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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CASE NO. 2:10-cr-186-MHT
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

MOTION FOR JUDGMENT OF ACQUITTAL
ON BEHALF OF TOM COKER AFTER DISCHARGE OF THE JURY

Comes now Tom Coker, by and through his undersigned counsel and moves this Honorable Court pursuant to Rule 29(c)(1), *Federal Rules of Criminal Procedure* to enter a judgment of acquittal as to Counts 1, 8 and 31 of the indictment on the grounds that "the evidence is insufficient to sustain a conviction" of the offense(s) charged in the indictment. The standard on a motion after discharge of the jury is the same as on a motion at the close of the government's case or all the evidence. *United States v. Austin,* 585 F.2d 1271, 1273 (5th Cir. 1978) *citing* Wright, *Federal Practice and Procedure: Criminal 3d* § 465.

On August 11, 2011, the jury in this case returned a verdict acquitting Coker of 11 of the 14 counts he faced.[1] Despite having called numerous witnesses, playing a large volume of tape recordings and introducing numerous documents, the Government failed

[1] Coker was found not guilty of Counts 10, 23-30, 32 and 33. A mistrial was declared as to Counts 1, 8 and 31. (Doc. 1665 and 1678)

to offer any evidence--circumstantial, direct or otherwise--from which a rational juror could find beyond a reasonable doubt that Tom Coker committed the crimes with which he is charged. As grounds for and in support of his motion, Coker states as follows:

OVERVIEW

1. While finding Tom Coker not guilty of 11 counts, a mistrial was declared as to 3 counts. These 3 counts are comprised of:

a). 1 count of Conspiracy under 18 USC §371 (Count 1);

b). 1 count of Bribery under 18 USC §666(a)(2) (Count 8-Senator Preuitt)[2]; and

c). 1 count of Honest Services Wire Fraud (Count 31).[3]

2. The following charts summarizes the charges in the indictments:

Charges	Federal Statute	Counts	Summary
Conspiracy	18 USC § 371	1	From Feb. 2009-Aug. 2010 various things of value alleged to have been offered or given by Coker and others to Alabama State legislators and legislative staff to reward and influence them in connection with gambling legislation.
Bribery	18 USC § 666(a)(1)(B)	8	8-Promised $2 million in campaign support and service of country music stars to Preuitt

[2] Coker was found not guilty of Count 10 alleging bribery of Senator Ross.

[3] Coker was found not guilty of 5 counts of mail fraud under 18 USC §§1341 and 1346 (Counts 23-27) and 5 counts of wire fraud under 18 USC §§1343 and 1346 (Counts 28-30, 32 and 33).

Honest Services Wire Fraud	18 USC § 1343 and 1346	31	A telephone call between: 31-McGregor and Coker[4]

5. In summary, a mistrial was declared as to Coker with regard to 1 conspiracy count, 1 bribery count and 1 honest services wire fraud count.

ARGUMENT

The argument portion of this Motion will be divided into two sections: 1) **Factual Basis**–outlining the testimony presented at trial as it relates to Tom Coker; and 2) **Legal Basis**–outlining the law applicable to each of the counts and/or the failure of the Government to meet its burden.

I. FACTUAL BASIS

In the factual basis portion of his motion, Coker will address each witness called by the Government, in the order presented by the Government, as each relates to Coker.

SCOTT BEASON (June 13-16)

The first witness called by the Government was Senator Scott Beason. He testified that Coker never approached him regarding gambling issues. He testified that Coker has never asked him to do anything improper, illegal or unethical.

BARRY MASK (June 16-21)

[4] The wire fraud counts (and the participants on the telephone calls) of which Coker was found not guilty included: 28-McGregor and Winn; 29-McGregor and Coker; 30-McGregor and Hubbert; 32-McGregor and Bedford; and 33-Gilley and Smith. Of particular interest is the fact that Coker was found not guilty of Count 29 but guilty of Count 31. Both of these Counts charged Coker with having a conversation with McGregor about Sen. Preuitt and occurred one day apart. The content of these conversations, as they relate to Sen. Preuitt are virtually identical.

Rep. Mask testified that he has known Coker for a long time. He also testified that Coker has never asked him to do anything improper, illegal or unethical.

DEBORAH MOORE (June 21)

Did not mention Coker.

GAIL TRAYLOR (June 21 and 23)

Did not mention Coker.

CHERYL FARROW (June 21)

Did not mention Coker.

BENJAMIN LEWIS (June 21-23)

Judge Lewis testified the Coker has never asked him to do anything improper, illegal or unethical.

LYNN BIRD (June 23)

Did not mention Coker.

JIM SUMNER (June 23)

Mr. Sumner testified that he has been with the ethics commission since April 28, 1997 and that there has never been an ethics complaint filed against Coker.

RONNIE GILLEY (June 23, 24, 27, 28 and July 6)

Ronnie Gilley testified that he only had one telephone conversation with Tom Coker – ever. Gilley further testified that he believed they may have met one time before but he wasn't sure if they even exchanged greetings. (Gilley Testimony on 7/7/11) It is telling that immediately prior to his only telephone conversation with Coker, Gilley and Massey had a telephone conversation in which Massey asked Gilley to call Coker. Only four days before the Senate's final vote on SB380, Massey was providing Gilley with Coker's phone number and the following exchange occurred:

MASSEY: Zero, zero, two, four.

GILLEY: Okay, his name's Tom?

MASSEY: Yeah, Tom Coker, yeah you, you'll like him,...

(J-83: 3/26/10 at 10:25 a.m. between Massey and Gilley--Page 2 Lines 33-38)[5]. Gilley admitted that prior to this phone call he did not know Coker's first name. (Gilley Testimony 7/7/11) Further, Gilley admitted that he did not have a personal relationship with Coker. (Gilley Testimony 7/6/11)

Thereafter, Ronnie Gilley called Tom Coker. While this call was not captured by the wiretap, it occurred sometime between 10:42 a.m. and 2:27 p.m.[6] On re-direct examination on July 8th, Gilley testified that he was calling Coker because Coker had inquired about what Gilley meant when he told Preuitt he would support Preuitt's campaign in a "significant way".

Gilley testified on June 28th that the only thing he discussed with Coker regarding Sen. Preuitt was to confirm his offer of country music stars to be utilized in Preuitt's campaign. Gilley referred to it as a Democracy Tour. There was no discussion of $2 million in campaign contributions or vehicles or anything other than country music stars.

BRYANT RABY (June 29)

Did not mention Coker.

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[5] J-83 is a transcript of the same conversation as J-204. Both are in evidence. J-83 is a transcript from the tap that was on Jarrod Massey's phone. J-204 is from the tap that was on Ronnie Gilley's phone.

[6] Neither the Government nor Coker dispute this call occurred on the 26th. Simply for informational purposes to the Court, this call occurred sometime between 10:42 a.m. and 2:27 p.m. J-205 (3/26/10 at 10:42 a.m. between Massey and Gilley) Gilley tells Massey he hasn't called Coker yet. Session 2747 (3/26/10 at 2:27 p.m.) from the wiretap on Massey's phone is not in evidence, Ronnie Gilley acknowledges that he has spoken with Coker.

