

But the Court's inquiry calls for a negative answer because it framed the question of admissibility in terms of whether "defendant Preuitt's statement can be viewed as trying to mislead the authorities, meaning that it was made in furtherance of the alleged conspiracy."

Even if the Court concluded that Senator Preuitt was "trying to mislead the authorities" that would not "mean[] that [his statement] was made in furtherance of the alleged conspiracy."¹ As Mr. McGregor demonstrated in yesterday's filing, the case law does not allow a conspiracy to conceal to be inferentially tacked on to every alleged conspiracy to commit substantive offenses, in a way that would make alleged "concealing" statements admissible as having been in furtherance of the conspiracy.

In *Grunewald v. United States*, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957), the Supreme Court held that: "After the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02, 77 S. Ct. at 972. The Court also recognized that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Id.* at 405, 77 S. Ct. at 974.

United States v. Magluta, 418 F.3d 1166, 1178 (11th Cir. 2005). *See also United States v. Griggs*, 735 F.2d 1318, 1324-25 (11th Cir. 1984) ("Admissibility under Rule 801(d)(2)(E) is conditioned upon a showing by the government that the statement was made by a co-

¹ Also, the appropriate question is not whether the statement "can be viewed" as having been in furtherance of the alleged conspiracy, but whether the Government demonstrates by a preponderance of the evidence that the statement *was* in furtherance of it. *E.g.*, *United States v. Singleton*, 545 F.3d 932, 934 (11th Cir. 2008).

conspirator during and in the furtherance of the conspiracy. Statements made after the cessation of the primary purpose of the conspiracy that served only to conceal the conspiracy are not protected by the Rule.”); *United States v. Baker*, 432 F.3d 1189, 1220 n.38 (11th Cir. 2005).

In *Diez*, there was (according to the opinion) a conspiracy to cover up, to conceal. That is how the court in *Diez* distinguished the progenitors of the line of case law that we have just discussed. “[I]n the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, thereby inducing them to accept fraudulent tax returns as truthful and accurate.” *Diez* at 897.

Here, there is absolutely no evidence that there was a conspiracy between Senator Preuitt and anyone else – certainly not Mr. McGregor – to conceal. One cannot say that the intent to conceal is implicit in every conspiracy, making concealment part of the conspiracy. That is the lesson of the case law above, and of other cases to the same effect (including a portion of *Diez*). Therefore, even if Senator Preuitt did try to mislead the authorities (a position that Mr. McGregor does not support, but mentions for the sake of argument in response to the Court), that would not “mean[] that [his statement] was made in furtherance of the alleged conspiracy.” Relatedly, there is no reason to conclude that Senator Preuitt’s own intent, when speaking to Agent Glaser, was to further a conspiracy. *E.g.*, *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991) (what matters is not whether the statement actually did effectively further the conspiracy, but whether that was the declarant’s intent).

Finally, even if (contrary to the argument above) the statement could come within

Rule 801(d)(2)(E), its admission against Mr. McGregor would violate the Sixth Amendment. There are, of course, cases (including a nod from the Supreme Court) suggesting broadly that co-conspirator statements in furtherance of a conspiracy do not present a Confrontation Clause problem. But in this particular instance, there must be a limit. This questioning by the FBI was the very core of exactly what the Confrontation Clause is about: the authorities grill somebody for purposes of an investigation, and then try to use the statement derived from that in court against somebody else. Allowing such statements to be used, because the person was allegedly involved in the offenses charged and because the Government thinks he was not entirely truthful in everything he said, would create too big a hole in the Confrontation Clause and must not be permitted. When *Crawford* said that coconspirator statements were generally acceptable for admission, the implicit point was that they are generally not “testimonial.” *Crawford v. Washington*, 541 U.S. 36, 56 (2004). Here the statement is so plainly testimonial (as that word is used in the Confrontation Clause context) that the Confrontation Clause must bar it even if the Rules of Evidence would otherwise allow it.

Respectfully submitted,

s/ Benjamin J. Espy
Benjamin J. Espy (ASB-0699-A64E)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Joe Espy, III (ASB-6591-S82J)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
Clayton R. Tartt
Ashley N. Penhale
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com
tart@copelandfranco.com
penhale@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 S. Shackleford Road
Little Rock, AR 72212
Telephone: (501) 954-7878
rwhitney@inveritasinfo.com

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin V. Shur
Eric Olshan
Barak Cohen
Brenda K. Morris
Emily Rae Woods
John L. Smith
Edward T. Kang
US Department of Justice
1400 New York Avenue
Washington, DC 20005
justin.shur@usdoj.gov
eric.olshan@usdoj.gov
barak.cohen@usdoj.gov
brenda.morris@usdoj.gov
rae.woods@usdoj.gov
edward.kang3@usdoj.gov

Louis V. Franklin, Sr.
Stephen P. Feaga
US Attorney's Office
Post Office Box 197
Montgomery, AL 36101-0197
steve.feaga@usdoj.gov
louis.franklin@udsoj.gov

David McKnight
William J. Baxley
Joel E. Dillard
Stewart D. McKnight, III
Baxley, Dillard, Dauphin, McKnight & James
2008 Third Avenue South
Birmingham, AL 35233
bbaxley@bddmc.com
jdillard@bddmc.com
dmcknight@baxleydillard.com

Jackson R. Sharman, III
Jeffrey P. Doss
Samuel H. Franklin
Lightfoot, Franklin & White
400 20th Street North
Birmingham, AL 35203
jsharman@lightfootlaw.com
jdoss@lightfootlaw.com
sfranklin@lightfootlaw.com

James P. Judkins
Larry D. Simpson
Judkins, Simpson, High & Schulte
1102 North Gadsden Street
Tallahassee, Florida 32303
jjudkins@readyfortrial.com
lsimpson@readyfortrial.com

William N. Clark
William H. Mills
Stephen W. Shaw
Glory R. McLaughlin
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
whm@rmclaw.com
sws@rmclaw.com
grm@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwwise@aol.com

H. Lewis Gillis
Tyrone C. Means
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
hlgillis@tmgsllaw.com
tcmeans@tmgsllaw.com

Mark Englehart
Englehart Law Offices
9457 Alysbury Place
Montgomery, AL 36103
jmenglehart@gmail.com

J. W. Parkman, III
Richard M. Adams
Joshua L. McKeown
William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com
adams@parkmanlawfirm.com
jmckeown@parkmanlawfirm.com
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Jeffrey C. Duffey
Law Office of Jeffrey C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

s/ Benjamin J. Espy
Of Counsel