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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

RESPONSE TO "UNITED STATES' SUBMISSION TO THE COURT REGARDING THE SUFFICIENCY OF EVIDENCE AS TO COUNT ONE OF THE INDICMENT" (Doc. 1521)

Milton McGregor respectfully responds as follows to Doc. 1521, pursuant to the Court's instructions.

1. The Government's filing is premised on an incorrect legal standard, and fails to carry the Government's burden on the relevant inquiry.

Mr. McGregor submits that the Government's filing is not sufficient in light of the purpose for which the Court requested it.

What the Government filed is a "sufficiency of the evidence" brief, written under a Rule 29 standard. Thus the Government (a) insists that the Court must accept all the Government's evidence as true, for purposes of this filing, and that inferences must be drawn in favor of the Government; and (b) says nothing about any alleged conspirator other than the defendants in this case (including those who have pleaded guilty).

What we believe the Court requested and what was needed, by contrast, is

different: a brief that would assist the Court in making particularized Rule 104 findings for the purpose of determining the admissibility of evidence under Rule 801(d)(2)(E).

This distinction matters in two ways:

(a) Under Rule 104, the Government does not have the right to have its evidence taken as true or to have inferences compelled in its favor. Instead, the Government must convince the Court by a preponderance of the evidence. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987) (discussing, throughout, the trial court's role as factfinder, using its own judgment to make findings on the predicates to admissibility under Rule 801(d)(2)(E), based on the court's assessment of all the evidence presented to the court). Of course, any findings that the Court made in favor of the Government, on a preponderance standard, would not be binding on the jury which applies a "beyond a reasonable doubt" standard. But still, the Government's burden is to *prove* the predicates for admissibility under Rule 801(d)(2)(E), to the satisfaction of the Court as preliminary factfinder, without the luxury of insisting that the Court *must* take its evidence as true and *must* draw inferences in favor of the Government.

We believe, as shown herein, that the Government's argument does not even meet the Rule 29 standard about what findings would be *permissible* if one looked at everything in the light most favorable to the Government. But it certainly should not suffice to convince the Court about what findings this Court should make. Therefore *no* statements by anyone are properly in evidence under Rule 801(d)(2)(E) against Mr. McGregor. And there is simply no conspiracy proven.

(b) Part of the Rule 801(d)(2)(E) inquiry before the Court is whether the out-of-

court statements of some people other than the defendants can be considered "for their truth," as an exception to the general hearsay exclusion. Without naming anyone in this unsealed document (since discussions of those persons' identities has been under seal for good reason, so as not to smear their names), we note that the Government has *alleged* previously that it considered six people to be in that category. (This was reduced from a larger initial list.) None of those people is mentioned in the Government's filing, and certainly there is no showing that any of those people have 801(d)(2)(E) status in any respect. Therefore, no out-of-court statement by *anyone* other than the defendants could be taken as "true" in this case, even if the Court agreed with every aspect of the Government's argument.

Some such statements are likely still admissible to show merely that they occurred – as events, or *res gestae* – but no such statement is in evidence for its truth. Mr. McGregor may or may not seek a limiting instruction to this effect at the close of the case. Whether to seek that or not will depend on further review as to whether there are any particular statements where the distinction is so important that it should be emphasized to the jury. (The Government certainly has not contended that it is important to allow any such statement in for its truth; that explains why the Government has not mentioned those people in this brief.) For now, it is sufficient to note that for purposes of Rule 29 review, and for purposes of closing argument, the Government cannot rely on any statement by any such person for its truth, even if the Court agreed with the Government's arguments in Doc. 1521.

2. There is not even "preponderance" proof that Mr. McGregor engaged in a conspiracy to violate § 666. The Government's contentions about Mr. McGregor, in the section of the brief about him, are based on misstatements of the record, and on attempts to find a conspiracy in lawful politics.

The Government focuses its argument against Mr. McGregor on pages 6 through 8 of its brief, Doc. 1521. The Government's argument fails to show that Mr. McGregor engaged in a conspiracy with anyone to violate § 666 as charged. (The Government mentions Mr. McGregor in other sections as well, and those contentions are dealt with in Section 3 below to the extent that they are not addressed here).

