

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 BRIEF IN SUPPORT OF HER POST-TRIAL
MOTION FOR JUDGMENT OF ACQUITTAL DOCUMENT 1756**

Comes now the Defendant, Harri Anne Smith and pursuant to this Court's Order (Doc.1758) submits this brief in support of her post-trial motion for judgment of acquittal (Doc.1756) as to Counts 1, 14, 26, 33, 34, 35, 36, 37 and the forfeiture allegations, pursuant to the authority contained within Fed. R. Crim. P. 29(c)(1). As grounds for such request, in addition to the arguments provided herein, Smith also adopts any and all arguments of co-defendants.

The standard for a Court to grant a motion for acquittal after a jury verdict is the same as the standard utilized by the Court at the close of all of the evidence. On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. Sanders v. United States, 416 F.2d 194, 196 (5th Cir. 1969); Jones v. United States, 391 F.2d 273, 274 (5th Cir. 1968); Weaver v. United States, 374 F.2d 878, 881 (5th Cir. 1967).

The following summarizes Smith's charges and the outcome of each at trial:

Count 1: Smith was charged with Conspiracy to commit bribery in order to pass SB380 during the 2010 Alabama legislative session. The conspiracy was alleged to have included co-defendants Milton McGregor, Tom Coker, Bob Geddie, Larry Means, Jim Preuitt, Quentin Ross, Jay Walker, and Ray Crosby. The Court dismissed Crosby from the Conspiracy Count during the course of the trial. The jury unanimously acquitted Geddie and Ross, but failed to reach a unanimous verdict as to Smith and the remainder of her co-defendants.

Count 2: Smith was charged with Bribery for allegedly offering Rep. Benjamin Lewis Two Hundred Thousand Dollars in exchange for his official action of voting in favor of SB380 during the 2010 Alabama legislative session. The jury acquitted Smith on this charge.

Count 14: Smith was charged with bribery for allegedly soliciting or agreeing to accept Four Hundred Thousand Dollars from Ronnie Gilley in exchange for her official action of voting in favor of SB380 during the 2010 Alabama legislative session. The jury failed to reach a unanimous decision on this charge.

Count 21: Smith was charged with Hobbs Act Extortion for allegedly pressuring Gilley to provide her Four Hundred Thousand Dollars in the form of campaign contributions. The jury acquitted Smith on this charge.

Counts 23-33: Smith was charged with Honest Services Mail/Wire Fraud for allegedly using the mail and wire to commit fraud, thereby denying the citizens of Alabama their right to honest services (11 counts). The jury acquitted Smith on Counts 23, 24, 25, and 27 which involved checks mailed from McGregor to Crosby. The jury further acquitted Smith on Counts 28, 29, 30, 31, and 32, which alleged

interstate telephone calls from McGregor to others involving pro-gambling legislation.

The jury failed to reach a unanimous verdict on the Honest Services Mail/Wire Fraud charges contained within Count 26, alleging 4 PAC checks of \$50,000, each mailed to Huntsville, Alabama. The jury further failed to reach a unanimous verdict on Count 33, alleging an interstate telephone call between Smith and Gilley, in which they are alleged to have discussed pro-gambling legislation.

Counts 34-37: Money Laundering, alleging the four checks referenced in Count 26 were directed to PAC's secretly in an effort to hide that they were the proceeds of the alleged bribe contained within Count 14. The jury failed to reach a unanimous verdict as to these 4 money laundering counts.

Of the 19 Counts on which Smith was charged, the jury acquitted her on 11 Counts (Counts 2, 21, 23, 24, 25, 27, 28, 29, 30, 31, and 32). The jury failed to reach a unanimous verdict on the remaining charges (Counts 1, 14, 26, 33, and 34-37). Smith also faced a forfeiture action, which was never reached due to the government's failure to convict her on any charge. These remaining charges are due to be dismissed based on the government's failure to present evidence upon which a rational juror could find beyond a reasonable doubt that Smith committed those crimes as charged.

I. Count One: Conspiracy

In order to convict Smith on Count One, the government was required to produce evidence of the following:

1. An agreement between Smith and at least one other person,

2. This agreement must be to achieve an unlawful objective,
3. Smith had to voluntarily enter this agreement, knowing its unlawful objective, and
4. There must have been an overt act by a conspirator in furtherance of the agreement.

