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

UNITED STATES OF AMERICA,	*	
V.	*	CRIMINAL ACTION NO: 2:10cr186-MHT
HARRI ANNE H. SMITH,	*	
DEFENDANT.	*	

SMITH'S MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the Defendant, Harri Anne Smith, by and through her undersigned attorney, and submits this motion for judgment of acquittal at the close of the Government's case pursuant to Fed. R. Crim. P. 29. Per the Court's instruction, this response does not focus on the pertinent legal authority, but instead on the facts as they relate to the charges within the indictment. Smith hereby adopts the arguments made in "SMITH'S RESPONSE TO UNITED STATE'S SUBMISSION AS TO SUFFICIENCY OF EVIDENCE AS TO COUNT ONE" and further hereby reserves the right adopt all arguments of each co-defendant.

I. Count Two: 18 u.s.c. 666(a)(2) & (2): Federal programs bribery and aiding and abetting

Count Two charges Smith, along with Gilley and Massey with offering over $200,000 in campaign contributions to Benjamin Lewis in exchange for his favorable vote on electronic bingo legislation.

Smith adopts the argument that the Government has failed to prove the "coverage" elements of this statute as discussed in the argument of Milton McGregor, including agent status, receipt of federal funds, 'business' as not including the drafting and voting on legislation, and involvement of a thing of

value > $5,000. Smith further adopts the argument that Section 666 does not cover campaign contributions or other electoral support, but that even if Section 666 does cover such support the evidence lacks any explicit quid pro quo.

This allegation centers on the events of March 4, 2009 at Garrett's Restaurant. Lewis never indicated Smith was involved in any illegal offer. Instead, Lewis' testimony centered on what Lewis perceived as Gilley's illegal offers. According to Lewis, Smith's only involvement (which is not even substantiated by any other Government witness) was to tell Gilley, after inquiry from Gilley, that Lewis' campaign had previously cost $150,000 and to comment that it was going to be difficult to raise money at home during the next election.

Lewis admitted that Smith never offered him any money in exchange for his vote, and never specifically told him he should vote a certain way. Lewis also testified that at the time he went to the report the incident to the authorities he was not focused on Smith, but rather on Gilley's activities from that evening. There is no indication Smith had Gilley's authority to make Lewis any offer and no evidence that Smith participated in any offer. Gilley's own testimony establishes Smith could not have bribed Lewis or aided or abetted Gilley in a bribe because Gilley had no intent to bribe Lewis that evening.

Fortunately, Lewis records a conversation with Smith only three weeks later on March 24, 2009 in which Smith explains her reasoning for supporting the Country Crossing project and legislation allowing it, while encouraging Lewis that "you gotta feel in your heart like I do. You don't feel in my hear..., you don't feel in your heart like I do then you don't need to vote for it." (J-15, p. 28, l. 19). Such a conversation does not support allegations of a *quid pro quo*. In the same call, Lewis admits Smith said that she was not telling him how to vote. She also made the comment that she was going to vote for it, but he didn't have to and that she even hoped he didn't have to vote on the 2009 bill. The call confirms it was Smith's position that she "felt more

comfortable with having the people vote." (J-15 P. 26, L. 13).

As late as February 10, 2010, Lewis' opinion, as relayed to Scott Beason, was that Smith "had a good argument." This inadvertent recording also details the Government's attempts to convince Lewis that Smith had a corrupt intent, despite his statements to the contrary. (J-503A).

For the reasons stated herein, the evidence is insufficient as to Count II of the indictment.

II. Count 14: 18 u.s.c. 666(a)(1)(B) & 2: Federal programs bribery and aiding and abetting

Under Count 14 of the indictment, Smith is charged with corruptly soliciting, demanding, accepting, and agreeing to accept something of value intending to be influenced and rewarded for an official act on her behalf. This behavior allegedly occurred from December 2009 until March 2010.

In addition to disputing the Government has proved the statutory "coverage" elements, that she was an agent of the State of Alabama, and that the State of Alabama received benefits in excess of $10,000 from federal programs, the facts as presented by the Government fail to prove the substantive elements of this charge.