First, the Government points generally – and incompletely – to Mr. Gilley's testimony that Mr. McGregor lent him $5 million "to pass the legislation and whatever we needed to do to get the legislation passed." (Government Brief, p. 6 final paragraph.) (The Government cites realtime transcript, but the final transcript is Doc. 1334, transcript of June 24, p. 88 lines 23-25).[1] This does not amount to evidence of a conspiratorial agreement by Mr. McGregor to violate § 666. Mr. Gilley testified, in the same sentence, that his understanding was that the use of the funds was "at my [i.e., Gilley's] discretion," with no evidence cited by the Government that there was any agreement by Mr. McGregor that such discretion would be utilized by Mr. Gilley to violate any federal law. Moreover, the written agreement representing the loan (Exhibit 1214) provides at pages 9-10 that Gilley must certify to McGregor "the actual use of the loan proceeds (or if not yet expended, the intended use of the balance of the loan proceeds") together with a later

[1] Doc. 1334 is a sealed transcript containing some *in camera* sessions. It is not clear that there is yet a Doc. number for the corresponding unsealed transcript, but Mr. McGregor is citing only open-court portions of the proceeding that the Government has referenced.

report "setting forth the actual use of the remaining balance of the loan proceeds, if any," with the requirement that "Such certification shall include .. certification .. that all proceeds have been applied to lawful business purposes of the Gilley Parties" (emphasis supplied). This was the very opposite of a conspiratorial agreement to commit crimes.

The Government falsely says (p. 7, top) "it was defendant McGregor who initially urged Mr. Gilley to reach out to Senator Scott Beason in February 2010 in order to buy the Senator's vote." For this false proposition, the Government incorrectly cites J-174 and the discussion of it in Mr. Gilley's testimony. (Doc. 1334, transcript of June 24, p. 9-183 line 14 *et seq.*). Neither J-174, nor the testimony about it, says that it was Mr. McGregor who initially urged Mr. Gilley to reach out to Senator Beason in February 2010 *in any respect*, and certainly does not say that Mr. McGregor gave that direction in February 2010 *in order to buy the Senator's vote*. J-174 was a discussion on March 13, not February, and in the discussion Mr. McGregor does not say what the Government claims.

J-174 was one of the calls in which Mr. Gilley starts by telling Mr. McGregor that he should get a "drop phone" because people might be listening – and Mr. McGregor says "I don't really care." (J-174, p. 1 line 33). Mr. McGregor suggests that Mr. Gilley reach back out to Senator Beason (not that he somehow should go back in time to reach out to Senator Beason a month earlier), and not with any suggestion of bribery but with a pure merits-based political appeal:

> McGREGOR: But the other thing I wanted to tell you, I think, I think it's important that, that, um, that you reach back out to, um, to Beason

> GILLEY: Yes, sir
>
> McGREGOR: because this bill, I mean this approach son is, is, is very, very similar to what he's already on record as, as wanting himself. See, um, 'bout the only difference is if his bill, if his bill were successful it'd do away with greyhound racing and everything and that ain't even a issue with anybody.
>
> GILLEY: Yeah
>
> McGREGOR: But, but, other than that, th--, th--,(chuckles) this is very close to his, is what I'm saying.

(J-174, p. 2 lines 7 to 27)

> MCGREGOR: … but what I'm saying is, on Beason, unless you uncomfortable talking to him, you got a perfect, perfect, uh, scenario to talk to him about now because this, this is, this follows the pattern of what he's been preaching publicly that he wanted.

(*Id.*, p. 3 lines 16-22). Thus this first specific suggestion by the Government of evidence of any "conspiracy" involving Mr. McGregor is simply based on a false statement by the Government about what the cited evidence shows.

The Government says next (p. 7, first paragraph), "Gilley consulted with defendant McGregor regarding the decision to secure Beason's vote for $500,000, 6/24/2011 Trial Tr. at 71, 81, and after consulting with defendant McGregor, raised the amount to $ 1,000,000. 6/24/2011 Trial Tr. at 82." Here again, the record simply does not support what the Government contends. Neither page 82 of the transcript cited, nor any other page, supports the Government's statement that "after consulting with defendant McGregor, [Mr. Gilley] raised the amount to $1,000,000." (Even if Mr. Gilley had testified to that, the Court should not find his testimony credible enough on this or any other point to meet even the "preponderance" standard; but he did not testify to that.)