While the government was able to prove overt acts by Massey and Gilley in furtherance of their conspiracy, the government's proof failed as to Smith and her requisite participation, knowledge and intent. The government alleged that Smith knowingly entered into a single conspiracy with Gilley, Massey, Pouncey, McGregor, Coker, Geddie, Means, Preuit, Ross, Walker, and Crosby. The Court dismissed this charge against Crosby, and the jury acquitted Geddie and Ross of the Conspiracy Count, indicating the Government's proof as to this Count as alleged was inadequate. This charge as to Smith should be dismissed as well.

A. No Agreement Proven

No evidence was provided that Smith entered any agreement with any co-defendants, except Ronnie Gilley. The only evidence of any conspiratorial agreement between Smith and any co-defendant was provided by Gilley.

1. 2008 Legislation and Congressional Campaign

The government alleges Smith entered a conspiracy as early as 2008. "Although defendant Smith previously opposed pro-gambling legislation, and, in fact, introduced an anti gambling bill in 2008 – that is, until Gilley began exchanging campaign contributions for her support of any legislation that would benefit Country Crossing. Specifically, in 2008, Gilley funneled \$40,000 in conduit

payments to defendant Smith's campaign at her direction." (Gov. Doc. 1521, p.15-16). Even the government's evidence as to this event does not support their conspiracy theory.

On February 25, 2008, the Country Crossing project in Houston County, Alabama was first announced publicly by its' developer, Ronnie Gilley, as well as the Houston County Commission. (V. 17 p. 270) At this time, it became public knowledge that Country Crossing would include a "casino" with electronic bingo. (V. 17 p. 271) This became a very controversial issue. Prior to this announcement, Gilley made no effort to discuss the project with Smith. (V. 17 p. 270-271)

On April 3, 2008, Smith introduced legislation in the Alabama Senate that provided for a referendum on electronic bingo in Houston County. (V. 17 p. 273, V. 18 p. 10) This is the legislation referred to as "anti-gambling" by the government in its filing (Document 1521, p. 15), despite the fact it had to be approved by the voting public, much like SB380, prior to becoming law. At the time, it was the general belief of Gilley and the Alabama Attorney General that electronic bingo could be operated at Country Crossing without new legislation, based on a Houston County constitutional amendment passed decades earlier. (V. 10 p. 158)

On April 14, 2008, Smith held a press conference to publicly announce her withdrawal of legislation based on the overwhelming support of the project by her constituents. (V. 18 p. 10, 40) Prior to withdrawing this legislation and announcing her support for the project, she had never spoken with nor met Gilley, nor had he ever contributed or promised to contribute to any of her campaigns. (V. 18 p. 29)

The first meeting between Gilley and Smith occurred on May 27, 2008 at a fundraiser for Smith's upcoming congressional race. (V. 10 p. 33-34) Gilley claims to have handed Smith a \$5,000 check at this event, despite the fact that \$2300 is the maximum contribution allowed. (V. 18 p. 33-34) Gilley further claims Smith returned this same check to him at a later date, and thanked him for running ads against her congressional opponent, Jay Love. (V. 18 p. 33-34) Testimony of Gilley established that his ads against Jay Love could not have begun running until at least the week of July 7, 2008 because Jay Love did not begin attacking Gilley until on or about July 3, 2008. (V. 18 p. 26-27) Gilley testified these ads were run without her knowledge and with no prior communication with Smith. (V. 18 p. 45-46, V. 17 p. 239-240).

At this alleged meeting at which Smith returned Gilley's check and said she could not accept it because of the ads her opponent had been running in the congressional campaign, Gilley claims Smith advised that they would find a way to allow Gilley to financially support her congressional campaign. (V. 10 p. 41-42)

Great discrepancy exists between government witnesses Scott Beason, Jarrod Massey and Gilley. Massey and Gilley both claim that \$23,000 was contributed to Smith through conduit contributors for her July 15, 2008 run-off against Jay Love. Massey claims Gilley came to him a week to a week and a half before writing the first \$20,000 check for "consulting services" to Massey, and advised they would contribute \$40,000 to Smith's campaign. (V. 20 p. 188-192) Massey claims to have then contacted Smith to let her know they would be getting her a contribution. (V. 20 p. 188-192) Gilley, however, claims it was Massey that said Smith had requested

money and suggested Gilley “pony up” \$40,000 and not ask any questions. (V. 17 p. 253, V. 24 P. 172)

Regardless which version of events the government intends to rely upon, it is apparent that \$23,000 is eventually contributed to Smith by five different individuals, with this money deposited into Smith’s congressional campaign account on July 14, 2008, the day before the run-off. (Gov. Ex. 1004). While the testimony of Gilley and Massey is not consistent, neither claims that the checks were delivered to Smith.