JOHN MCEACHERN (June 29, 30, and July 1, 5, and 6)

Special Agent McEachern did not provide any direct testimony with regard to Coker but did introduce some calls which are addressed as appropriate, in this motion. However, not addressed elsewhere in this motion is call J-167 related to Quentin Ross and Count 10 of the Indictment. This conversation occurred on March 31st (the day after the vote) between McGregor and Coker. In this conversation McGregor asks Coker if he can say anything to any of his other clients about helping Quinton Ross. (J-167: P3 L34-36) Coker responds that he is going to give him a good check from the Medical Association because he has been real helpful on two or three issues and also get him one from the soft drink people. (J-167: P4 L1-12) Govt Ex 1185 is the Medical Association's PAC check on May 6, 2010 to Sen. Ross in the amount of $10,000. There is no check from the soft drink association to Sen. Ross. There is express evidence (as noted above) that the Medical Association had its own reasons for supporting Sen. Ross. In addition, there is absolutely no discussion (explicit or otherwise) that this money is in exchange for Sen. Ross' vote on SB380. In fact, when McGregor and Coker were having this conversation, Ross' vote had already been cast and the Medical Association check wasn't sent until over one month later. Count Ten of the Indictment is due to be dismissed.

In addition, Agent McEachern introduced a series of phone calls in which McGregor and Lowell Barron concocted a scheme to play on Coker. The intent of these calls was for McGregor to contact Coker and tell him that Barron had cussed him out and was not supportive of SB380. (J-148 on 3/23/10 between McGregor and Barron at 9:07 am). Shortly after this call (which lasted 21 min.) McGregor calls Coker and acts out the scheme to him (J-676 on 3/23/10 between McGregor and Coker at 10:02 am). McGregor asks Coker to tell Preuitt that it "ain't fair for to us to be in a damn posture where you

ain't supporting us because we're supporting you ... and that's the reason Lowell's pissed off... I think you ought to let Preuitt know that don't you?" (J-676: P7 L41-P8 L15) Coker takes the bait and relays the whole story to Preuitt and Means who happens by while Coker and Preuitt are having lunch together. (J-150: P6 L39-P7 L2 and P16 L22-P18 L42). The import of these calls shows that while Coker was a contract lobbyist for McGregor, he wasn't involved in a conspiracy with him. There isn't any evidence that McGregor did anything wrong but even if he did, there is no evidence that he confided his every action to Coker, any more than he did to his secretary or office staff. In fact, there is no evidence that Coker had knowledge of any monies loaned to Country Crossings/Gilley. Further, there is direct evidence that McGregor actually schemed with Lowell Barron to use Coker to unknowingly provide misinformation. Coker was not a member of any conspiracy at all, let alone a knowing, willing participant of a conspiracy involving any of the other defendants in this case.

JARROD MASSEY (July 7-8, 11-15, 18 and 19)

Jarrod Massey was on the stand nine days. But his testimony with regard to Coker is very simple and straightforward. He claims that Coker was leading the pro-gambling lobbyists and that he was following Coker's directions. And secondly, when Coker called to find out what Gilley had discussed with Preuitt, Massey told Coker that he would get Gilley to call him so that he could hear it from the horse's mouth. That is it in a nutshell.[7]

With regard to the "leader" issue, Massey testified that Coker attended pro-gambling meetings, discussed strategy and counted votes in favor SB380. All of

[7] Granted Massey put his spin on these two facts and would tell other people that Coker was the quarterback, etc. and that the Gilley folks were using Coker to close the deal with Preuitt. But those assertions are completely unsupported by the facts. Massey admitted that he exaggerated and that he lied and that the period of time when he was doing so was when the wiretap was in place.

these activities were similarly attended and performed by numerous individuals not named in this indictment and are carried on every day in legislatures throughout the country. These events were entirely proper and legal and even Jarrod Massey testified that such meetings happen every time there are complex matters presented in the Alabama Legislature (he specifically acknowledged it occurring with regard to Tort Reform, Amendment One and other similar issues). Massey also testified that Coker was chosen to be the point person for the lobbying efforts of the pro-gambling side (which included not only McGregor and Gilley but also the Mobile track, White Hall, Etowah and other gambling interests) because of their great respect of him, his trust among the legislative community, his abilities, seniority and track record as a lobbyist. There is no allegation in the indictment that Coker was a leader of any improper or illegal activities and if there were, the facts simply do not bear that out. There is not a shred of evidence indicating that Coker led anything but legitimate lobbying efforts of behalf of SB380.

It is further clear that regardless of what Massey said to Coker's face–he was doing his own thing behind Coker's back. Examples of this were brought out during Massey's cross-examination (i.e. the conversations with Coker and Robert Crowder about Jimmy Holley wherein Massey was telling Coker to his face that he was following his direction but behind his back Massey was telling Crowder to lie to Holley–J-600 and J-601) but it was most succinctly stated by Massey in his conversation with Ferrell Patrick wherein Massey stated:

> ... but I've waited long enough, I mean, I'm gonna kinda coordinate with Tom, but I'm not gone ask for permission every ten minutes to do something. I'm gone get, get what I need and, you know, if somebody gets ticked off cause I talked to somebody or released something that I wasn't supposed to then, hell beg for forgiveness later and, you know, should have told me so.

(J-619: P6 L39-43) Another time he told Sen. Harri Anne Smith: "...I'm not going to sit

back and just be comfortable letting them [Coker and Fine] do it. So that's why yesterday I just decide hey, I'm going to engage." (J-29: P2 L2-34) [And, of course, Massey engaged by sending Jennifer Pouncy into lie to Preuitt about losing her job. (J-30: P1 L35-P2 L8)

With regard to the Preuitt conversations, there is simply nothing to support the charges in the indictment. In fact, Coker's direct involvement in the activities asserted in the Indictment occur in a very narrow window:

-Coker speaks with Sen. Preuitt on March 25th concerning an offer made by Gilley to him for campaign support and agrees to find out what Gilley was talking about; (J-82: P1 L24)

-on March 26th Coker speaks with Massey because he does not want to interfere with Massey's relationship with his client, Ronnie Gilley; (J-82: P2 L28-29)

-Massey does not discuss any details with Coker but tells him that Massey wants Coker to hear it from the horse's mouth what "real" or "heavily" involved means; (J-82: P3 L10-11)

-Massey tells Coker that he will get Gilley to call him; (J-82: P3 L15-16)

-Massey hangs up from Coker and calls Gilley, asking him to call Coker; (J-83)

-Gilley tells Massey that "I'm going to tell him exactly what I told Preuitt." And Massey responds: "Oh, okay, well, perfect, perfect." (J-83: P2 L4-7)[8]

-as noted above in the Gilley section, Gilley calls Coker and explains that the offer is for country music artists and nothing more.

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[8] This is important because the Government is trying to stretch the Gilley/Coker conversation into something its not–and they are doing so because it was not recorded. They have written in their proposed conspiracy findings that Gilley relayed not only his conversation with Preuitt but also those of Massey and Walker. This is simply not true as shown here where Gilley confirms he is only passing along what he discussed with Preuitt.

-further as noted in the Gilley section, Massey admitted that there was negativity (also described as political sensitivity) associated with these country artists because of their close association with Gilley.

The Government has emphasized two pieces of evidence in furtherance of their argument that Coker did more than call to figure out what they were talking about. First, they claim that Coker thanked the Gilley folks (at one point calling it icing on the cake). Secondly, they claim that on March 29th, the day before the vote Coker drove to Gadsden and Talladega and reported on the following day (March 30th) that he "thinks everything is fine". (J-88: P1 L42-43) Neither of these events support the Government's position.

First, Coker did not learn what the Gilley-folks offer was until his conversation with Ronnie Gilley on 3/26/10. Coker had called Massey with the stated purpose to "figure out... find out... figure out... figure out.... what heavily involved means." (J-82: P2 L14-32) Accordingly, any appreciation Coker expresses prior to understanding what the offer is, cannot be anything other than polite conversation without understanding the details. The conversation where Coker expresses appreciation for the Gilley efforts occurred on March 23rd (J-150: P7 L6-13)[9] and March 26th (J-82: P3 L34-41).[10] After learning that "heavily involved means" country music artists, Coker never again described this as "icin' on the cake" or in any way thanked Gilley and Massey for their efforts. As admitted by Massey, these country music artists carried a certain negativity and political

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[9] Coker introduces this section by stating: I think you know I like to try to give everybody credit. This conversation follows a lunch meeting Coker had with Jim Preuitt wherein he relayed the McGregor/Barron scheme to Preuitt and Means (i.e. where they tell Preuitt that Barron is mad at McGregor and not cooperating on the bill in an effort to get Preuitt to side with McGregor since he was so at odds with Barron).