And as discussed in Senator Beason's testimony about his understanding of the meeting (Transcript of 6/15, Doc. 1298, p. 222 lines 11 to 21), Massey and Gilley emphasized to Senator Beason that the particular discussion at the later meeting was to stay just between the people who were present at that meeting - "this group right here," "Period."

The Government goes on to say (p. 7, middle) that "after Mr. Gilley argued with Representative Scott Beason during a dinner at Garrett's Restaurant defendant McGregor directed Mr. Gilley to take a conciliatory approach to Representative Lewis because 'we may need Lewis later.'" The Government cites p. 61 of the realtime transcript for the putative quote 'we may need Lewis later.' We do not see that quote on that page. The pertinent discussion on p. 61 of the realtime transcript corresponds to p. 9-125, lines 13-25 of Doc. 1334, transcript of June 24:

> GILLEY: I told Mr. McGregor … [that] I did not feel good about Benjamin Lewis at all and that I was irate with him and I was going to attack him. And –
>
> Q. Slow down. And what was Mr. McGregor's response?
>
> A. … And then he told me to basically calm down on Representative Lewis, because we're not at the house yet, and it may come down to where we, Mr. McGregor and myself, have to have Representative Lewis's vote. And that he would still be a potential yes vote if we, Mr. McGregor and myself, played our cards right.
>
> Not in those exact words, but that's the gist of what was said.

That is no evidence of a conspiracy to bribe. It merely reflects Mr. McGregor's mature approach to politics – don't make enemies unnecessarily – as contrasted with Mr. Gilley's hotheaded immaturity. Mr. McGregor did not suggest any bribe, and the Government does not even actually claim that he did. Here, as throughout the case, the

Government is trying to fudge the distinction between *politics* and *crime*. It is not a crime to try to make political alliances, to seek out votes, or to try to avoid making political enemies.

The Government points (p. 7, middle) to Mr. McGregor's presence and participation in a February 18 meeting with Senator Beason. This is discussed in Mr. McGregor's motion for judgment of acquittal, showing that Mr. McGregor's approach in that meeting was *not* an unlawful conspiracy to bribe Senator Beason, but was instead a lawful attempt to possibly effectuate a long-term alliance and political realignment. Mr. McGregor's discussion in that meeting (as perhaps contrasted with Mr. Gilley's and Mr. Massey's subsequent discussions with Senator Beason, in which Mr. McGregor did not participate) was ordinary political discussion of a potential alliance, and of the unsurprising fact that citizens support officials who take actions that the citizens think are wise as a matter of policy and politics. This cannot be a crime under the First Amendment, and making it a crime in this case would violate Due Process.

Similarly, the Government contends that Senator Smith viewed Mr. McGregor as "the conspiracy's dominant member." (Government brief, p. 7). How Senator Smith may have viewed Mr. McGregor is not probative of whether Mr. McGregor *actually* engaged in a conspiracy to violate § 666. There is no evidence cited by the Government, in this regard, that Senator Smith knew of anything that Mr. McGregor had done or said that went beyond the lawful discussion that Mr. McGregor had, in the February 18 meeting. Calling this a "conspiracy" with Mr. McGregor as the "dominant member" is merely the Government's rhetoric, based not on testimony but on the Government's

unsupported innuendo that Mr. McGregor was himself engaged in unlawful activity in regard to Senator Beason. As explained above and in the Rule 29 motion, Mr. McGregor's conduct in the February 18 meeting was lawful.