According to Gilley, the only agreement between the two was hatched during the summer of 2008 after Smith had lost her election for United States House of Representatives. Gilley testified that Smith thanked him for a campaign contribution, and made a comment to the effect, “I’m yours.” (V. 18 p. 238, 241) Gilley interpreted this to mean Smith would vote in favor of any pro-bingo legislation.

Even if Gilley’s testimony were true, it would not support a conviction of Smith for conspiracy. Such a conversation, if it occurred, would amount to nothing more than gratitude for contributions, not an agreement to commit illegal acts. The contributions Gilley claimed to give Smith during 2008 would have necessarily been for her run for United States Representative, a position for which she could have provided no help for Gilley’s state legislation. Additionally, at the time of Gilley’s alleged contributions, SB380 was still over a year and a half from being introduced or voted on. At the time of the alleged statement by Smith to Gilley, there is no way for either to have know whether Gilley would need legislation (Riley’s task force had

not yet been formed), and certainly no way to know the contents of any such legislation. Therefore, this alleged conversation could not be the “meeting of the minds” necessary to convict Smith of conspiracy under United States v. Adkinson, 158 F.3d 1147 (11th Cir.1998).

2. “10 for 10” fundraiser

The government further provided evidence of Gilley’s involvement in a fundraiser for Smith in December 2009 to support their theory of Smith’s ongoing involvement in a conspiracy.

While Gilley testified this fund-raiser (and PAC contributions made in early 2010) was in exchange for Smith’s official actions, there is no evidence that Smith was aware of this, or had been so advised. There was also no evidence provided that had Gilley not participated in the fund-raiser or provided campaign contributions so Smith would not have voted favorably on SB380. No witness testified that Smith even hinted she would not favor the right of the people to vote unless Gilley hosted the event, or that Gilley even implied he would not host the event unless Smith agreed to vote on legislation. At the time of the event, the legislature was not in session and SB380 had not even been introduced. There was no evidence provided that Smith was even aware in December 2009 that legislation would be needed for Country Crossing, as the project was open and operational. Therefore, Gilley’s agreement to host the fund raiser is not the basis for any conspiracy.

In fact, there is evidence the in-kind contribution of \$217,000 was not even to Smith’s benefit, but instead to Gilley’s. (V. 18 p. 59-67). Testimony from both Gilley

and Massey failed to establish Smith's prior knowledge of the amount Gilley intended to attribute to the in-kind portion of the fund-raiser and Massey's concern that such amount could be detrimental to Smith. Massey further testified that the fund-raiser and in-kind amount was being used by Gilley to make a statement. (Real time transcript of 7-12-2011 p.8-10). The large majority of monetary contributions generated by the fund-raiser were not from Gilley or the entities he controlled, but rather from members of the community that attended the well-publicized event.

3. \$400,000

The government further provided evidence related to a promise by Gilley to provide \$400,000 in campaign contributions to show Smith's ongoing involvement in a conspiracy. "In exchange for her behind the scenes efforts, Gilley testified that he agreed to funnel \$400,000 in campaign contributions to defendant, Smith." (Gov. Doc. 1521, p. 17). This allegation is the basis for Count 14.

The call giving rise to this allegation occurred on the evening of March 11, 2010. This call is recorded to prevent any mischaracterization. (J-172). The pertinent portion of the call is shown below:

J-172 – P. 1

10	Ronnie Gilley:	Harri Anne.
11		
12	Harri Anne Smith:	Can you hear me now?
13		
14	Ronnie Gilley:	Yeah, my phone's messin' up. I was
15		waitin...I was, I was fixin' to call you
16		back. I just got to the house.
17		
18	Harri Anne Smith:	Oh...I appreciate ya callin' me back, I
19		don't mean to bother ya, but (sighs)...
20		
21	Ronnie Gilley:	No problem.