[10] This is the call where Massey tells Coker he will have Gilley call him. Coker introduces this section by stating: Not having been a party to any of that [meaning the conversations with Preuitt] I told Milton to convey this [appreciation] to Ronnie.

sensitivity because they were closely associated with Gilley. Mere association with these artists could provide negative association for a politician's campaign. In fact, Massey opined that he believed it was a bad idea for Sen. Harri Anne Smith to utilize their services when she did.

Additionally, the Government places great weight on the March 30th conversation between Coker and Massey in which Coker states: I was up in Talladega and Gadsden yesterday visiting and so I think everything's fine there. I haven't heard anything this morning. (J-88: P1 L37-44). However, that had been a consistent feeling of most persons involved in this matter. As early as March 2nd Coker had told Massey the exact same thing: "Preuitt's gone be fine." (J-590: P1 L25) Massey relayed that same information to Gilley on March 2nd, telling him that Preuitt is probably going to be ok at the end of the day." (J-24: P2 L26) On March 8th, Massey told Robert Crowder that "Preuitt will come with us at the eleventh day". (J-606: P1 L41-46) On March 22nd Pouncy told Massey that Means and Preuitt are "probably gone be fine at the end of the day". (J-56: P1 L36-37) There are other conversations that discussed how important it was not to over-work Preuitt or be too heavy handed with Preuitt. Preuitt had voted for every gambling bill since 1983. To express the opinion that "I think everything's fine" is nothing more than repeating what most believed from the very beginning of the 2010 legislative session.

George Glaser (July 19 and 21)

Special Agent Glaser testified that Jim Preuitt told him that he has known Coker for years and considers him a dear friend. Preuitt believes that Coker is one of the best lobbyists in the state and is not "sleazy" like some others. For example, Coker visited Preuitt when his grandson died. While lobbying Preuitt on SB380, Coker told Preuitt that

his friendship was more important than how he voted on the bill.

Jennifer Pouncy (July 19-22)

Pouncy testified with regard to three matters related to Coker. First, she testified that Coker was putting together a deal for Means from the other tracks. As noted in Coker's conspiracy response, this conduct is not charged as an overt act in the Indictment, nor is Coker charged in any substantive count with bribing Means. Secondly, she testified that Coker told her had already given Senator Ross ten or fifteen thousand and Ross was asking for an additional ten or fifteen thousand. For purposes of this motion this is taken as true, but it is completely harmless. Pouncy never suggested that these requests were tied in any manner to Ross' vote on SB380. The final area concerned a telephone call between Pouncy and Massey on March 30th at 2:24 p.m. (J-91) In this call, Pouncy says that Preuitt committed to her. Thereafter, Massey recounts his conversation with Coker and his conversation with Gilley. In doing so, Massey exaggerates and lies about the content of that call, which Pouncy described as being characteristic of Massey. Pouncy testified that Massey regularly exaggerated, lied and was generally a dishonest person. Coming from a person who Massey described as his main lobbiest and an honest person, this testimony alone creates a reasonable doubt about Massey's testimony.

Steve French (July 22)

Former State Sen. Steve French testified that he had know Coker for a long time. He also testified that Coker has never asked him to do anything improper, illegal or unethical.

Phillip Harrod (July 25)

Is a Forensic Accountant Program Analyst but did not mention Coker.

Nathan Langmack (July 26)

Special Agent with the FBI testified concerning toll records. He introduced evidence about the numbers of calls made by and between certain individual but did not provide independent testimony about the substance of any calls.

Dickey Whitaker (July 28)

Whitaker was the first and only defense witness called in the case. He testified that the $10,000 Alabama Medical Association contribution to Senator Ross on May 6, 2010 was in no way related to the bingo bill. Nor did Coker ever mention Milton McGregor or Quentin Ross in relation to this campaign contribution to Ross. He testified that in order for the contribution to be made it had to be requested by a local physician, then approved by a local committee and finally approved by the statewide committee. He said that Coker didn't make a recommendation about the Ross contribution, had no input on the committee level, nor did he attend any meeting where the contribution was approved. Whitaker also testified that Senator Ross was on the Senate Health Committee, would listen to the Associations concerns and had been helpful in the past. The Association had made contributions to Ross every year he was elected (2002, 2006 and 2010).

II. LEGAL BASIS

RULE 29 STANDARD

"The standard by which the Judge is to be guided in passing on a motion for judgment of acquittal is the same regardless of whether the motion is at the close of the government's evidence or at the close of all the evidence or after discharge of the jury." Wright, *Federal Practice and Procedure: Criminal 3d* § 467. A Motion for Judgment of Acquittal pursuant to Rule 29 tests the sufficiency of the evidence against the defendant

and avoids the risk that a jury may capriciously find him guilty though there is no legally sufficient evidence of guilt. Wright, *Federal Practice and Procedure: Criminal 3d,* § 461. A motion for judgment of acquittal must be granted if "the evidence is insufficient to sustain a conviction" of one or more of the offenses charged in the indictment. *Id.* at § 466. In other words, the motion should be denied only if there is "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt that the accused is guilty." *Id.* at § 467. The jury cannot be permitted to speculate if the evidence is such that reasonable jurors must have a reasonable doubt. *Id.* at § 467. According to Wright's *Federal Practice*, the appropriate test to be applied to motions for judgment of acquittal in all circuits (except the Second Circuit) is as set forth in *Curley v. United States:*

> If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.
>
> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

Curley v. United States, 160 F.2d 229, 232-233 (D.C. Cir. 1947) *cert. denied* 67 S.Ct. 1511.[11] In the instant action, Coker's motion is due to be granted as there must be a reasonable doubt with regard to Counts 1, 8 and 31, based on the evidence as presented

[11] In *Jackson v. Virginia,* 99 S.Ct. 2781 (1979) the United States Supreme Court endorsed this formulation as "the prevailing criterion for judging motions for acquittal in federal criminal trials." *Id.* at 2789 n. 11.

by the Government.

1. Conspiracy (Count 1)

The elements for proving a conspiracy under 18 U.S.C. § 371 are: **(1)** an agreement between two or more persons to achieve an unlawful objective; **(2)** knowing and voluntary participation in the agreement; and **(3)** an overt act by a conspirator in furtherance of the agreement. *U.S. v. Bachynsky*, 2011 WL 573485, 3 (11th Cir. 2011); *U.S. v. Brenson,* 104 F.3d 1267 (11th Cir. 1997); *U.S. v. Suba,* 132 F.3d 662 (11th Cir. 1998); *U.S. v. Hansen,* 262 F.3d 1217 (11th Cir. 2001).

A conspiracy is a crime involving "two intents". The **first intent** involves two or more people agreeing to commit a crime. The **second intent** is that at the time of the agreement a defendant must have a state of mind to commit the substantive crime which is the object of the illegal agreement. *U.S. v. Chagra,* 807 F.2d 398 (5th Cir. 1986).

In order to sustain the conspiracy charge as alleged in Count One of the Indictment, the United States was required to introduce evidence that there was a 'meeting of the minds" to accomplish the unlawful goal and that Tom Coker knowingly participated in that agreement. *United States v. Adkinson*, 158 F.3d 1147, 1154 (11th Cir. 1998). Moreover, the United States was also required to show that Coker possessed full knowledge of the conspiracy's general purpose and scope. *United States v. Michel*, 588 F.2d 986, 995 (5th Cir. 1979). The United States presented no evidence of any conspiracy between Coker and any other defendant in this case. The United States did not call a single witness to testify that Coker acted in concert with any of the other defendants to obtain an unlawful objective. There was no conspiratorial agreement as alleged in the indictment.