Next, the Government contends (p. 7, bottom) that "Defendant McGregor and Mr. Gilley discussed offering things-of-value to additional legislators, including defendant Preuitt and former Alabama State Senator Wendell Mitchell, in exchange for votes to pass Senate Bill 380. 6/27/2011 Trial Tr. at 3-4." (We believe that the sealed transcript of the same session is Doc. 1354, pp. 19-21, and as above we are not referencing any part that was *in camera*.) The relevant evidence, discussed there, is J-162. To the extent that anything at all could be gleaned from that discussion, the only thing at issue was Mr. Gilley's vision of a so-called "Democracy Tour." To say that this was a thing of value explicitly exchanged for a vote, i.e., a bribe, is flatly wrong. To deem it a bribe would violate the First Amendment and Due Process.

The proposed Democracy Tour was a (perhaps grandiose, but still lawful and constitutionally protected) vision of a country music tour throughout the State, in advance of the vote of the people on the proposed constitutional amendment, designed to inspire the vote. This was Democracy, the right to vote, a major theme of the political fight for SB380. As the envisioned tour would go around the State, then (like practically all political rallies), local-area politicians who had aligned themselves with the movement could gain the benefit of basking in the glow of the good publicity, putting their name and their face in front of potential voters who were at the rally precisely because they supported the cause and would be more likely to support politicians who supported it. *By*

definition, no official who opposed the cause would either want to, or be allowed to, be part of the rally; that would just make no sense from either the cause's perspective or the anti-cause official's. This is categorically different from a bribe, and cannot be unlawful. It is at the hard core of the First Amendment. We know of no case ever holding such a thing to be a crime, and it would be unconstitutional to hold it a crime. Therefore, to whatever extent Mr. McGregor is deemed to have been involved in this vision or in discussions of it with officials, it is simply not evidence of an illegal conspiracy.

The Government says next (Doc. 1521, pp. 7-8) that "Defendant McGregor also undertook efforts involving buying the votes of defendant Means, id. at 19, and defendant Ross, id. at 28-29." Again, the Government is trying to find a criminal conspiracy where Mr. McGregor plainly was not involved in one.

Take Senator Means first. The passage that the Government cites from the realtime transcript is, we believe, at page 50 line 16 to p. 51 line 15 of sealed Doc. 1354 (but again we are not quoting any sealed part or any passage that the Government has not referenced). Mr. Gilley says that he told Mr. McGregor that Gilley and Massey had offered Senator Means a campaign contribution. Mr. McGregor responded, essentially, that Mr. Gilley was foolish, and that Mr. McGregor already knew that Senator Means would vote "yes" in the end. To Mr. McGregor, therefore, the campaign contribution was not a bribe, because it was not in exchange for a vote, because (as the Government's own evidence shows) Mr. McGregor already counted on the vote. *See id.* p. 51 lines 13-15 (Mr. Gilley: "[Mr. McGregor] was somewhat upset because he told me he already had Mr. Means under control, that that was going to be a yes vote from the beginning, but

okay."); p. 50, lines 23-25 ("And Mr. McGregor had told me for two or three weeks that he had Means under control, not to worry about Means, that he was -- he was going to come around. He would be a yes vote.") From Mr. McGregor's perspective, then, this was not a conspiracy to bribe, but merely knowledge of a campaign contribution to someone who was already on board before the contribution was mentioned.

With Senator Ross, too, the Government cites no actual evidence that Mr. McGregor unlawfully conspired. Instead, the pages of transcript that the Government cites show only perfectly lawful behavior – indeed, constitutionally protected behavior that is at the core of normal politics – on Mr. McGregor's part. The Government again does not quote the testimony, because it is devastating to the Government's insinuation of criminal conspiracy. Once again, referring not to any sealed part or to any part beyond what the Government cited (which is Doc. 1354, June 27 afternoon transcript p. 68 line 18 to p. 70 line 15), here is the evidence:

> Q. Now, do you know Senator Quinton Ross?
>
> A. I do.
>
> Q. How did you meet Mr. Ross?
>
> A. I was first introduced to Senator Ross, I believe, by Mr. McGregor in 2009.
>
> Q. During the legislative session?
>
> A. Yes, sir.
>
> Q. And under what circumstances were you introduced to Senator Ross?
>
> A. Mr. McGregor said, this is the sponsor of our bill, and we want to give him all the support we can.

Q. And what did you understand support to mean?

A. Obviously, support him with his campaign or any other measure that we could support him in.

...