22
23 Harri Anne Smith: I was to...I'm working on my campaign,
24 and I know what all you're going
25 through and I hate to ask, but you had
26 said you had some other people who will
27 go...
28
29 Ronnie Gilley: I do...
30
31 Harri Anne Smith: get to help.
32
33 Ronnie Gilley You, you can count on it. Uh, whatcha
34 need and when do you need it? I never
35 did call, dadgum, Rick because I forgot
36 to Harri Anne.
37
38 Harri Anne Smith: Well...(inaudible)
39
40 Ronnie Gilley: Just tell me what you need and when you
41 need it and it'll be there.
42
43 Harri Anne Smith: Alright, well, I... uh...you know, we're
44 gonna, we need another 400,000 to
45 finish out the campaign.
46
47 Ronnie Gilley: Okay.

J-172 - P. 2

1
2 Harri Anne Smith: And it, and anything you can help with
3 that will be appreciated.

The call begins by Smith apologizing for bothering Gilley and saying she “hate(s) to ask.” (J-172, P.1, L25). The recording makes clear that it was Gilley who had previously represented to Smith he had people interested in contributing to Smith’s campaign and she was only following up; “you had said you had some people who will go . . . get to help” (J-172, P. 1, L.25-27; 31). There is no discussion of Gilley himself contributing any 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 by saying, "I do..." (J172, P1. L 29).

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, P. 1, L43 through P.2 L3). A review of the entire conversation shows there is absolutely no mention of SB380 or any "pro-gambling legislation" during this conversation or any suggestion that Smith expects help with contributions in exchange for her vote, and nothing contained in this conversation would give rise to, or support a conviction for Conspiracy.

B. No Unlawful Objective

Even if the alleged "I'm yours" conversation between Gilley and Smith in 2008 was enough to constitute an agreement as alleged (or any of the other Gilley/Smith contributions outlined above), the government's evidence failed to show any unlawful objective any such agreement. The government alleges the object of the conspiracy was the unlawful passage of SB380 during the 2010 legislative year.

Smith clearly favored SB380's passage, and voted in favor of both the BIR and the bill itself. Smith's district had the most to gain by the passage of SB380 and arguably the most to lose by its defeat. Evidence was provided that Smith had initially been opposed to the Country Crossing project in early 2008, until polls made it clear that her constituents supported the economic development the project would bring to Smith's district. On April 14, 2008, Smith publically announced her

support of the project. (V. 18 p. 10-12, 40). This announcement was made a month and a half prior to Smith ever speaking to Ronnie Gilley, making it clear her motivation for this support of the project was not campaign contributions from Gilley. (V. 18 p. 29) Her support for this project resulted in her re-election as an independent during the 2010 election cycle, despite running against a millionaire Republican businessman from Dothan, George Flowers. Testimony of Gilley established that Flowers was opposed to the Country Crossing project, and that Flowers' election would have been bad for Country Crossing. (V. 18 p. 39-41)

The Country Crossing project generated thousands of jobs for Smith's district, and, as a result of the Governor's task force, those jobs had been lost during the spring 2010 when Smith voted in favor of SB380.

While Gilley did testify that any campaign contributions made to Smith were as a result of agreement between the two that the contributions were in exchange for Smith's vote, there is evidence in the record that disputes this testimony. Both Gilley and Massey (and the tapes and transcripts) show that Gilley repeatedly stated his support for Smith was unconditional. (V. 18 p. 47, 90) These statements were made directly to Smith. Therefore, Gilley's assertion that Smith entered into an illegal agreement with him defies logic in that his actual words to her were that his support was unconditional. If Smith had in fact knowingly entered into any such illegal agreement, Gilley would not have repeatedly stressed how "unconditional" his support was. Instead, Gilley would have reminded Smith that she would only receive his support for as long as she supported the Country Crossing project.

While Gilley and Smith may have been seeking the same objective, (the re-

opening of Country Crossing) it was only Gilley who sought to do so illegally.

C. Overt Acts alleged against Smith

While overt acts of Gilley and Massey in furtherance of a conspiracy were proven, the government attempted to prove overt acts by Smith who they allege acted as a “recruiter” seeking other legislator’s votes in a corrupt manner. The government’s evidence as to these allegations fell short of proving Smith’s involvement in any conspiracy.

1. 2009 Meeting with Beason and Lewis at Garrett’s

The government has alleged, “Both Scott Beason and Benjamin Lewis testified that defendant Smith offered them bribes at Garrett’s Restaurant in Montgomery, during a dinner with Gilley, Massey, and others.” (Doc. 1521, p. 16).

