UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 2:10-cr-00186-MHT

MILTON E. MCGREGOR, et. al.

Defendants.

FORMER GOVERNOR BOB RILEY'S MOTION TO QUASH SUBPOENA TO TESTIFY AT TRIAL

COMES NOW, Robert R. Riley, the former Governor of the State of Alabama, ("Governor Riley") and moves this Honorable Court to quash the "Subpoena to Testify at a Hearing or at Trial of a Criminal Case" served by Defendant Milton McGregor ("McGregor"). Governor Riley has no knowledge about any issues relevant to this criminal proceeding, and he can provide no admissible testimony. But, even if Governor Riley did have knowledge relevant to this matter, all such information and testimony would be privileged from disclosure. Accordingly, the subpoena to Governor Riley should be quashed. In support of this motion, Governor Riley states as follows:

BACKGROUND

Governor Riley was the Governor of the State of Alabama from 2003 to

2011. The indictment alleges that McGregor conspired to bribe and otherwise corruptly influence certain Alabama State legislators to secure the passage of pro-gambling legislation from February 2009 to August 2010. (Indictment ¶28). The indictment further alleges that this conspiracy was executed by telephone conversations and private meetings among the conspirators.

During his term in office, Governor Riley "ma[de] a judgment that the laws concerning illegal gambling were not being enforced in certain counties in this State" and "directed certain law-enforcement officers who have been placed at his disposal by law to investigate and prosecute alleged gambling activity." *Ex parte State* (*Riley v. Cornerstone Community Outreach, Inc.)* --- So. 3d ---, 2010 WL 2034825, *12 (Ala. 2010). The investigations and other law enforcement actions that Governor Riley initiated continue under the direction of Attorney General Luther Strange. *See* Governor Bentley's Executive Order No. 1, January 18, 2011, available at http://governor.alabama.gov/news/news_detail.aspx?ID=4299 (last visited May 9, 2011).

THE SUBPOENA SHOULD BE QUASHED

The Court should quash the subpoena directing Governor Riley to testify at the trial of this matter. "Although Rule 17(a), which governs such subpoenas, does not provide explicitly for quashal or modification, courts routinely have entertained motions seeking such relief and decided them by reference to comparable

principles." *See Stern v. United States Dist. Court for Dist. of Mass.*, 214 F.3d 4, 17 (1st Cir. 2000). The subpoena to Governor Riley should be quashed for two reasons. First, Governor Riley has no personal knowledge about any fact at issue in this case but, even if he did, that evidence could surely be introduced without his testimony. Second, Governor Riley's testimony about law enforcement and official decisions would be privileged.

I. Governor Riley Has No Personal Knowledge of Facts Relevant to or Admissible in This Action.

The subpoena should be quashed because Governor Riley has no knowledge of facts relevant to this case, and Defendants cannot establish the "extraordinary circumstances" necessary to compel a former governor's testimony. "Top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C.Cir.1985)). This prohibition necessarily extends to current and former governors of States. *See Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982) (governor not required to testify absent compelling need) (cited by the Eleventh Circuit in *In re United St ates*, 985 F.2d at 512); *Thomas v. Cate*, 715 F.Supp.2d 1012, 1049 (E. D. Cal. 2010) (former governor and sitting governor of California could not be deposed absent extraordinary circumstances); *Coleman v. Schwarzenegger*, 2008

WL 4300437 (E.D. Cal. Sept. 15, 2008) (governor not required to testify absent extraordinary circumstances). *See also United States v. Wal-Mart Stores*, No. 01-152, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) ("[i]f the immunity [*United States v. Morgan*, 313 U.S. 409 (1941)] affords is to have any meaning, the protections must continue upon the official's departure from public service").

McGregor cannot establish that Governor Riley knows any information that is relevant to this suit, much less that extraordinary circumstances require his testimony. "[A] subpoena ad testificandum survives scrutiny [only] if the party serving it can show that the testimony sought is both relevant and material." *See Stern*, 214 F.3d at 17. *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (a defendant does not have "the right to secure the attendance and testimony of any and all witnesses . . . He must at least make some plausible showing of how their testimony would [be] both material and favorable to his defense."). McGregor cannot meet this most basic test. Governor Riley obviously has no personal knowledge about the meetings and phone calls between McGregor and his alleged co-conspirators or of the financial arrangements allegedly made between Defendants and legislative officers. The fact that state officers under Governor Riley's direction were investigating illegal gambling at the same time as the alleged vote buying was occurring does not establish the relevance or materiality of any testimony from Governor Riley. *See United States v. Dinitz*, 538

F.2d 1214, 1225 (5th Cir. 1976) (affirming denial of motion to produce evidence that was not "used to prosecute the case against [the defendant] but rather . . . used in an investigation into an event which was at best collateral to [the defendant's] case").

