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**
	)	
LARRY P. MEANS,	)	
	)	
Defendant.	)	

RESPONSE TO GOVERNMENT'S SUBMISSION (DOC. 1521)

COMES NOW the Defendant, Larry P. Means, and for his response to the pleading of the United States, Submission to the Court Regarding the Sufficiency of Evidence as to Count One of the Indictment, responds as follows:

1. Defendant Means hereby incorporates the arguments as set forth in any co-defendant's submission.

2. It was Defendant's understanding that the Court had ordered the Government to submit specific proposed findings of fact, not argument, to the Court upon which the Court could determine if a conspiracy existed so as to decide whether the testimony of alleged coconspirators should be admitted. However, the pleading of the Government is in the nature of an argument against the granting of a Rule 29 motion, rather than a proposed statement of facts. Means was not certain the Court would accept it as such until this morning when the Court stated it did. The original draft of this pleading asked that the Government's submission be stricken.

3. Defendant Means also objects to the Government's response in that it is based on a non-certified copy of the transcript in this case. Repeatedly during the trial the Court has advised counsel that it may not use such transcripts as if it were the official record. And now, the Government is attempting to use these very transcripts during its argument. There is no transcript yet and none should be used at this stage. The Court should rely on its recollection of the testimony and evidence and not a transcript, as the jury is requested to do.

4. The issue which the Court must decide at this point, having provisionally allowed evidence of alleged coconspirators' hearsay statements, including the wiretaps, is whether, by a preponderance of the evidence, the Government has proved these things: (1) a conspiracy existed; (2) the conspiracy included the defendant against whom the statement was offered; and (3) the statement was made during the course and in furtherance of the conspiracy. *United States v. Hasner,* 340 F.3d. 1261 (11th Cir. 2003). The Government has not provided proposed findings of fact as to these issues.

5. Despite the Government's failure to comply, Defendant Means offers the following response to the Government's submission without waiving his objection. Defendant intends to file his Rule 29 motion which will fully set forth Defendant's position regarding the alleged conspiracy. Defendant Means submits that the Government did not prove even by a preponderance of the evidence that Defendant Means knowingly and willfully joined any alleged conspiracy, or that there was a conspiracy as alleged in the

Indictment.

6. To prove that a conspiracy existed, the Government must show: (1) the existence of an agreement to achieve an unlawful objective; (2) knowing and voluntary participation in the agreement; and (3) the commission of an act in furtherance of the agreement. *United States v. Adkinson*, 158 F.3d 1147 (11th Cir. 1998). The Eleventh Circuit has emphasized that the agreement to commit an unlawful act is the "essential element of the crime." *United States v. Chandler*, 388 F.3d 796,806 (11th Cir. 2004). If the Government relies on circumstantial rather than direct evidence to prove a conspiracy, as is the case here, there must be more than mere speculation that a conspiracy exists; there must be "reasonable inferences" to be drawn from the evidence presented. *United States v. Perez-Tosta*, 36 F.3d 1552,1557 (11th Cir. 1994). Further, it is not enough that the Government establish just *some* evidence to connect the defendant to the conspiracy; the Government must offer "substantial" evidence in order to establish a defendant as a conspirator. *United States v. Atkinson*, 158 F.3d 147 (11th Cir. 1998). Mere proof that participation in a conspiracy is possible or even plausible is not enough. *United States v. Hardy*, 895 F.2d 1331,1334 (11th Cir. 1990).

7. Defendant Means submits that the Government has not met its burden of proof to establish that (1) a conspiracy existed; or (2) that he was part of any conspiracy. The Government, therefore, has failed to meet its burden under the three-prong test described above in paragraph 4, as outlined in *Hasner* and previous Eleventh Circuit cases.