While there is great conflict regarding the actual events of that evening, under any theory, Smith was not involved in a conspiracy. Gilley’s testimony relevant to this dinner is that he had no intent to bribe anyone that evening. (V. 18 p. 31) The only other “conspirator” present was Jarrod Massey. (V. 19 p. 134) Massey provided no testimony that he had any agreement with Smith to offer bribes that evening. Additionally, there was no gambling legislation voted on during the 2009 legislative session and SB380 was not even in existence. Since according to the government’s own witnesses Smith could not have conspired with Massey or Gilley that evening, no alleged action taken by Smith could be an overt act in furtherance of conspiracy whether it be the allegations related to Beason or Lewis.

Even if a conspiracy existed on that date, the testimony of Beason and Lewis did not implicate Smith. Beason claims Smith told him Gilley could provide

\$500,000 if he wanted to run for a statewide office. (V. 4 p. 134) Beason was not in such an election, and never entered any such election. Lewis' testimony centered on Gilley offering money in exchange for his vote. According to Lewis, Smith's only involvement was to tell Gilley, after inquiry from Gilley, that Lewis' campaign had previously cost \$150,000. (V. 8 p. 28-29) Smith also made a comment that it was going to be difficult to raise money at home during the next election. (V. 8 p. 30-31) 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). The government, in its closing arguments to the jury, changed its theory and stated that it was not what Smith did that evening at Garrett's that implicated her, but instead, what she said on the telephone on March 24, 2009. Despite this argument, the jury acquitted Smith of the only charge involving the March 24, 2009 telephone call.

As late as February 10, 2010, Lewis and Beason discussed how 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). If corrupt offer had been made by Smith to Beason and Lewis, it is illogical they would be having such a discussion 11 months later.

2. Other legislators

In addition to Beason and Lewis, the government alleges Smith attempted to recruit other legislators as well. "Defendant Smith's role also involved gathering the

votes of other legislators. The evidence establishes that, in order to achieve the goal of the conspiracy, defendant Smith facilitated and made bribe offers to defendants Preuitt and Means, as well as then-Senator Steve French.” (Doc. 1521, p. 16).

The evidence presented with regard to Smith and Preuitt was offered through Massey who testified that Smith spoke with Preuitt about the positive economic impact Country Crossing would have on her district. (V. 19 p. 218, V. 24 p. 196-197) This conduct amounts to no more than lobbying for legislation Smith felt would positively impact the community she represents and does not support conviction for conspiracy.

Smith is unaware of any evidence presented that she was involved in speaking with Means about any legislation. French did testify that Smith offered him a contribution if he would vote in favor of SB380. (V. 29 p. 124-126) However, even French testified that he did not feel she bribed him, and no specific amount was ever mentioned. (V. 29 p. 201)

According to French, the conversation in question took place on the floor of the Senate on the morning of March 11 two days after a dinner at The Olive Room restaurant that both French and Smith attended. (V. 29 p. 124-126, 198-199) At the dinner at The Olive Room, French told Smith he was interested in her giving him a campaign contribution. (V. 29 p. 198-199) According to French, two days later Smith asked him if he was in favor of SB380 and indicated she would give him a contribution if he agreed to vote in favor of the bill. (V. 29 p. 125) Even if such a conversation occurred, there is no evidence of corrupt intent on behalf of Smith. It is common for campaign donors to gauge a candidate’s position on a particular issue

prior to providing a contribution. French testified he told Smith he would review the bill and get back to her on his position, to which she allegedly agreed. (V. 29 p. 124-126) French's version of the events depicts Smith simply inquiring as to French's position on SB380 prior to committing to make a contribution as opposed to offering him money in exchange for his vote, a very important distinction.

There is also no evidence that Smith had spoken with any other "conspirator" regarding French prior to the alleged conversation between Smith and French on the Senate floor on the morning of March 11, 2010, or that Smith was authorized to offer French money on anyone's behalf. In fact, at the time of Smith's alleged offer to French, she had not even made the call to Gilley (J-172) to ask for a contribution. On the call to Gilley on the evening of March 11, there is no mention of Steve French or any offer made by Smith to French, despite the offer having allegedly taken place only hours earlier. Despite thousands of recorded calls in March 2010, not one has any discussion related to any offer to French by Smith on behalf of any other conspirator.

D. Jurisdictional Elements

In addition to failing to prove the substantive elements of the Conspiracy charge, the government never met its burden of proof as to the other jurisdictional elements of the bribery statute. This argument will be covered under Smith argument for dismissal of the Bribery allegation contained within Count 14, but is raised and preserved in her argument for dismissal as to conspiracy under Count 1.