Q. Mr. Gilley, do you recall where you were when you met Senator Ross?

A. The first time with Mr. McGregor?

Q. Yes, sir.

A. I believe I was at Mr. McGregor's office.

Q. And do you recall what the purpose was you were there at Mr. McGregor's office on that day?

A. I don't.

Q. When he told you that Senator Ross was the sponsor of the bill that year, did he tell you anything else?

A. Just he's a good man, just -- no, sir, not that I can recollect.

Q. Okay.

A. It was a brief conversation.

It is stunning that the Government of the United States claims that this is a criminal conspiracy. It is, as Senator French explained and as everybody knows, the way pure lawful politics works. People support politicians who support their issues. If a politician does something that you think is good – if he has sponsored a bill you favor, or if he votes reliably in favor of bills you favor – you support that politician, and you contribute to his campaign. There is no evidence here of a corrupt *quid pro quo* agreement to buy official action even under the *Siegelman II* standard, much less under a stricter interpretation of the *McCormick* standard. This again is the hard core of the First

Amendment, not a criminal conspiracy. If this were a criminal conspiracy, then every lobbyist and every executive in every industry in the nation would have to be prosecuted. To prosecute these defendants for it violates Due Process as well as the First Amendment.

Finally, the Government says (top of p. 8) that "Furthermore, defendant McGregor single-handedly[2] paid defendant Crosby, a senior analyst with the Legislative Reference Service ("LRS"), $3,000 per month over at least a two-year period in exchange for the ability to shape the wording of gambling legislation." The Government cites no evidence – neither in this passage, nor even in the longer section about Mr. Crosby later in the brief – literally not a single citation to a single line of testimony, a single document, nor a single recording. The reason is that there is no evidence to support the Government's statement that payments were made "in exchange for the ability to shape the wording of gambling legislation." There is not a shred of evidence that Mr. Crosby ever intentionally wrote a word of *any* legislation in any way that was not in line with his understanding of what the sponsor of any such legislation wanted. Insofar as Mr. McGregor interacted with Mr. Crosby on SB380, it was because he was *authorized* to do so by the sponsor of the bill. Insofar as Mr. Massey complains that he got less information from Mr. Crosby, there is *no* evidence that the sponsor of the bill authorized LRS to communicate with Mr. Massey about it. There is simply no evidence to support the Government's position in any respect. (These statements, and the evidence, are further discussed in our Rule 29 motion).

[2] How it could be "single-handed[]," yet be a conspiratorial agreement, is a puzzle.

3. The evidence cited by the Government about Mr. McGregor, in the course of the Government's discussion of other defendants, also does not demonstrate that Mr. McGregor conspired to violate § 666.

To the extent not already addressed above, Mr. McGregor now responds to the things the Government claims about him in other sections of Doc. 1521, showing that these things too are mischaracterizations of the record, are an attempt to turn lawful constitutionally-protected politics into crime, and are not proof that Mr. McGregor conspired to violate § 666.

Mr. Coker

The Government mentions Mr. McGregor twice in the section of its brief about Mr. Coker.

First, the Government again mistakes concerted political activity for a criminal conspiracy. When the Government devotes two whole paragraphs (Doc. 1521, p. 8) to saying that Mr. Coker was one of Mr. McGregor's "primary lobbyists" and that as such he worked with Mr. Massey in some cooperation to work towards passage of SB380, the Government is glossing over the distinction between crime and politics. It is not a conspiracy, and is not even evidence of a conspiracy, to show that people took some steps to coordinate their lobbying activity. The charge is of conspiracy to violate § 666, not of working together on legislation.

Second, the Government claims (p. 9) that Mr. Coker told Mr. McGregor that "Gilley and his camp put the 'icin' on the cake' with respect to defendant Preuitt." The conversation in question is J-150, p. 7. It is no evidence at all that Mr. McGregor knew, from Mr. Coker or from anyone else, of any offer made to Senator Preuitt by the Gilley

"camp" other than the lawful and constitutionally-protected "Democracy Tour" vision that we have already addressed above. The relevant "icing on the cake" passage of J-150, p. 7, refers only to "that little added layer of uh what they offered in terms of, uh, entertainers and things like that." There is no evidence that Mr. McGregor was told of any actual offer of anything that can legitimately be called a bribe.