A. Multiple Conspiracies

Count One charged a single conspiracy existing between McGreger, Gilley, Coker, Crosby, Geddie, Massey, Means, Preuitt, Ross, Smith, and Walker (along with Pouncy aka "Lobbyist A").[12] Not only is this illogical as McGregor and Gilley were, to a certain extent competitors, but there was no evidence of any such mutual agreement nor that all these parties were part of a single, common, unlawful plan. Even though evidence has been introduced that McGregor loaned money to Gilley, this does not establish a conspiracy but in addition, there has never been any proof that Coker viewed the two as anything but competitors. "Multiple conspiracies exist where the evidence shows separate networks operating independently of one another." *United States v. Barlin*, 686 F.2d 81, 89 (2nd Cir. 1982) Multiple conspiracies arise when "each of the conspirators' agreements has its own end and each constitutes an end in itself." *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969) In *United States v. Castro*, 829 F.2d 1038 (11th Cir. 1987) convictions were reversed when the Eleventh Circuit found multiple (rather than a single) conspiracies to exist. Such is obviously the case in the instant action. Coker has suffered prejudice for various reasons including but not limited to the fact that there is a substantial likelihood that the jury transferred evidence from one conspiracy to another conspiracy, from the numerous overt acts of one conspiracy to the other and the 404(b) evidence, which may have been admissible as to one conspiracy to the other. Each of these individually prejudiced Coker and allowed the likelihood that some of the jurors might have found that an overt act from one conspiracy existed while others might have found it was a separate overt act from another conspiracy. *Kotteakos v. United States,* 328 U.S. 750 (1946).

[12] Sen. Ross and Bob Geddie were acquitted by the jury on this and all other counts.

B. There Was No Agreement

In order to sustain the conspiracy charge as alleged in the Conspiracy Count, the United States was required to introduce evidence that there was a 'meeting of the minds" to accomplish the unlawful goal and that Tom Coker knowingly participated in that agreement. *United States v. Adkinson*, 158 F.3d 1147, 1154 (11th Cir. 1998). Moreover, the United States was also required to show that Coker possessed full knowledge of the conspiracy's general purpose and scope. *United States v. Michel*, 588 F.2d 986, 995 (5th Cir. 1979). The United States presented no evidence of any conspiracy between Coker and the other defendants. There was no conspiratorial agreement as alleged in the indictment.

C. Coker did not Knowingly and Willfully Join Alleged Conspiracy

Moreover, the evidence failed to demonstrate that Coker willfully and knowingly joined such a conspiracy, even if such an unlawful plan existed. A conspiracy is an agreement between two or more persons to accomplish an unlawful plan. 18 U.S.C § 371; *United States v. Parker*, 839 F.2d 1473 (11th Cir. 1984). The essence of a conspiracy is an agreement. *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). The agreement itself "remains the essential element of the crime." *Id.* Thus the government must prove the existence of an agreement to achieve an unlawful objective and the defendant's knowing participation in that agreement. *United States v. Adkinson*, 158 F.3d 1147, 1155 (11th Cir. 1998). The government must prove beyond a reasonable doubt that there was a "meeting of the minds to commit an unlawful act." *Adkinson*, 158 F.3d at 1154 (quoting *Parker*, 839 F.2d at 1478). Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of knowledge of the overall scheme is critical to a finding of conspiratorial intent. "Nobody is liable in conspiracy except for the fair import of the

concerted purpose or agreement as he understands it." *United States v. Peoni*, 100 F.2d 401, 403 (2nd Cir. 1938). The Government, therefore must prove beyond a reasonable doubt that the conspiracy existed, that the defendant knew about it and that he voluntarily agreed to join it. *United States v. Hernandez,* 896 F.2d 513, 519 (11th Cir. 1990). There is no evidence in this case that any conspiracy existed but even so, there is no evidence whatsoever that Coker knew about it and voluntarily agreed to join it. At best, he inquired on Senator Preuitt's behalf as to what Gilley had offered in the way of campaign support. There was never any assertion that he was going to try to convince Preuitt to accept the offer, nor that he even believed it was beneficial in any way to Sen. Preuitt. In fact, the evidence is to the contrary. Once Coker learned from Gilley what the offer was, there was never any expression of appreciation thereafter.

The Eleventh Circuit has reversed conspiracy convictions where there was no direct proof of a charged agreement, and the circumstantial evidence of an agreement was insufficient to support such an inference. *Adkinson*, 158 F.3d at 1159; *United States v. Awan*, 966 F.2d 1415, 1434-35 (11th Cir. 1992); *Parker*, 839 F.2d at 1478. Proof of a true agreement is the only way to prevent individuals who are not actually members of the group from being swept into the conspiratorial net.

D. <u>There was no Unlawful Objective</u>

The object of the conspiracy is set out in paragraphs 29, 30 and 31 of the Indictment. In essence, these paragraphs charge the defendants with efforting to secure the passage of SB380 by offering bribes (things of value in exchange for a favorable vote). The Government must prove that the object of the conspiracy, as alleged in the indictment, is in fact the object that th defendant agreed to achieve. See, *United States v. Martinez,* 83 F.3d 371 (11th Cir. 1996) (conviction for conspiracy to commit theft of drugs

reversed when proof was that the theft was of money); *United States v. Charles,* 313 F.3d 1278 (11th Cir. 2002) (conviction reversed possession with intent to distribute cocaine was reversed because the defendant participated in a home invasion but was unaware that his co-conspirators' design was to steal drugs from the house). Coker admits that he was engaged in efforts to pass SB380. However, these efforts were entirely legal and the evidence demonstrates that he did not offer anything of value to any of the identified legislators in exchange for their vote.

2. Bribery (Count 8-Preuitt)

The basic elements of a bribery charge under 18 USC § 666(a)(2) are: **(1)** the defendant gave to an agent of the state, local or tribal government anything of value; **(2)** with the corrupt intent to influence or reward them; and **(3)** in connection with any business, transaction, or series of transactions of the [state, local or tribal government] involving anything of value of $5,000 or more. *U.S. v. McNair*, 605 F.3d 1152, 1186 (11th Cir. 2010)

The nuances of these various elements are vast and have been the subject of extensive motions to dismiss. Coker relies on these previous pleadings which have directly addressed these issues. However, in summary, these related issues include but are not limited to: 1) the allegations of the Indictment relate to speech (i.e. campaign contributions) which is specially protected by the First Amendment; 2) an explicit *quid pro quo* must be proven (see *McCormick v. U.S.,* 500 U.S. 257, 273 (1991)[13]); 3) whether

[13] Prior to trial, the Government conceded that an explicit *quid pro quo* applies to the allegations in this case which relate to campaign contributions. The Government has agreed that all of the allegations against Coker in this case involve campaign contributions. An explicit *quid pro quo* requires the Government to prove an express agreement to exchange specific benefits for specified official action.

the term "corruptly" is unconstitutionally vague when applied to campaign contributions; 4) whether "in connection with any business, transaction or series of transactions" covers state legislators in their non-commercial role as regulators; 5) whether the allegations in the indictment (and the application of §666) impermissibly encroach on State sovereignty and violate the 10th Amendment; 6) whether campaign contributions constitute "a thing of value"; 7) whether the allegations, interpretation and application by the Government violates due process, especially in light of the rule of lenity; 8) whether the Government has properly alleged and proven the valuation element ($5,000) and the federal program element ($10,000); and 9) whether a legislator is an "agent" of the State or his constituents.