There is no evidence that at any time Smith ever threatened or even suggested she would not support a bill to allow the people to vote on the issue of

electronic bingo. This was in fact her position as early as spring of 2008. While Gilley may have had corrupt intent in contributing to her campaign, there is no evidence that Smith knew that it was only in exchange for her vote. There is evidence however to the contrary. The only two elections in which Smith was running involved opponents Jay Love and George Flowers, both of which Gilley greatly disliked and wanted to see defeated. Additionally, there was testimony that on numerous occasions, Gilley would tell Smith that his support for her was unconditional. There is no reason for Smith to be aware that Gilley was being disingenuous with these repeated statements. As such, evidence is lacking that Smith ever knowingly entered into a conspiracy, and Smith requests Count One against her be dismissed.

E. Double Jeopardy

Further, due to the acquittals of Smith in the first trial, Count One of the indictment should be dismissed based on the Double Jeopardy considerations discussed in *Yeager v. United States*, 129 S.Ct. 2360 (2009) and *Ashe v. Swenson*, 397 U.S. 436 (1970). Under *Yeager, supra*, if the jury “necessarily decided” “a critical issue of ultimate fact” in the defendant’s favor during a previous trial, “the Court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Id.* at 1367. The Supreme Court in *Yeager*, in reversing the Fifth Circuit, held that a Double Jeopardy analysis must focus on what the jury in the previous case decided and not the counts upon which they were

hung.

The issue of whether Defendant Smith was a participant in the conspiracy or scheme alleged by the government in Paragraphs 28 through 37 of the indictment was the central “critical issue of ultimate fact” in both the conspiracy charge under Count I and the honest services charges in Counts 23, 24, 25, 27, 28, 29, 30, 31, and 32 for which Smith was acquitted. Therefore, the jury verdict necessarily decided that Smith was not involved in the scheme alleged by the government under the honest services counts. Such a unanimous decision should therefore preclude Smith from re-prosecution on the conspiracy charge alleging essentially the same scheme that was alleged in the honest services fraud counts.

**II. Count 14: 18 U.S.C. 666(a)(1)(B)
Federal programs bribery**

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 order for Smith to be convicted under Count 14, the government has to prove:

1. Smith was an agent of the State of Alabama,
2. During the period in question, Alabama received in excess of \$10,000 from the Federal Government,
3. Smith received something of value,
4. Smith received the thing of value with the corrupt intent to be influenced or rewarded,

5. The influence or reward is in connection with any business, transaction, or series of transactions of the State of Alabama, and
6. The business, transaction, or series of transactions involves value of \$5,000 or more.

A. Smith not an agent of Alabama

Legislators are not agents as they do not act “on behalf of” the State as required under 18 U.S.C. § 666(d)(1). See *Nevada Comm’n on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011), 2011 U.S. LEXIS 4379 (2011). Legislators only authority is to vote on behalf of their constituents. They do not have the power to act “on behalf of” or bind the State. Smith only role as a legislator is to vote on legislation. In doing such, she only casts one vote representing the people of the area from which she is elected. There is no guarantee that her vote will even become law.

Smith has no power to spend any federal monies. In fact, it is undisputed that Alabama Legislature does not receive federal funds. (See testimony of Ms. Traylor, June 23 realtime transcript). Therefore, as to Senator Smith, there is a lack of evidence that she was an “agent” in the required sense of having responsibility for the expenditure of funds, see *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (“In *United States v. Phillips*, we held that for an individual to be an ‘agent’ for the purposes of section 666, he must be ‘authorized to act on behalf of [the agency] with respect to its funds.’ 219 F.3d 404, 411 (5th Cir. 2000).”) As to Senator Smith, there can be no charges under § 666 where the person allegedly “bribed” worked in a branch of Government that received no federal funds. There is no caselaw clearly establishing that the Government can spread the reach of § 666 merely by charging

everyone as an agent of the undifferentiated State as a whole, where the person worked in a constitutionally separate branch of State government that receives no federal funds. Such application would go beyond the proper reach of the statute and would go beyond proper boundaries of federal Spending-Clause power.

When these points are combined with the fact that the Congress chose not to specifically say that legislators are covered by § 666 – as contrasted with the Congressional decision to specifically cover Members of Congress in § 201 – the best logical conclusion is that § 666 does not cover alleged influence of state legislators, especially when the State Legislature receives no federal funds.