Mr. Geddie

With grossly inflated rhetoric, the Government describes the allegations about a $5000 contribution that (according to the Government's view of the case) Mr. McGregor provided to Representative Mask via Mr. Geddie, at the Valentine' Day steak dinner. In fact, the evidence in this regard does not prove a conspiracy to violate § 666 (not even by a preponderance, much less beyond a reasonable doubt).

As explained in the Rule 29 motion, even if one did take all evidence in the light most favorable to the Government, this $5000 contribution was not in corrupt exchange for Representative Mask's vote. The Government is attempting, in this, to do away with the "*quid pro quo*" aspect of § 666 (and therefore of conspiracy to violate § 666). Certainly there was no "explicit" *quid pro quo*, not even in the *Siegelman II* sense of "explicit" much less in the stricter *McCormick* sense. There is not the slightest bit of evidence in J-004, the relevant telephone conversation between Mr. McGregor and Representative Mask, of any corrupt agreement to exchange $5000 for Representative Mask's vote on the bill.

As explained in the Rule 29 motion, even if one takes Mr. McGregor as having been responsible for the $5000 contribution, there was no agreement (not even any

pretense by Representative Mask that there was an agreement) that there would be such an exchange. Representative Mask's position on the phone call was the same as it had been (according to that call) during prior conversations with other people: leaning towards "yes" but on the fence. There was no commitment, certainly not a commitment driven by $5000 or any other thing of value. At most, one might *speculate* that the $5000 was given in hopes that it would inspire Representative Mask to resolve any remaining qualms he had about the bill, but that is not a crime even under the *Siegelman II* standard, much less under a proper *McCormick* standard.

In fact, the conversation with Representative Mask (J-003) shows lawful political discussion on Mr. McGregor's part. Mr. McGregor had heard that Representative Mask was leaning towards the bill but had a concern. Mr. McGregor attempted to gain Mask's support for the bill, by coming towards Mask's position on that concern. When Mask steered the conversation towards money, there was no *quid pro quo* commitment and the Government does not point to one. If Mr. McGregor gave a (relatively small) contribution after the conversation, it was a purely lawful one: at most, something along the lines of, this politician has acted reasonably, I shall show him some support.

The Government also mentions J-169, contending that "defendant Geddie told defendant McGregor that the only reason people were supporting Grimes was because of 'one fucking vote.'" Here again, as it does throughout the case, the Government is trying to ignore the line between crime and politics, and is ignoring the "explicit *quid pro quo*" standard under both *Siegelman II* and *McCormick*. It is not a crime to support someone because you want their vote. It is not even a crime to support someone because you think

it will inspire them to vote in the way you prefer. It is also not a crime to support someone because he has expressed the intent to vote in the way that you prefer. And it is not a crime to stop a past pattern of support for someone if you suspect he is going to do something you oppose, nor to say that you will do that. J-169 does not show that Mr. McGregor engaged in any conspiracy to violate § 666 in regard to an explicit *quid pro quo* corrupt exchange as regards Representative Grimes.

Senator Preuitt

The only mention of Mr. McGregor in the section regarding Senator Preuitt (Doc. 1521, pp. 11-12) is a conclusory mention of his name as allegedly having offered things of value to Senator Preuitt (bottom of p. 11), followed by a cite to the July 8 transcript pp. 176, 178 and 180. The cited pages do not support the allegation against Mr. McGregor at all. There is only one reference to Mr. McGregor on those pages, and it is not about any offer to Senator Preuitt.

