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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CR. NO. 2:10cr186-MHT**
	)	
JAMES E. PREUITT,	)	
	)	
Defendant.	)	

JAMES E. PREUITT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 FEDERAL RULES OF CRIMINAL PROCEDURE

COMES NOW the defendant, James E. Preuitt, and asks this Court to enter a Judgment of Acquittal as to all Counts on the grounds that the evidence is insufficient to sustain a conviction.

As to any count that the Court is not convinced to enter a judgment of acquittal at this time, the Court should defer ruling rather than denying the motion. That would allow the Court to revisit the issue, on the adequacy of the Government's proof, when the Court has more time to consider. Rule 29 of the *Federal Rules of Criminal Procedure* allows this.

Defendant adopts and incorporates by reference the arguments and law being submitted by all co-defendants dealing with what is necessary to sustain a conviction on the counts for which he is charged.

I. Section 666 "coverage"

The Government has not met its burden of proof on all the "coverage" elements of

the statute, including agent status, receipt of federal funds, "business" as not including the drafting and voting on legislation, and involvement of a thing of value > $5000. While the Court denied the motion to dismiss raising these grounds, the arguments are improved by new caselaw and by the evidence and lack of evidence on these points.

* New caselaw showing that Legislators do not act "on behalf of" the State (18 U.S.C. § 666(d)(1), definition of "agent") is *Nevada Comm'n on Ethics v. Carrigan*, ___ U.S. ___, 2011 U.S. LEXIS 4379 (2011). Legislators hold authority on behalf of their constituents, or of the People, rather than acting "on behalf of" the State as an entity. When a legislator votes on, or drafts, legislation, he or she is not acting "on behalf of" the State. The individual's vote, or the drafting, do not constitute acts that bind the State in an agency sense. Only (at most) the aggregate act of the Legislature as an entity enacting a law might be said to be "on behalf of" the State (and even that would be a linguistic stretch as well as a legal stretch, since the Governor is involved in creation of laws as well), not the individual acts of legislators.[1]

* The evidence is that the Legislature did not receive federal funds, and that the Legislative Reference Service did not, either. (*See* testimony of Ms. Traylor, June 23 realtime transcript). Therefore, as to Mr. Crosby, there is a lack of evidence that he was an "agent" in the required sense of having responsibility for the expenditure of funds, *see*

[1] As stated in *Carrigan*, 2011 U.S. LEXIS 4379, *15, a "legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people." (emphasis supplied). The "legislator casts his vote 'as trustee for his constituents …,'" *id.*, not as an agent of the State as an entity. "A legislator voting on a bill … is performing a governmental act as a representative of his constituents," *id.* at n.5, *20 (emphasis supplied).

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).") And as to both Mr. Crosby and Legislators, there can be no charges under § 666 where the person allegedly "bribed" worked in a branch of Government that received no federal funds. There is no caselaw clearly establishing that the Government can spread the reach of § 666 merely by charging everyone as an agent of the undifferentiated State as a whole, where the person worked in a constitutionally separate branch of State government that receives no federal funds. Such application would go beyond the proper reach of the statute and would go beyond proper boundaries of federal Spending-Clause power.

* When these points are combined with the fact that the Congress chose not to specifically say that legislators are covered by § 666 – as contrasted with the Congressional decision to specifically cover Members of Congress in § 201 – the best logical conclusion is that § 666 does not cover alleged influence of state legislators especially when the State Legislature receives no federal funds.

II. Section 666 – no "bribery"

Mr. Preuitt preserves his argument that § 666 does not cover campaign contributions or other electoral support. But even if it does, the evidence is insufficient. There was no corrupt agreement to exchange things of value for votes. There was no "explicit *quid pro quo*" agreement of that sort with regard to campaign contributions or other electoral support. The requirement of proof of these sorts of corrupt agreements is

supported by *Siegelman II*, even if the Court does not accept Mr. Preuitt's view of what "explicit" means.[2] Mr. Preuitt continues also to assert that *Evans* does not dilute *McCormick* and that "explicit" requires something truly explicit, in terms of manner in which the corrupt agreement is communicated. But even on *Siegelman II* standard, proof is insufficient here. Conviction on this proof would violate due process and First Amendment. Further, as to each count in particular:

III. Count Nine – (Federal Programs, Bribery and Aiding and Abetting, 18 U.S.C. §§666(a)(1)(B) and (2)

There is absolutely no evidence that James E. Preuitt was "an agent of the State of Alabama" or that he corruptly solicited, demanded, accepted or agreed to accept something of value, intending to be influenced and rewarded. Specifically, there was absolutely no evidence that there was any agreement with anyone that James E. Preuitt would accept "at least two million dollars in campaign support" from any of the defendants in this case. In fact, defendant Gilley testified that James E. Preuitt told him

[2] *See United States v. Siegelman*, ___ F.3d ___, 2011 U.S. App. LEXIS 9503 (11th Cir. 2011) (*Siegelman II*). *See* 2011 U.S. App. LEXIS 9503, *22 ("*McCormick* uses the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions."); *25 (speaking of "*McCormick*'s requirement for an explicit agreement involving a *quid pro quo*."); *30 ("Absent an explicit agreement to 'buy an appointment' there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime."); *30-31 (continuing to reflect that an "agreement" that is the essence of the offense); *41 (emphasizing that "*quid pro quo*" includes not only the *quid* and the *quo* but also the "*pro* - the corrupt agreement to make a specific exchange."). The opinion further holds that the *quid pro quo* agreement must be for a "specific" official action, in order to constitute a crime. *See* 2011 U.S. App. LEXIS 9503, *23 ("The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.")

that he did not want any money from him for his campaign. Jennifer Pouncey testified that she never had a commitment or acceptance of any offer of two million dollars from James E. Preuitt. Jarrod Massey testified that he only had a conversation with James E. Preuitt wherein they were talking "politics" and that James E. Preuitt was told by Mr. Massey that his campaign could cost anywhere between half a million dollars and one million dollars. Massey testified this was just talk in general and nothing specific was offered to James E. Preuitt in his conversation with him.

IV. Count Twenty-Two (Extortion and Aiding and Abetting, 18 U.S.C. §§1951 & 1952.

There is absolutely no evidence that James E. Preuitt "agreed to accept at least two million dollars in campaign support and the services of prominent country music stars for campaign purposes, among other things of value from the defendants listed in count twenty-two. (See pages 56-57 of the indictment, doc. Number 3).

V. Counts Twenty-Three through Thirty-Three (Honest Services Fraud and Aiding and Abetting, 18 U.S.C. §§1341, 1343, 1346 and 2)

As to Count Twenty-Three there's no evidence whatsoever that James E. Preuitt participated in or had any knowledge of any payments drawn on the account of Macon County Greyhound Park, Inc. in the amount of three thousand dollars payable and mailed to defendant Crosby in Montgomery, Alabama. The same is true as to counts twenty-four, twenty-five and twenty-seven. As to count twenty-six there is no evidence that James E. Preuitt had any knowledge of or participated in the four checks referenced in count twenty-six, each in the amount of fifty thousand dollars to be mailed from Houston

County, Alabama to four separate P.A.C.'s in Huntsville, Alabama.

Counts twenty-eight through thirty-three are premised on phone calls to which Mr. Preuitt was not a party. In addition to the absence of proof of bribery, the absence of proof of fraud, and the absence of proof of specific intent to defraud, these calls were not in furtherance of any bribery or fraud scheme even if (contrary to fact) there was such a scheme. Phone calls which concern aspects of the effort to pass SB380 other than a bribery or fraud "Honest Services" scheme would not be "in furtherance of" the scheme and would not be a crime.

VI. Count Thirty-Eight

According to F.B.I. Agent Glaser, James E. Preuitt told him that he never accepted anything of value in exchange for his vote and that he was never offered anything in exchange for his vote. There is no testimony that he was offered anything in exchange for his vote or that he accepted anything in exchange for his vote. Further, there is absolutely no evidence that he was aware of private individuals, lobbyist, or Legislators being involved in the offer or acceptance of things of value in exchange of votes to pass pro-gambling legislation.

WHEREFORE THE PREMISES considered, Defendant James E. Preuitt asks this Honorable Court enter a Judgment of Acquittal as to all Counts on the grounds that the evidence is insufficient to sustain a conviction

RESPECTFULLY SUBMITTED this the 26th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record.

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