A. Generally: There was Insufficient Evidence of the Elements

The Government failed to produce sufficient evidence the satisfy a reasonable juror beyond a reasonable doubt that: 1) during the specified periods the State of Alabama received benefits in excess of $10,000 under a Federal Program involving some form of federal assistance; 2) Coker knowingly gave, offered or agreed to give the specified things of value; 3) to an agent of the state to influence or reward the agent of the State; 4) in connection with a transaction or series of transactions of the State of Alabama involving something of value of $5,000 or more; and 5) in so doing the Defendant acted corruptly. Because of this failure of proof, Coker's motion is due to be granted.

B. $10,000 Requirement

Coker does not dispute that the Government established that the State of Alabama received $10,000 in federal funding. However, the Government's proof was that the recipient of the federal funds was the State of Alabama. On the other hand, the purpose

of the conspiracy as established in the Indictment was directed toward the Alabama Legislature (see paragraphs 29, 30 and 31 of the Indictment). The Government wholly failed to prove that the Alabama Legislature received any federal funds. In fact, the evidence was exactly the opposite. Gail Traylor testified that the Alabama Legislature did not receive any federal funding. In addition, this Court is without jurisdiction and Congress is without authority to regulate the activities included in the Indictment.

C. $5,000 Requirement

18 USC § 666(a)(2) "applies to anyone who corruptly offers or agrees to give anything of value of $5,000 or greater to any person, with the intent to influence or reward an agent of a State, local or Indian Tribal government or any agency of those entities." *White Collar Crime: Business and Regulatory Offenses* §3.03[1][b] (2011). The $5,000 requirement was not met by several of the Government's allegations namely: Count 8 as it relates to Coker/Preuitt involves some unspecified value of country music singers. The Government has made no effort to put a value on those services. Therefore, this count failed with regard to this requirement and Coker's motion should be granted.

D. Agency

The Government has failed to establish the "Agent" status of Senator Preuitt, who was supposedly bribed in this matter. "Agent" status (or not) is ultimately a conclusion about applicability of a legal term as used in this specific status with a specific definition. See § 666(d)(1):

> "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."

The conclusion about whether somebody is an agent, for § 666 purposes, can be based on proof of facts about the relationship. E.g., U.S. v. Langston, 590 F.3d 1226, 1234 (11th

Cir. 2009) ("Next, we must determine whether the Government produced sufficient relevant evidence at trial to allow a jury to conclude that Langston was an agent of the state. We conclude that it did not.") State laws defining the nature of the relationship can also be relevant. Langston, 590 F.3d at 1234 ("Our task then is to determine whether the applicable law creating the Executive Director's employment with the Fire College also made the Executive Director an agent of the state Based upon our examination of the relevant state law, we conclude that it does not.").

Legislators just aren't "agents" as that word is used in this law. Members of the Alabama Senate or House of Representatives are not "agents" of the State, simply in that capacity. *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 747 (9th Cir. 2003) (although in a different legal context–not a § 666 case–held that State Legislators aren't agents of the State). The statutory definition of "agent," as quoted above in § 666(d)(1) begins with the basic concept of what agent status is all about: "the term 'agent' means a person authorized to act on behalf of another person or a government." This is consistent with the general legal understanding of the concept: an agent is somebody who is "authorized to act for or in place of another" (Black's Law Dictionary (8th ed.); see also definition of "agency" is a relationship "in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions"). The Eleventh Circuit has used this basic "act on ... behalf' concept in discussing agent status under § 666. Langston, 590 at 1234 ("We must necessarily scrutinize that which purports to create the employment relationship with the agency to determine if the employee is authorized to act on the principal entity's behalf.")

A State Legislator is not authorized to act "for or in the place of," or even "on behalf of," the State That's not what a Legislator is doing when he or she votes — they're

not acting on behalf of the State as an agent. They're doing something conceptually different from that. A legislator again is not a "representative" of the State, but a representative of his or her constituents.

Finally, nobody is an "agent" within the meaning of § 666 unless the Government proves that he or she is authorized to act on behalf of the principal (here, the State) with respect to its funds. *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) ("In United States v.Phillips, we held that for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.' 219 F.3d 404, 411 (5th Cir. 2000).") The Government has not met its burden of proof.

E. Specific Bribery Allegations

With regard to Sen. Preuitt, there was never any explicit agreement that anything was being offered in exchange for his vote. Moreover, in anything was offered, there was never any indication that it was accepted by Sen. Preuitt. As noted above, Preuitt's friendship was more important to Coker than his vote on SB380. Preuitt had voted for every gambling bill since 1983. The suggestion of country music artists for his campaign carried with it a certain negativity. There is no evidence that Preuitt ever even accepted any offer of the country music artists. Nor has there been any proof of an explicit agreement in this regard. Count 8 is due to be dismissed.

F. Bribery: Quid Pro Quo Requirement

Coker is charged under 18 U.S.C. § 666(a)(1)(B) which specifically requires that something of value must be solicited or accepted "in connection with any business, transaction, or series of transactions...." The requirement of this statute requires a nexus

between the things of value exchanged. This nexus, a *quid pro quo* requires, as it applies to this case, that an explicit agreement. The Government, prior to trial, agreed that all of the allegations against Coker in this case involve campaign contributions. Accordingly, an explicit quid pro quo requires the Government to prove an express agreement to exchange specific benefits for specified official action. The Government's proof has failed to establish such a direct/explicit quid pro quo or even any connection between things of value allegedly exchanged. There has been no identification of a single thing of value that was tied to any Senators vote in any way (especially with regard to Preuitt with whom Coker is charged with bribing). There has been no nexus shown at all. The Government has simply failed to establish the "connection" required by law.

3. Honest Services Wire Fraud

The elements of the crime of Honest Services Wire Fraud under 18 USC §§ 1343 and 1346 requires that the Government must prove that the defendant:

(1) intentionally participated in a scheme to defraud;

(2) used wire communications to further that scheme;

(3) the there was a falsehood which was material;

(4) acted willfully and with an intent to defraud; and

(5) the identity of what the victim has been defrauded (for example, money, property, or the § 1346 intangible right of honest services). *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999); *United States v. Brown*, 40 F.3d 1218, 1221 (11th Cir.1994). *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1841, 144 L.Ed.2d 35 (1999)

As with the general bribery elements, the nuances of these various elements have been the subject of extensive motions to dismiss (and oral arguments thereon) prior to and

during the trial. Coker relies on these previous filed pleadings which have and will directly address these issues. However, in addition to the various issues noted above in the bribery section (which are applicable herein assuming that the alleged scheme to defraud is a bribery scheme), additional related issues include but are not limited to: 1) the Government must prove a personal benefit to the offender; 2) whether the allegations of the Indictment fall outside the parameters established by the United States Supreme Court in *Skilling* as being limited to the pre-*McNally* core of bribes or kickbacks; 3) whether an alleged payment or offer to pay was made to influence a specific act; 4) whether the Indictment sufficiently alleges the scheme to defraud; and 5) whether the allegations in these charges survive the constitutional concerns under the 1st, 5th and 10th Amendments, especially in light of the rule of lenity.

A. Historical Background

In 1988, Congress enacted Section 1346 to overrule *McNally v. United States*, 483 U.S. 350, 358, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), and reinstated the intangible rights theory. *United States v. Waymer,* 55 F.3d 564, 568 n.3 (11th Cir. 1995) In *McNally*, the Supreme Court held that the then-existing mail fraud statute did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly." *McNally*, 483 U.S. at 358. "When [Congress] enacted . . . [Section 1346] – Congress was recriminalizing mail- and wire-fraud schemes to deprive others of that 'intangible right of honest services, which had been protected before McNally." *Rybicki*, 354 F.3d at 138. *Skilling v. United States*, 130 S.Ct. 2896 (2010) curtailed the expansion of the intangible rights doctrine by limiting it to the pre-McNally core cases which involved bribery and kickback schemes.