But even if McGregor could establish some superficial connection between this case and Governor Riley, that would not be enough to compel his testimony. "[T]he Supreme Court has indicated that the practice of calling high officials as witnesses should be discouraged." *In re United States*, 985 F.2d at 512 (citing *United States v. Morgan*, 313 U.S. 409 (1941)). Accordingly, the testimony of a high government official about his official duties may be compelled only when he "ha[s] direct personal factual information pertaining to material issues in an action," and "the information to be gained is not available through any other sources." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir.2007); *Accord In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010) (granting writ of mandamus to quash subpoena against agency director). Governor Riley clearly has no "direct personal factual information" about any matter that is relevant or material to this case. But, even if Governor Riley had information that was relevant to this case, that evidence—whatever it might be—can surely be introduced through other sources without compelling Governor Riley to testify.

II. If Governor Riley Knew Any Relevant Facts, Their Disclosure Would Be Privileged.

Governor Riley does not know any facts relevant to an allegation or defense in this case. But, even if the State's investigation of illegal gambling were relevant to this political corruption case, Governor Riley's testimony about his participation in that investigation would be privileged.[1]

A. Executive Privilege

Governor Riley's testimony about the performance of his official duties is protected from disclosure by executive privilege. "[T]here is the undeniable interest of the executive branch of government in maintaining confidentiality over certain types of information necessary for the performance of its constitutional duties." *Assured Investors Life Ins. Co. v. National Union Associates, Inc.*, 362 So. 2d 228, 233 (Ala. 1978). *See also United States v. Nixon*, 418 U.S. 683, 708-713 (1974) (apart from policy considerations, "history and legal precedent teach that documents from a former or an incumbent President are presumptively privileged."). Alabama law imposes on the governor the duty to faithfully execute the laws of the State, and it was in that role that Governor Riley participated in law enforcement activity that affected McGregor and other gambling promoters. *See*

[1] Governor Riley contends that any knowledge he has that could even arguably be relevant to this criminal action is protected by one or more of these privileges. But Governor Riley reserves the right to assert other applicable privileges if and when McGregor identifies the specific information that he seeks to adduce from Governor Riley's testimony.

ALA. CONST. art. IV, §§ 112, 120; *Ex parte State* (*Riley v. Cornerstone Community Outreach, Inc.),* --- So. 3d ---, 2010 WL 2034825 (Ala. 2010). Governor Riley cannot be called to testify about his performance of those duties, even if such testimony were not patently irrelevant.

B. Deliberative Process/Consultative Privilege

Governor Riley's testimony about information gathered and used in his decision-making process is also protected from disclosure by deliberative process privilege. "The deliberative process privilege is a sub-category of the executive privilege." *Sierra Club v. Alabama Environmental Management Com'n,* 627 So.2d 923, 926 (Ala. Civ. App. 1992). "The deliberative process privilege protects the internal decisionmaking processes of the executive branch in order to safeguard the quality of agency decisions." *Nadler v. United States Dept. of Justice*, 955 F.2d 1479 (11th Cir.1992). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions ... by protecting open and frank discussion among those who make them within the Government...." *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-9 (2001) (internal quotes omitted). Governor Riley cannot be called to testify about pre-decisional considerations that were "a direct part of [his] deliberative process" on gambling

regulation or other legal or policy matters, including the facts that he relied on in making his decisions. *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1490-91 (11th Cir. 1992) *abrogated on unrelated grounds, U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 170 (1993). *See also Alabama v. Abbott Laboratories, Inc.*, 2009 WL 692189, *2 (M.D. Ala. 2009) (discussing deliberative process privilege). Procuring this privileged testimony appears to be the object of the subpoena, and it should be quashed.

C. The Law Enforcement Investigation Privilege

Finally, any information that Governor Riley has about law enforcement operations or investigations or any information that Governor Riley has as a result of law enforcement operations or investigations is protected from disclosure by the law enforcement investigation privilege. "[T]he government is entitled to protection when the probative value of [investigatory] evidence is outweighed by the risks of exposing incomplete investigations." *Abston v. State*, 548 So.2d 624, 628 (Ala. Crim. App. 1989) (quoting *Young v. State*, 469 So. 2d 683, 688 (Ala. Crim. App. 1985)). *See also United States v. Winner*, 641 F. 2d 825, 831 (10th Cir. 1981) ("The law enforcement investigative privilege is based primarily on the harm to law enforcement efforts which might arise from public disclosure of [investigations]."). "An investigation, however, need not be ongoing for the law enforcement privilege to apply as the ability of a law enforcement agency to

conduct future investigations may be seriously impaired if certain information is revealed to the public." *In re The City of New York*, 607 F. 3d 923, 944 (2d Cir. 2010) (internal quotation marks omitted). Information protected from disclosure includes "law enforcement techniques and procedures," information that would undermine "the confidentiality of sources," information that would endanger "witness and law enforcement personnel [or] the privacy of individuals involved in an investigation," and information that would "otherwise . . . interfere[ ] with an investigation." *Id.* Governor Riley cannot be compelled to testify about the actions, techniques and procedures he and others under his supervision employed as part of their effort to enforce Alabama's prohibition on slot machine gambling, nor can he be compelled to testify about the information that those investigations uncovered.

CONCLUSION

For the foregoing reasons, the Court should quash the subpoena issued to Governor Riley to testify in this case.

Respectfully submitted,

/s/ Michael R. Pennington
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