The indictment specifically alleges Smith solicited and agreed to accept at least $400,000 for her campaign from Gilley. There is no evidence that Smith demanded, solicited, or agreed to accept this amount from Gilley. As it relates to the "10 for 10" fundraiser, the evidence indicates Smith was wholly unaware of the amount of "in-kind" contributions Gilley would attribute to the fundraiser until after the fact. The evidence further indicates Gilley only personally contributed $19,500 to Smith's campaign during the time of the "10 for 10" fundraiser (excluding in-kind) with other money coming from PAC's. Gilley takes credit for $30,000 contributed to Smith's campaign from a PAC to which he had not yet contributed in January 2010. (Massey claims that Smith received $25,000 in December 2009 from a PAC to which Gilley had previously

contributed, although Gilley provided no such testimony, and there is no evidence Smith knew the original source of the contribution.) The only evidence Gilley could provide that Smith was aware that the $30,000 was supposedly attributable to Gilley was his claim that she thanked him for the contribution, although he could not remember any of the conversation. Gilley later admitted the only times he actually specifically remembered Smith thanking him was in 2008 after allegedly receiving $23,000 for her congressional campaign, and on New Year's Eve 2009, which was prior to the January 2010 PAC contributions.

A call from Smith to Gilley on the evening of March 11, 2010 is the basis for the Government's allegation Smith corruptly solicited and agreed to accept at least $400,000. Luckily, this call is recorded to prevent any mischaracterization. The recording makes clear that Gilley has previously represented to Smith he had people interested in contributing to Smith's campaign. There is no discussion of Gilley himself contributing any additional money to Smith. At the first mention by Smith of Gilley's previous representation of these potential contributors, Gilley interrupts to confirm Smith's impression of their previous conversation.

It is Gilley who then asks Smith how much she needs. Smith responds by advising Gilley, "We need another 400,000 to finish out the campaign. . . And it, and anything you can help with that will be appreciated." (J-172) There is absolutely no mention of SB380 or any legislation during this conversation.

Bribery requires a specific *quid pro quo* or "explicit promise or undertaking by the official to perform or not to perform an official act." United States v. Siegelman 640 F.3d 1159, 1170 (11th Cir. 2011). "No generalized expectation of some future favorable action will do." Siegelman at 1171. An agreement to assist in the future in exchange for a campaign contribution is not enough. According to Siegelman, at the time the contribution is accepted, a specific official act has to be agreed upon. "A close in time relationship between the donation and the act will not suffice." Id.

III. Count 21: 18 u.s.c. 1951 & 2: Extortion and aiding and abetting

The Hobbs Act prohibits extortion, and attempts or conspiracies to extort, that "in any way or degree obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce." 18 U.S.C. §1951(a). "Commerce" is defined in the Act as "all commerce between any point in a state ... and any point outside thereof." 18 U.S.C. §1951(b)(3). Two essential elements for Hobbs Act prosecution are extortion and an effect on commerce. United States v. Kaplan, 171 F.3d 1351 (11th Cir. 1999).

The indictment alleges Smith "solicited and pressured Gilley" to provide at least $400,000 which money was not due Smith. As previously stated, it is clear from the recording of March 11, 2010 that it was Gilley that first mentioned additional contributions to Smith. Smith was simply responding to Gilley's prior representations. There is no evidence of any pressure on Gilley, and no evidence of Smith requesting any specific amount simply stating, "anything you can help with that will be appreciated."

Even if Smith is found to have solicited the contributions, there was no pressure as alleged. Smith is aware of United States v. Williams, 621 F.2d 123 (5th Cir. 1980) which held that a conviction for extortion can stand on a finding that property was unlawfully obtained either under color of official office or through force or duress. Id at 124. "The language, 'under color of official right,' is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required. . . The coercive element is supplied by the existence of the public office itself." Id.

However, the current case is distinguishable from Williams, which involved a school board member accepting cash and plane tickets from a contractor that did business with the school

board. These personal benefits are completely different from campaign contributions. If the holding in Williams was extended to campaign contributions, every campaign solicitation would be extortion.

In the context of campaign contributions, there is a requirement of coercion in the solicitation of the contribution. This coercion, in the context of campaign contributions, is exhibited through the showing of an explicit quid pro quo as required by McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807 (1991).