B. Alabama’s receipt of \$10,000

While the Government produced evidence that during 2009 and 2010, the State of Alabama received in excess of \$10,000 from the federal government, the evidence is undisputed that none of this money was provided to the Alabama Legislature. (V. 9 p. 140-142) As argued above, the federal bribery statute only reaches those agents of the State having spending responsibility over federal monies. Phillips at 441. As Alabama legislators have no such power, the federal bribery statute should be held inapplicable as to Alabama state legislators, and this Court should be dismissed.

C. No corrupt intent

Smith reasserts her argument that § 666 does not cover campaign contributions. In any event, the evidence is insufficient based on failure to prove an “explicit *quid pro quo*” agreement. There was no corrupt intent that Smith would vote in any particular way in exchange for campaign contributions. As stated herein,

Smith staked her position in favor of Country Crossing prior to even speaking with Gilley. There was no evidence that there was ever any question as to how Smith would vote on SB380. Polls in Smith's district showed overwhelming support for the project, and her conversation with Benjamin Lewis on March 24, 2009 (J-015) showed Smith's belief that any politician representing the district in which Country Crossing was located who did not support pro-bingo legislation would be defeated:

J-015 - P. 17

22 Smith: Yeah, I III really I really I really to
23 believe that the majority of the people
24 back home want the opportunity to vote,
25 and most of em and most of em
26
27 Lewis: Well I think your poll showed you that.

J-015 - P. 20

10 Smith: Right, but do I believe do I believe
11 that if Benjamin Lewis votes against
12 this that he will have opposition that
13 Ronnie gets him and pays for it, yes I
14 do believe it. Do I believe that if
15 Harri Anne votes against it, that
16 Ronnie will get opposition? Yes, I do.
17 Do I believe that opposition will beat
18 us? Yes, I do.

Smith's intent was not corrupt, but instead to get re-elected and vote in a manner consistent with the wishes of her constituents, not to engage in bribery.

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. While the government witnesses discussed various contributions to Smith's campaigns

allegedly beginning as early as the Summer of 2008, the government made clear that the allegations contained within Count 14 relate to a call between Smith and Gilley about campaign contributions in March 2010.

Thankfully, this conversation referenced in this allegation is on tape. (J-172) The government and Gilley have claimed Smith called and asked Gilley for \$400,000. It is clear from the tape that this never took place. As has already been argued herein, it is apparent from the recording that Gilley had previously told Smith he had other people interested in contributing to her campaign if she needed it. In the recording, it is Gilley who asks Smith how much she needs. In response, Smith advises she needs \$400,000 to finish out the campaign, and Smith tells Gilley anything he "can help with that would be appreciated." (J-172, p.2) There is absolutely no discussion that this contribution, which is not even to be made by Gilley, is in exchange for any official action by Smith. Despite the fact the call takes place in the middle of March 2010 while SB380 is pending, SB380 is not even discussed.

Gilley then speaks with one of Smith's advisors, Rick Heartsill, who advises to whom the PAC checks should be made payable. (J-178). While Gilley testified he had the checks hand delivered to Smith at a party, on or around March 24, 2010, the checks are not deposited into the PAC accounts until several weeks later, and there is no evidence this money was ever deposited into Smith's account. (V. 18 p. 88) While the evidence is undisputed that none of this money was in Smith's account as of the day of the vote on SB380 (if ever), Smith still voted in favor of SB380. This is further evidence that Smith's vote was not given in exchange for \$400,000.

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. At the time of the March 11, 2010 telephone call, the BIR vote had failed and SB380 was not even scheduled for a vote. While Gilley testified he would not have agreed to try to raise this \$400,000 if Smith was not in favor of SB380, there is no evidence that Smith was motivated to vote in favor of SB380 because of this money. (V. 10 p. 193-194, 198-199) In fact, while Smith did eventually vote in favor of SB380, the government provided no evidence that Smith ever received 1 penny of this \$400,000 despite having offered voluminous financial records. The government only established that \$200,000 was deposited into PAC’s run by Raby. These funds were never traced from Raby’s PACs into Smith’s personal or campaign account.