8. Although Defendant objects to the use of the transcript, even so, the Government incorrectly states the evidence from its transcripts. On page 12 of the United States' submission (Doc. 1521), the Government addresses the issue related to Defendant Means. On page 13 the Government incorrectly cites to the transcript on line 4. Specifically, the Government alleges "Defendant Means asked Pouncy for $100,000.00 in exchange for his vote in favor of SB380. 7/9/2011 Trial TR at 56." On reviewing the transcript it clearly reveals that the following took place:

Q. What did Senator Means say to you?

A. He said that he was going to have a real tough reelection campaign. He's [tkpwo*] going to have a real serious [OP] opponent and he needed a hundred thousand dollars and wanted me to ask my employer if he could get a hundred thousand dollars.

9. There was no evidence by Ms. Pouncy that Means asked for a campaign contribution in exchange for his vote as argued by the Government. Ms. Pouncy has never stated that Means made any such request for a campaign contribution in exchange for his vote. What she testified to at trial was that she told Massey he wanted a $100,000 contribution in exchange for his vote, but admitted on cross-examination that was not what she told Agent Herman, and that she "assumed" that is what Means meant.

10. The Government incorrectly asserts that "Pouncy relayed the 'demand to Massey.'" Pouncy did not testify that Means "demanded" a contribution. Her statement to

Massey, she acknowledged, was based upon her "assumption."

11. In the next sentence the Government argues "when Pouncy confirms Gilley's willingness to pay defendant Means, he (Means) confirmed their understanding" (Doc. 1521 at 13). This is not a proposed finding of fact but is rather argument by the Government. Further, a review of the conversation shows that there was not an understanding and even Ms. Pouncy was uncertain. The following transpired:

> Q. And when Senator Means said to you that morning on the twenty-fifth of March are we talking about the same thing, what did you understand the same thing to be?...
>
> A. I understood it to mean that he was going to vote yes for the bill.[TR at 66]

From this it can only be argued that it was "Ms. Pouncy's" understanding and not "their understanding" as argued by the Government. Again, it was merely an assumption on her part, i.e., taking something for granted without proof.

12. The Government next argues that Means "explicitly tied" his vote by making the statement, "going to need a lot of help" from McGregor and others (Doc. 1521 at 13). It would be pure speculation to suggest that this statement of a general need constitutes a specific request for a campaign contribution in exchange for his vote.

13. The Government next argues (at 13) that Means told Pouncy that Defendant Coker was "putting a deal together for him for the rest of the tracks." However, Pouncy also testified that when she was interviewed on April 28 by ABI Agent McEachern she merely

said that Means had said Coker was doing something also. There was no mention of "tracks." And whether Coker was helping "also" to raise campaign funds is in no way illegal and adds nothing to whether there was a conspiracy, or whether Means knowingly and willfully joined it.

14. The Government then argues that Means voted in favor of SB380 "after securing these illicit commitments." This is an improper conclusion of fact. It has long been recognized that the Latin phrase *post hoc ergo propter hoc* describes an illogical conclusion. Merely because Means voted yes, after his conversation with Pouncy, does not mean his vote was because of it. Two things which occur in sequence do not necessarily make a cause and effect pair. The evidence, even from Government witness Massey, was that the bill which passed was in the best interest of Etowah County and that Etowah County was better off after the passage than it had been before.

15. The Government next argues that Means and Prueitt were trying to "stay together" on the issue (Doc. 1521 at 14). This comment and conclusion by the Government is based merely on speculation and conjecture and is not a specific finding of fact. There was no testimony regarding any conversation between Means and Prueitt on this issue, and no evidence that merely because two Senators may have cooperated on legislation supports any allegation in the Indictment. To do so is to engage in pure speculation.

16. As a final note, the Government submits, as an argument, that defendant Smith "facilitated and made bribe offers to defendants Prueitt and Means" (Doc. 1521 at 16).

There was no citation by the Government to any portion of the evidence and testimony, because there is none. That statement is either a significant error or a gross misrepresentation on the part of the Government.

For the reasons stated herein, Means requests that the Court find that the Government has not met its burden under *Hasner* and other Eleventh Circuit precedent to establish the existence of a conspiracy or Means' knowing and willful participation in any conspiracy. Any alleged coconspirator statements used against Means should therefore be deemed by the Court to be inadmissible for such purposes.

DATED this 26th day of July 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following and **all counsel** of record electronically on this the 26th of July, 2011.

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