In the current case, there is no quid pro quo, but instead evidence to the contrary. Smith cemented her position in favor of the right of the people to vote, and in favor of Country Crossing in April 2008, prior to ever meeting Gilley. This position remained consistent despite the fact she would lose other contributors because of the desires of her constituents. No government witness has testified that Smith had ever given the slightest indication that she would not vote in favor of a public referendum on electronic bingo.

In addition to failing to prove any *quid pro quo*, the Government has failed to prove a specific connection between Smith's actions and interstate commerce as required by the Hobbs Act. Thus, in a prosecution under the Hobbs Act, it is necessary to show a nexus between the extortionate conduct and interstate commerce in order to establish federal jurisdiction—this is a necessary element of the crime. United States v. Gupton, 495 F.2d 550 (5th Cir. 1974). The prosecutor must prove definite connection with commerce in every Hobbs Act case and have failed in this instance, and Count 21 should be dismissed.

IV. Count 23-33: 18 u.s.c. 1341, 1343, 1346 & 2: Honest services fraud and aiding and abetting

Smith hereby further adopts and preserves all arguments raised in McGregor's Motion for Judgment of Acquittal as it relates to the "honest services" counts. Smith is only alleged to be

involved in Count 26 and Count 33.

Count 26 involves the allegation that on March 24, 2010 Smith caused "Four checks, each in the amount of $50,000 . . . to be mailed from Houston County, Alabama, to four separate PACs in Huntsville, Alabama." No evidence has been presented that these checks were ever mailed, and certainly no evidence they were mailed from any particular county. Testimony from Ronnie Gilley was that it was his belief that the checks were hand delivered by a representative of Gilley's to Smith at a party on March 24, 2010. These checks were subsequently deposited into PAC checking accounts several weeks later. The government attempts to rely on testimony of the PAC president that the ordinary pattern and practice of his office is to receive checks in the mail, but he had no specific knowledge of these four checks in question. While the PAC may have been used to receiving checks in this manner, no evidence has been provided that Smith's campaign routinely sent checks in this manner, or that this PAC had ever received money in this manner from either Gilley or Smith's campaign in the past. This pattern and practice testimony is insufficient evidence to prove these particular four checks were ever mailed.

Count 33 alleges that on March 22, 2010, Smith and Gilley engaged in a telephone call from Tennessee to Alabama "concerning the need to gather votes in support of the bill." Smith adopts the arguments provided by McGregor related to Counts 33 in that such a call was not in furtherance of any conspiracy, bribe and fraud. Smith also alleges failure by the Government to prove the elements of this count as charged as there is no evidence of any call from Tennessee.

As Smith is not even alleged to have known or have been involved in the allegations contained within Counts 23-25, and 27, these counts as they relate to Smith are due to be dismissed. There is no indication Smith had any knowledge of any payments by McGregor to Crosby or any reason to know such payments would exist. Siegelman at 1174. This same logic as expressed in Siegelman would apply to the phone calls of McGregor contained in Counts 28-32,

and Smith further adopts the arguments of McGregor as to these counts that these calls cannot be interpreted to contain any illegality.

V. Count 34-37: 18 u.s.c. 1956(a)(1)(B)(I) & 2: Money laundering and aiding and abetting

Because there was no "bribery", "extortion", or "honest services fraud", the Court should enter judgment of acquittal on all "money laundering" counts as money laundering requires a financial transaction designed to conceal and disguise the proceeds of an unlawful activity. If there is no unlawful activity, there is no money laundering.

Even if there were some knowing unlawful activity on the part of Smith, the evidence fails to establish the crime of money laundering. Testimony was provided that contributions to PACs are completely legal in Alabama. Further testimony indicates that all contributions made by Gilley during the period in question were made through political action committees, just as with many other companies such as Alabama Power. The purpose of placing the money through a PAC was not to disguise any bribe, but instead to protect the donor's identity from other solicitations, and for public relations purposes for the candidate.

In fact, once the money is sent to the PAC, the donor loses control of the money and cannot require the PAC to forward it to the candidate of the donor's choosing. While the PAC may assent to the donor's wishes, there is no guarantee because the PAC distributions are within the sole discretion of the PAC administration.