B. Honest Services Wire Fraud: Failure of Proof

In determining the merits of Coker's Motion under Rule 29, this Court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999). Coker's Motion for Judgment of Acquittal is due to be granted as the Government failed to produce evidence sufficient to sustain a conviction with regard to each and every element of the counts as set forth above. Namely, there was no scheme to defraud; intentional participation therein by Coker; there were no materially false or fraudulent pretenses; and there was no specific intent to commit a fraud.

C. There was No Criminal Intent

As a corollary to the good faith defense (below), the Government's case fails if it does not establish the element of criminal intent beyond a reasonable doubt. As noted above, wire fraud is a specific intent crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt that the defendant had the specific intent to defraud. *United States v. Foshee,* 578 F.2d 629, 634 (5th Cir. 1978) Intent targets "a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Stephens,* 421 F.3d 503, 509 (7th Cir. 2005). In *United States v. Brown,* 40 F.3d 1218 (11th Cir. 1994) the Eleventh Circuit reversed a mail fraud conviction holding that the Government failed to prove that the defendant was aware that the applications in issue were all fraudulent. Likewise, the Government has failed to prove (or even infer) any criminal intent on the behalf of Coker. Whether anyone else had criminal intent in this matter is irrelevant and cannot be transferred to Coker. Furthermore, in order to find Coker not guilty of the other 10 mail and wire fraud counts, they found no criminal intent

on behalf of Coker. To fail to acquit Coker on Count 31 is inconsistent. This lone mis-tried count is precluded from retrial based on the not builty verdicts on the other, related counts. Count 31, alleging wire fraud must be dismissed on this ground alone.

D. <u>There Was No Scheme To Defraud</u>

Not only must there be a scheme to defraud but also, the United States Supreme Court ruled in *Neder v. United States* that the government has to prove that the deception was material. *Neder v. United States*, 527 U.S. 1, 20-25 (1999). See also, *United States v. Brown,* 79 F.3d 1550 (11th Cir. 1996) (convictions were reversed because materiality was not proven). There was absolutely no scheme to defraud in the instant action concerning Tom Coker with regard to any matter. The focus of the scheme to defraud is on the harms suffered by the victims (and not the defendants' ultimate goal or purpose). *United States v. Cross*, 928 F.2d 1030, 1044 (11th Cir. 1991). In this case, there was no harm suffered by any victim.

Even assuming the Government's theory is true, the acts made the basis of this Indictment as they relate to Tom Coker are not actionable under the federal wire fraud statute. The federal mail/wire fraud statutes do not purport to reach all frauds. *Schmuck v. United States,* 489 U.S. 705 (1989) "The fraud statutes do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or [even] unethical transactions." *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996) There was no scheme to defraud and there was certainly no scheme to defraud which is actionable under 18 U.S.C. §§ 1343 and 1346.

E. <u>Good Faith is an Absolute Defense</u>

Good faith is a complete defense to charges brought under the wire fraud statute. *United States v. Young*, 470 U.S. 1, 32 (U.S. 1985); *United States v. Paradies*, 98 F.3d

1266, 1285 (11th Cir. 1996); *United States v. Goss*, 650 F.2d 1336, 1345 (5th Cir. 1981); *United States v. Josleyn*, 99 F.3d 1182, 1194 (1st Cir. 1996); *United States v. Rossomando*, 144 F.3d 197, 199 (2d Cir. 1998); *South Atlantic Ltd. Partnership v. Riese*, 284 F.3d 518, 531 (4th Cir. 2002); *United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Morris*, 80 F.3d 1151, 1165 (7th Cir. 1996); *United States v. Behr*, 33 F.3d 1033, 1035 (8th Cir. 1994); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States v. Migliaccio*, 34 F.3d 1517, 1524-1525 (10th Cir. 1994). "While the term 'good faith' has no precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another." *United States v. Migliaccio*, 34 F.3d 1517, 1524-1525 (10th Cir. 1994) As noted in *United States v. Santoli*, 1999 U.S. App. LEXIS 2204, 6-7 (4th Cir. 1999):

> Good faith on the part of the defendant is a complete defense to a charge of mail fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on [the] government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. Under the mail fraud statute, false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statement may turn out to be. . . . The government must establish beyond a reasonable doubt that [the defendant] knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.

Id. Tom Coker's Motion for Judgment of Acquittal is due to be granted as he exercised the utmost good faith with regard to all of his responsibilities as a lobbyist on behalf of SB380. The testimony of Senators Beason and French along with Representatives Mask and Lewis and that of Jim Sumner demonstrate Coker's good faith. The absence of any direct evidence of unlawful conduct requires that any adverse inferences drawn are

outweighed by Coker's explicit good faith.

F. The Rule of Lenity and the Wire Fraud Statute

The Wire Fraud statute is subject to the "Rule of Lenity". The Rule of Lenity provides that when a criminal statute is ambiguous in its application to certain conduct, the rule of lenity requires it to be construed narrowly and all doubts are to be resolved in favor of the defendant. *Jones v. United States,* 529 U.S. 848 (2000); *United States v. Trout,* 68 F.3d 1276 (11th Cir. 1995) The Eleventh Circuit has set aside fraud convictions on several occasions, applying the rule of lenity. *United States v. Brown,* 79 F.3d 1550 (11th Cir. 1996); *United States v. Chandler,* 388 F.3d 796 (11th Cir. 2004). In *Brown* the Court wrote:

> The law is a causeway upon which, so long as he keep to it, a citizen may walk safely. (Speech of Sir Thomas More in "A Man For All Seasons"). To be free of tyranny in a free country, the causeway's edges must be clearly marked. The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons, by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along.

Brown, supra at 1562. There is nothing to demonstrate that the activities complained of by the Government were clearly marked nor that Coker's conduct contravened any such clear demarcations. The conduct of Tom Coker does not fall within the parameters of the wire fraud statute, especially in light of the Rule of Lenity. This is especially true when you are dealing with campaign contributions, political activities and First Amendment speech rights.

G. No Personal Gain to Tom Coker

There has been shown no personal gain to Tom Coker from the acts complained of in the Indictment. Tom Coker had no personal interest in any gaming facility. Coker did not have an "incentive contract" or "contingency fee contract". He was paid a flat fee

regardless of whether the legislation passed or failed. In order for a wire fraud charge to be viable, there must be some personal gain to the person charged.

> No one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*. An employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain. Count I does not allege that Bloom did this and therefore does not state an offense under the intangible rights theory.

United States v. Bloom, 149 F.3d 649, 656-7 (7th Cir. 1998) (affirming the trial court's dismissal of an honest services mail fraud complaint). See also, *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that the personal gain required typically takes the form of kickbacks or failure to disclose conflicts of interest). As Tom Coker did not personally gain from these transactions there is no deprivation of honest services.

H. <u>The Specified Conduct is Beyond the Statute's Reach</u>

The honest services provision represents the broadest extension of the wire fraud statute ever enacted. In *United States v. Adkinson*, 135 F.3d 1363 (11 th Cir. 1998), the Government persuaded the Grand Jury to return an indictment on a conspiracy count for which 4 of the 5 conspiratorial objectives were not violations of the law. The Eleventh Circuit held that to be reversible error.[14] The court noted, "[i]n order to be valid, an indictment must allege that the defendants performed acts, which if proven, constitute the

[14] The Eleventh Circuit reversed the case despite the fact that "the trial lasted five months; 115 witnesses generated more than 85 volumes and 17,500 pages of transcript; 1,447 exhibits were admitted." *Adkinson*, supra at 1369.

violation of law for which they are charged". Further "[a]n indictment should be tested against the law 'as we find it on the date of our decision.'" *Adkinson* at 1372. Here the indictment has a plain defect in that it can be construed to allege circumstances which do not constitute a criminal offense. There is simply nothing illegal or improper with the conduct complained of in these counts. Associations have for ages, inquired as to the voting proclivities of the persons it intends to support. Questionnaires are filled out, interviews are conducted and persons must commit to certain positions before campaign contributions or other support is provided. The protected area of free speech, especially political speech most be protected.