Senator Means

In the section regarding Senator Means, the Government points (p. 13) to J-146, a conversation between Senator Means and Mr. McGregor. As shown in the Rule 29 motion, this conversation was not a part of a criminal conspiracy and not a violation of § 666, because it was not a corrupt explicit *quid pro quo* exchange, neither under *Siegelman II* nor under a better reading of the *McCormick* standard. Mr. McGregor's expression of support for Senator Means, including discussion of future campaign "help" in unknown amounts, was not conditioned on how Senator Means voted. It was a purely lawful and constitutionally protected discussion on Mr. McGregor's part. It is not a

crime to say that one will "help" (even through unspecified campaign contributions) an official who has been a long-time ally. It is also not a crime to decide to support officials, with campaign contributions or otherwise, based on how officials act in specific instances. It is not even a crime for an official to say that if he votes a certain way he expects to take political heat for it, and will therefore have a harder time in reelection, and will therefore need help; and it is not a crime for an interested citizen to engage in conversation about that. Such discussions happen all the time, and it would violate Due Process to convict Mr. McGregor on the theory that he did such a thing. There was no explicit *quid pro quo* agreement in this conversation, J-146. Nor is there any evidence that Mr. McGregor engaged in any such agreement at any other time.

Senator Ross

As explained in the Rule 29 motion, Mr. McGregor did not engage in any criminal conspiracy or substantive offense with respect to Senator Ross. There is no hint whatsoever that anyone had any doubt about how Senator Ross would vote. There is no hint whatsoever that Senator Ross ever gave anyone any reason to doubt it either. He was a long-time supporter of gaming. As such, he was naturally an official that any person interested in gaming would think was a right-thinking official, that they would be pleased to have in office, and that they would support in any reelection bid. People contribute money to officials seeking re-election, because they like what the official has done so far and they like what they expect the official will do in the future. The Government is trying to turn being a fundraiser into a crime, simply based on closeness in time, contrary to both *Siegelman II* and *McCormick*. Again, a political alliance is not a

crime, and there was no corrupt explicit *quid pro quo* exchange here (certainly not in the conversations that the Government relies on, J-159 and J-161) either under *Siegelman II* or under a better reading of *McCormick*.

Senator Smith

In the section of the brief about Senator Smith (pp. 15-17) there is no claim that Mr. McGregor did or said anything. The mentions of Mr. McGregor's name, in this section, are only allegations that Senator Smith asked other people questions about him. This therefore adds nothing to the case that Mr. McGregor engaged in any conspiracy.

Mr. Walker

Mr. McGregor's name is not mentioned in the section of the Government's brief about Mr. Walker (pp. 17-18).

Mr. Crosby

The Government's argument regarding Mr. Crosby (pp. 18-19) is outrageous not only because the Government cites no evidence, but because the Government could not have cited evidence to support many of its allegations. There is no such evidence.

The Government says "Defendant Crosby, who drafted SB380, consistently acted to benefit defendant McGregor by, among other official actions, crafting language in the bill to maximize defendant McGregor's profit (through the imposition of the lowest feasible tax rate) …" There is no evidence of that.

The Government says that Mr. Crosby "acted to benefit" Mr. McGregor by "making sure defendant McGregor was informed of all developments with the bill." The Government also says, in the same vein, "the evidence established that defendant Crosby

regularly forwarded updated versions of the bill before they were circulated to other individuals." The Government has ignored the evidence, which came in through its own witnesses including Agent McEachern, showing that Mr. McGregor was clearly *authorized by the sponsor* to receive information about all developments with the bill.

No bill could be introduced without the support of the sponsor of the bill. Had Mr. Crosby drafted anything that was contrary to the preferences of the sponsor of the bill, it would have had no effect whatsoever; it would have gone nowhere. Furthermore, as explained in the Rule 29 motion, the evidence shows that Crosby drafted bills that he understood sponsors wanted, whether they would have killed Victoryland or allowed it to operate.

In short, there is no evidence, and the Government has cited no evidence, that Mr. McGregor conspired with Mr. Crosby to violate § 666.

Conclusion

For the reasons stated herein, the Government has failed to prove that Mr. McGregor engaged in a conspiracy with anyone to violate § 666. Certainly the Government has failed to prove that he engaged in the single conspiracy alleged in the Indictment. The Court should hold that no evidence is admissible for its truth under 801(d)(2)(E), and the Court should dismiss all counts against Mr. McGregor with prejudice for the reasons explained in this document and in the Rule 29 motion.

Respectfully submitted,

s/ Benjamin J. Espy
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