In this case, while the March 11, 2010 conversation between Smith and Gilley indicates Gilley's intent to gather $400,000 in contributions for Smith's campaign, there is no evidence this actually occurs. The government has provided evidence that Gilley gathered $200,000 in contributions, which were eventually deposited into 4 PACs selected by Rick Heartsill. There has been no showing that any of these monies were ever deposited into Smith's account for her use.

A payment by a donor to a PAC, the receipt of which by the candidate is speculative cannot be the basis for a bribe, and therefore cannot be the basis for a money laundering charge. Without evidence of ultimate payment to Smith, there has been no showing that such a PAC payment would even be a disguise. For these reasons, Counts 34-37 should be dismissed.

Respectfully submitted,

Dated this the 26th day of July, 2011.

s/ William C. White, II
WILLIAM C. WHITE, II
ATTORNEY FOR
HARRI ANNE SMITH

Of Counsel:
Parkman, Adams & White, LLC
505 20th Street North
Suite 825
Birmingham, AL 35203
(205) 244-1920
wwhite@parkmanlawfirm.com

Certificate of Service

I hereby certify that I have electronically filed the foregoing document with the Clerk of Court and I have served a copy of same upon the following counsel of record by email on this the 26th day of July, 2011:

Notice has been electronically mailed to:

Ashley Nicole Penhale penhale@copelandfranco.com, bryan@copelandfranco.com

Barak Cohen barak.cohen@usdoj.gov, barakcohenaccount@gmail.com

Benjamin Joseph Espy bespy@mewlegal.com, wroberts@mewlegal.com

Brenda K Morris Brenda.Morris@usdoj.gov

Clayton Rushing Tartt tartt@copelandfranco.com,

Edward T Kang edward.kang3@usdoj.gov

Emily Rae Woods rae.woods@usdoj.gov

Eric Olshan eric.olshan@usdoj.gov

Fred Sr. D. Gray fgray@glsmgn.com

Henry Lewis Gillis hlgillis@tmgslaw.com, lksteele@tmgslaw.com, tvenice@tmgslaw.com

James David Martin martin@copelandfranco.com, moseley@copelandfranco.com

James P Judkins jjudkins@readyfortrial.com, fsnavely@readyfortrial.com

James Woodfin Parkman , III parkman@parkmanlawfirm.com

Jeffery Clyde Duffey jcduffey@aol.com, jcduffey@bellsouth.net

John Mark Englehart jmenglehart@gmail.com

Joseph Cleodus Espy , III jespy@mewlegal.com, chead@mewlegal.com

Justin V. Shur justin.shur@usdoj.gov, debbie.shaw@usdoj.gov

Larry Dean Simpson lsimpson@readyfortrial.com, fsnavely@readyfortrial.com

Louis V. Franklin , Sr louis.franklin@usdoj.gov, debbie.shaw@usdoj.gov

Robert David Segall segall@copelandfranco.com, bryan@copelandfranco.com

Ronald Wayne Wise ronwwise@aol.com, melisslinn@aol.com

Samuel H Heldman sam@heldman.net

Shannon Lynn Holliday holliday@copelandfranco.com, Shannon.holliday@yahoo.com, smith@copelandfranco.com

Stephen P. Feaga steve.feaga@usdoj.gov, brittney.boshell@usdoj.gov, debbie.shaw@usdoj.gov

Stephen Wesley Shaw sws@rmclaw.com, melissa@rmclaw.com

Stewart Davidson McKnight , III dmcknight@baxleydillard.com

Susan Graham James sgjamesandassoc@aol.com, Dsimlaw@aol.com, mgaddSJLAW@aol.com

Thomas Martele Goggans tgoggans@tgoggans.com

Tyrone Carlton Means tcmeans@tmgslaw.com, sdprice@tmgslaw.com, twevans@tmgslaw.com

Walter Edgar McGowan wem@glsmgn.com

William Martin Espy wespy@mewlegal.com, chead@mewlegal.com

William Joseph Baxley BBaxley@bddmc.com

William N. Clark wnc@rmclaw.com, Lisa@rmclaw.com

s/ William C. White, II
OF COUNSEL