The Grand Jury returned an indictment which does not state a violation of federal law. Any conviction by the Trial Jury in this case would be clear error also. As the United States Supreme Court has stated "if a jury convicts on a count containing insufficient grounds, the conviction cannot stand since the verdict may have rested on the insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881, 103 S. Ct. 2733, 2745, 77 L. Ed. 2d 235 (1983).

I. <u>There is No Vicarious Liability</u>

The Eleventh Circuit in *United States v. Brown,* 79 F.3d 1550 (11th Cir. 1996) has ruled that there is no vicarious liability under the mail/wire fraud statute. Each person must willfully participate in the fraudulent scheme. *Id.* The Court held:

> We know that no criminal vicarious liability is authorized under the mail fraud statute. *U.S. v. Toney*, 605 F.2d 200, 208 (5th Cir. 1979) ("participation by a business entity in a scheme to defraud in no way necessitates a finding that the officers were participants in that scheme"). Instead, the evidence must show that each officer, the person, "willfully participated" in the scheme. *U.S. v. Sawyer,* 799 F.2d 1494, 1502 (11th Cir. 1986).

Id. at 1556 n.9. In *Brown,* the defendants convictions were reversed with a holding that

each individual person must themselves willfully violate the wire fraud statute to sustain any conviction. In this case there is no evidence that Coker willfully participated in any alleged scheme. Tom Coker cannot be held liable vicariously for any actions of others. Count 31, the remaining wire fraud count in this case specifically seek to hold Coker liable for completely legal speech.[15] There is never a discussion of anything being offered in exchange for anyone's vote. These are completely legal conversations discussing a legislative bill and the likelihood of whether Sen. Preuitt will vote for it.

J. A Bribery Scheme With No Quid Pro Quo

"For a bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange for* an official act." *United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 405 (1999). Because this wire fraud scheme is a bribery scheme, there is a *quid pro quo* requirement. *McCormick v. United States,* 500 U.S. 257 (1991); *United States v. Martinez,* 14 F.3d 543 (11th Cir. 1994). As has been established by the Court in this case, there is a requirement that this include an explicit agreement. There was no *quid pro quo* proven in the instant action with regard to Tom Coker in relation to any Count.

K. The Honest Services Wire Fraud Statute Is Unconstitutionally Vague

The Second Circuit has ruled that Congress' provision regarding honest services mail fraud is unconstitutionally vague. In *United States v. Handakas,* 286 F.3d 92, 112-13 (2nd Cir. 2002) the Court ruled that the "honest services" provision of 18 U.S.C. §

[15] Of all the mail and wire fraud counts in the Indictment, only 2 involved conversations (or mailings) in which Coker actually participated. Curiously, Coker was found not guilty of Count 29 (a transcript of this conversation is J-136) but the jury hung on Count 31 (J-138). The content of the conversations are virtually identical and involve discussions about Preuitt's concern over Dr. Hubbert opposing him and benefitting from the bingo legislation.

1346 was unconstitutionally vague because the statute did not provide fair notice that federal law had criminalized breaches of contract and failed to provide standards for enforcement.[16] The vagueness issue was raised in the Eleventh Circuit in *United States v. Waymer,* 55 F.3d 564 (11th Cir. 1995).[17] The Eleventh Circuit stated that the analysis of the claim is based on the particular facts of the case. *Id.* at 568. The Court denied Waymer's claim finding that the Government had established beyond a reasonable doubt the specific intent to defraud. *Id.* at 568-9. There is no such proof in the instant action. The actions taken by Tom Coker in this case involve proper lobbying and purely legal political activities. These activities are all constitutionally approved and part of the very fabric of our democracy. If Coker's conduct is deemed to have violated the law of honest services, then it is because the statute is unconstitutionally vague. Coker's actions were not illegal in any way and there is absolutely no evidence of any specific intent to defraud. Such activities are not illegal and therefore, if this statute encompasses them, it is void for vagueness.

L. Telephone Call was Not in Furtherance

The federal wire fraud statute does not purport to reach all frauds, rather it aims at instances where they are used as "part of the execution of the fraud." *Schmuck v. United*

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[16] In the interest of full disclosure, *Handakas* was overruled in *Rybicki*, but not with regard to the merits of the vagueness claim. Rybicki held: "[t]here was thus no reason to reach the constitutional question in Handakas. In light of our duty to avoid passing on constitutional questions whenever possible. . . we overrule the unnecessary constitutional ruling in that case without reviewing it on its merits." *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003).

[17] To avoid being unconstitutionally vague the criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) as cited in *Waymer,* at 568.

States, 489 U.S. 705 (1989). While the government need not prove a defendant intended to use the mails/wires, it must prove that they were for the purpose of executing the alleged scheme to defraud. *See United States v. Maze,* 414 U.S. 395, 400, 94 S.Ct. 645, 648 (1974); *Kann v. United States,* 323 U.S. 88, 94, 65 S.Ct. 148, 151 (1944); *United States v. Toney,* 605 F.2d 200, 206 (5th Cir. 1979). Wire communications that occur after the scheme has come to fruition[18] or that are only collateral to the alleged scheme do not violate the wire fraud statute. *Maze*, 414 U.S. at 400, 94 S.Ct. at 648; *United States v. Keenan,* 657 F.2d 41, 42-43 (4th Cir. 1981). Only use of the wires that plays an "'integral rather than incidental or tangential role in the fraudulent scheme" constitutes a violation of the wire fraud statute. *United States v. Bosby,* 675 F.2d 1174, 1183 (11th Cir. 1982). Although the communication may be accomplished by some innocent party, one participant in the fraudulent scheme must cause a use of the wires in execution of the fraud. *United States v. Munoz*, 430 F.3d 1357 (11th Cir. 2005).

In *United States v. Maze*, 414 U.S. 395 (1978) the defendant stole victims' credit cards and used the cards, resulting in bills being mailed to the victims. The Court held that this mailing occurred after the fraud was accomplished and reversed the mail fraud convictions. The Eleventh Circuit has held similarly in *United States v. Adkinson,* 158 F.3d 1147 (11th Cir. 1998) (mailings that occur after the scheme to defraud is complete cannot support mail fraud conviction). It bears noting that the jury hung as to the conspiracy count. Coker's requested charges 70 and 71 specifically addressed the conspiracy issue and would have clarified issues in that regard. Additionally, the requested bribery charges (as set out in McGregor's requested jury instructions and

[18] Use of the mails to lull the victims or delay discovery of the scheme is an exception to this rule, but not one relevant to this case. *See, e.g., United States v. Sampson,* 371 U.S. 75, 80, 83 S.Ct. 173, 136 (1962); *Toney,* 605 F.2d at 206.

adopted by Coker) would have added clarity to Count 8, another count upon which the jury hung and, because the scheme to defraud was a bribery scheme, Count 31 also.

4. Double Jeopardy Prevents a Retrial as to the Mistried Counts

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188 (1957).

The Double Jeopardy Clause of the Fifth Amendment provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." A retrial of the 3 "mis-tried" counts would subject Coker to double jeopardy, especially in light of the not guilty verdicts on 11 of the 14 counts he faced.

