro quo* comes in to play. And, it is submitted that by finding Defendant Means not guilty of Count 20 the jury necessarily found that there was no explicit *quid pro quo* proved beyond a reasonable doubt. In acquitting Defendant Means of the charge made in Count 20 the jury necessarily decided there was no explicit *quid pro quo*. Proof of an explicit *quid pro quo* is an essential element of the Government’s evidentiary burden for Count 6. To allow a re-trial of the *quid pro quo* issue in a re-trial of Count 6 would amount to a re-trial of Defendant Means for a charge on which he has been acquitted, and subject him to double jeopardy in violation of the Fifth Amendment.

Under *Yeager, supra*, if the jury “necessarily decided” in the defendant’s favor during a previous trial, following an acquittal, “ ‘ the Court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’ ” *Id.* at 1367. In *Yeager*, the issue was whether the acquittals on the fraud counts precluded the Government from retrying the defendant on the insider trading counts. The Fifth Circuit found that the jury must have found when it acquitted the defendant on the fraud count that the defendant did not have any insider knowledge. However, the Court of Appeals concluded that it was impossible to

decide what the jury “necessarily decided” because of the hung jury. The Supreme Court in reversing the Fifth Circuit, held that the analysis must focus on what the jury did decide. Here, as in *Yeager*, the issue of whether Defendant Means was a participant in the conspiracy or scheme was a “critical issue of ultimate fact” in both the conspiracy and honest services charges, hence the jury verdict necessarily decided that issue in his favor in the honest services charge and therefore precludes him from re-prosecution on the conspiracy charge. *Yeager*, at 2369. The same analysis is applicable to Counts 6 and 20 as discussed above.

For the reasons stated above, after the analysis required by the Supreme Court in *Yeager*, Counts 1 and 6 of the Indictment are due to be dismissed as to Defendant Means.¹

WHEREFORE, Defendant Means moves the Court to dismiss the charges made against him in Counts 1 and 6 of the Indictment.

Dated this 25th day of August, 2011.

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¹ Upon remand in *Yeager*, the Fifth Circuit directed the district court to enter judgment of acquittal as to all counts of the Indictment. *United States v. Yeager*, 334 Fed.Appx. 707 (1990).

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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