

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 Preuitt 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 Preuitt 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 purpose 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 to 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 Preuitt not guilty of the accusations made against him in Counts 23 through 33 the jury necessarily found as a fact that Defendant Preuitt 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 Preuitt 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 Preuitt 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 9 and Count 22

From the allegations of the Indictment and the proof offered by the Government at trial, the transactions and the occurrences on which Count 9 of the Indictment are based

are the same transactions and occurrences as those on which Count 22 of the Indictment are based. Both transactions, from the averments of the indictment and from the Government's proof presented at trial involved the alleged \$2,000,000.00 in campaign support and the services of prominent country music stars for campaign purposes, among other things, from Gilley, Massey, McGregor, Coker, Walker, and Lobbyist A, which things of value were not due to Preuitt.

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 9 and Count 22 was the same alleged \$2,000,000.00 in campaign support and the services of prominent country music stars for campaign purposes, among other things, from Gilley, Massey, McGregor, Coker, Walker, and Lobbyist A, which things of value were not due to Preuitt. 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 9 and the extortion accusations of Count 22.

The only rational basis on which the jury could have decided to acquit Defendant Preuitt of the charge made in Count 22 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 Preuitt, (i.e. the alleged \$2,000,000.00 in campaign support and the services of prominent country music stars for campaign purposes, among other things, from Gilley, Massey, McGregor, Coker, Walker and Lobbyist A, which things of value

were not due to Preuitt). If there was no explicit *quid pro quo* for Count 22 there could not be an explicit *quid pro quo* for Count 9. It is clear that the jury must have decided Count 22 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. And, it is submitted that by finding Defendant Preuitt not guilty of Count 22 the jury necessarily found that there was no explicit *quid pro quo* proved beyond a reasonable doubt. In acquitting Defendant Preuitt of the charge made in Count 22 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 9. To allow a re-trial of the *quid pro quo* issue in a re-trial of Count 9 would amount to a re-trial of Defendant Preuitt 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 preclude 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 Preuitt 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 9 and 22 as discussed above.

WHEREFORE, Defendant Preuitt moves the Court to dismiss the charges made against him in Counts 1 and 9 of the Indictment.

RESPECTFULLY SUBMITTED this the 16th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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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