D. Double Jeopardy

Further, Count 14 is due to be dismissed based on the Double Jeopardy argument made in reference to Count One based on the *Yeager* decision. Additionally, Smith was charged and acquitted with Hobbs Act Extortion in Count 21 of the indictment. Both Count 21, with which Smith was acquitted, and Count 14, which was a hung count, allege the same activity. Both Counts focus on the March 11, 2010 solicitation of \$400,000 in campaign contributions by Smith from Ronnie

Gilley recorded on J-172.

An explicit *quid pro quo* was required to convict Smith of both Bribery under Count 14 and Extortion under Count 21. Because the same *quid pro quo* was alleged under both Count 14 and 21 and the jury necessarily decided that there was no illegal *quid pro quo* in acquitting Smith under Count 21, a judgment of acquittal under the hung count 14 is appropriate. A re-prosecution on Count 14 would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

**III. Counts 26 and 33: 18 U.S.C. 1341, 1343, and 1346:
Honest services mail and wire fraud**

In order to support a conviction of Smith under Honest Services Wire and Mail Fraud under 18 USC 1341, 1343 and 1346, the government must prove:

1. Smith intentionally participated in a scheme to defraud,
2. Wire or Mail was used to further the scheme,
3. The scheme included a material falsehood,
4. Smith acted willfully with an intent to defraud, and
5. The victim was denied their rights to the intangible right to honest services.

A. Lack of Intent

Smith relies on the arguments already presented herein for her argument that the government failed to show she intentionally participated in any illegal activity, or acted willfully with any intent to defraud.

B. No scheme to defraud

The jury was charged that in order to convict a defendant on Counts 23-33,

“The government must prove that the scheme was substantially the same as the one charged in the indictment.” By failing to convict anyone under the Count I Conspiracy charge (and in fact acquitting two defendants), as well as issuing numerous acquittals of various defendants in Counts 23-33, the jury showed the government’s failure of proof. Smith herself was acquitted of 9 Honest Services charges, indicating the jury failed to find her involvement in the scheme alleged in the indictment. As such, Smith these remaining honest services counts should be dismissed to avoid double jeopardy under *Yeager* as argued herein repeatedly.

Additionally, under McCormick v. United States, 500 U.S. 257 (1991), a wire fraud scheme involving bribery requires an explicit *quid pro quo*. For the same reasons previously argued under the Bribery section herein, evidence of the necessary *quid pro quo* is lacking as shown by the jury’s acquittal of Smith for Extortion under Count 21 requiring the remaining wire/mail fraud counts be dismissed.

C. No mailing (Count 26)

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. (V. 18 p. 88). Massey testified that Gilley had believed he had given these checks to Massey. (real time transcript of 7-19-11 p.

37).

These checks were subsequently deposited into PAC checking accounts several weeks later. The government attempts to rely on testimony of the PAC president, Bryant Raby, that the ordinary pattern and practice of his office is to receive checks in the mail, but Raby had no specific knowledge of these four checks in question. While Raby may have typically received checks in this manner, no evidence has been provided that Smith's campaign routinely sent checks in the mail, 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 of Raby PAC's is insufficient evidence to prove these particular four checks were ever mailed.

D. Variance in proof and allegations (Count 33)

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."

The Government also failed to prove the elements as they were charged. Despite alleging a call from Gilley, who was allegedly in Tennessee to Smith in Alabama, the proof indisputably showed Gilley was in fact in Mississippi. This constitutes a fatal variance between the proof and the allegation and this charge should be dismissed. *See, e.g. United States v. Keller*, 916 F.2d 628, 632-36 (11th Cir. 1990).

**IV. Count 34-37: 18 U.S.C. 1956(a)(1)(B)(i)
Money laundering**

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 government's evidence failed 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 the vast majority of other large campaign contributors. The purpose of placing money through a PAC is 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 was no showing that any of these monies were ever deposited into Smith's account.

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.

**V. 18 U.S.C. 981(a)(1)(C) and 982(a)(1) and 28 U.S.C. 2461(c)
Criminal Forfeiture**

Upon dismissal of the remaining Bribery charge and Money Laundering Charges, the criminal forfeiture allegations are due to be dismissed. The statutes under which the government seeks forfeiture of \$200,000 from Smith require a conviction on Bribery, Extortion or Money Laundering charges. The jury has already acquitted Smith on the Extortion Count contained within Count 21. If the Court dismisses the remaining Bribery and Money Laundering Counts as requested herein, the Forfeiture action is due to be dismissed as well.

Respectfully submitted,

Dated this the 16th day of September, 2011.

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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 16th day of September, 2011:

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