The case of *Yeager v. United States,* 129 S.Ct. 2360 (2009), addressing this issue, arose out of the Enron circumstances. Yeager, an officer of an Enron subsidiary, was charged with securities and wire fraud, insider trading and money laundering. At the conclusion of the trial, the jury acquitted Yeager on the fraud counts but failed to reach a verdict on the insider trading counts. The Trial Court took the partial verdict and declared a mistrial. When the Government brought a second action, Yeager moved to dismiss the case on double jeopardy grounds claiming that the jury acquittals (on the fraud counts) had necessarily decided that he did not possess material, nonpublic information with regard to the insider trading counts. *Id. at* 2364. The Trial Court denied the motion and the Court of Appeals affirmed, both relying on the juries failure to acquit as a pivotal factor in the court's issue-preclusion analysis. *Id. at* 2367. The Government had taken the blanket position that "a retrial is always permitted whenever a jury convicts on some

counts and hangs on others. *Id. at* 2368. The Supreme Court stated that its conclusion is an express rejection of that argument and it reversed the opinions below.

In support of its opinion, the Supreme Court reaffirmed the standard set out in *Ashe v. Swenson,* 90 S.Ct. 1189 (1970) holding that "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager, supra at* 2367. It went on to explain that "when an issue of ultimate fact has once been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense. *Id.* In the instant action, Coker was acquitted of 10 of the 11 counts of honest services mail and wire fraud. As a result, the jury was convinced that Coker was not involved in the scheme to defraud as set forth in the indictment, and that the Government had failed to prove any of the other essential elements of those charges (i.e. that he intentionally participated in a scheme to defraud; used wire communications to further that scheme; there was a material falsehood; or that he acted willfully with an intent to defraud). The jury has already resolved these essential facts in his favor and moreover, they did so with regard to Count 29, a virtually identical charge as Count 31.[19] Accordingly, a retrial of Count 31 would violate the Double Jeopardy Clause. In addition, because the scheme to defraud in the honest services counts was a bribery scheme as set forth in the conspiracy count (Count 1) and substantively in Count 8–these counts are also barred by the Double Jeopardy clause. Accordingly, Coker's motion should be granted as to all remaining

[19] In Yeager the Courts below had rationalized that the fact that the jury hung was a factor to be considered in the analysis. The Supreme Court disagreed and specifically called it a "nonevent". The Court noted "a hung count hardly makes the existence of any fact ... more or less probable. A host of reasons–sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few–could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork." *Id. at* 2367.

counts.

5. Grand Jury Matters

A. The Government Failed to Properly Instruct the Grand Jury

The Government failed to instruct the Grand Jury on any aspect of *quid pro quo,* either explicit (at least for campaign contributions) or otherwise. The Government did not dispute that its instructions to the Grand Jury omitted the *quid pro quo* concept altogether. If the Grand Jury had been properly instructed there is grave doubt whether the Grand Jury would have returned an indictment. Coker adopts the previously filed motions to this effect.

B. Geddie and Mean's Motions to Dismiss for Grand Jury Abuse

Coker adopted and now renews his adoption of the facts and arguments set out in Geddie's and Means' Motion with regard to Grand Jury misconduct.

6. Jury Instructions

Coker renews his objections to the Court's Instructions to the Jury. These objections are included in Doc. 1623 and include not only the objections to the Court's Charge but also to the denial of Coker's Requested Jury Instructions.

7. **Additional Specific Grounds for Coker' Motion for Judgment of Acquittal**

A. Coker adopts and incorporates as if herein set forth each and every ground previously asserted by this defendant in his previously filed motions and objections,

including those filed pre-trial, during trial and post-trial.

B. Coker adopts and incorporates as if herein set forth each and every ground previously asserted by co-defendants in their previously filed motions and objections, including those filed pre-trial, during trial and post-trial.

C. Coker adopts and incorporates as if herein set forth each and every ground previously asserted by this defendant in his pretrial motions including but not limited to his Motions to Dismiss, Motions in Limine, Motions concerning 404(b) evidence, and Motions for Bills of Particular.

D. The defendant reasserts each and every motion and objection to which he has received an adverse ruling including those filed pre-trial, during trial and post-trial as if herein set forth.

E. The defendant moves that a Judgment of Acquittal be entered as to Count 31 (Honest Services Wire Fraud under 18 U.S.C. §§ 2, 1343 and 1346) because the Government has presented no legal evidence (or insufficient evidence), as to each and every element of this count from which the jury could find the defendant guilty beyond a reasonable doubt. The defendant moves that a Judgment of Acquittal be entered as to Count 1 (Conspiracy under 18 U.S.C. §§ 2 and 371) because the Government has presented no legal evidence (or insufficient evidence), as to each and every element of these charges from which the jury could find the defendant guilty beyond a reasonable doubt. The defendant moves that a Judgment of Acquittal be entered as to Count 8 (Bribery under 18 U.S.C. §§ 2 and 666) because the Government has presented no legal evidence (or insufficient evidence), as to each and every element of that count from which the jury could find the defendant guilty beyond a reasonable doubt.

F. The defendant incorporates all issues raised orally or in addition submitted in

writing at the hearing on this and any other motion.

G. That 18 U.S.C. § 2, 1343 and 1346 is unconstitutional to the extent that it would make a crime of activities which are beneficial to the State of Alabama and the citizens thereof. Furthermore, the activities (lobbying, campaign contributions, etc) made the basis of this indictment are admitted to be good for State of Alabama and the citizens thereof. As such, these statutes are overly broad and a denial of the defendant's due process and equal protection rights. They are being applied in this case to make completely legal conduct illegal.

H. That 18 U.S.C. §§ 2, 1343 and 1346 are unconstitutional to the extent that they are being used to make criminal activities out of activities in no way harm the system, the State or its citizens. As applied in this action they encompass legal activities and make them criminal.

I. That 18 U.S.C. §§ 2, 1343 and 1346 are unconstitutional as being vague. More specifically:

1). they do not give fair warning of the standards by which a persons conduct is to be judged;

2). they are further unconstitutional in their application to the defendant in this case;

3). they fail to give reasonable notice of the required conduct to one who should avoid its penalties, *Boyce Motor Lines, Inc v. United States*, 342 U.S. 337 (1952); and

4). they infringe on the defendant's constitutional liberties.

J. The defendant is entitled to a Motion for Judgment of Acquittal because of a failure of proof in the government's case. The government has failed to proof by the

required measure of proof that the defendant has committed any crime charged in the indictment.

K. There was insufficient evidence from which a reasonable jury could be convinced beyond a reasonable doubt that there was any mail fraud in that the circumstantial evidence presented was inconsistent with an obvious and reasonable interpretation of the evidence.

L. Insufficient evidence was presented from which a reasonable jury could be convinced beyond a reasonable doubt that Tom Coker aided or abetted any other person in the crimes charged.

M. Defendant Coker adopts as if here set forth the Motions for Judgment of Acquittal filed by the other Defendants in this matter which were filed at the close of the Government's case, at the close of all the evidence and within 14 days of the jury's verdict and discharge.

WHEREFORE, the Defendant is entitled to entry of judgment of acquittal on his behalf on Counts 1, 8 and 31 and requests this Court to enter an Order granting this Motion.

Respectfully submitted

/s/David McKnight

David McKnight
Attorney for Tom Coker
BAXLEY, DILLARD, DAUPHIN,
MCKNIGHT & JAMES
2008 Third Avenue South
Birmingham, AL 35233
Telephone: (205)271-1100
Fax: (205)271-1108
Email: dmcknight@baxleydillard.com

CERTIFICATE OF SERVICE

I hereby certify that on August 25th, 2011, I hand delivered a copy of the foregoing to the Court and the United States Attorney in open court and will file a copy electronically to be served upon all counsel of record through the CM/ECF system tonight.

/s/David McKnight
Of Counsel