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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. MCGREGOR	)	
THOMAS E. COKER	)	
JAMES E. PREUITT	)	
LARRY P. MEANS	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER, JR.	)	
JOSEPH R. CROSBY	)	

UNITED STATES' COMBINED OPPOSITION TO DEFENDANTS' POST-TRIAL MOTIONS FOR JUDGMENT OF ACQUITTAL AND MOTIONS TO DISMISS ON DOUBLE JEOPARDY GROUNDS

The United States, through undersigned counsel, hereby submits the following brief in response to the remaining defendants' renewed Rule 29 motions, as well as their motions to dismiss the Indictment on double-jeopardy grounds.[1] The motions are due to be denied.

I. INTRODUCTION

This is the third time the defendants have asked the Court to enter a judgment of acquittal as to the remaining counts in the Indictment. They first sought a favorable Rule 29 ruling on July 26, 2011, after the close of the government's case-in-chief. See Dkt. Nos.1531 (Coker), 1534

[1] The defendants initially filed their renewed motions on August 25, 2011. Dkt. Nos. 1748 (Coker Rule 29 Br.), 1749 (Means Motion to Dismiss), 1750 (Means Br. in Support of Motion to Dismiss), 1751 (Means Rule 29 Br.), 1753 (McGregor Rule 29 Br.), 1754 (Preuitt Rule 29 Br.), 1755 (Crosby Rule 29 Br.), 1756 (Smith Rule 29 Br.), 1757 (Walker Rule 29 Br.). After the Court directed the defendants (with the exception of defendant Coker) to file additional briefing, they submitted new briefs on September 16, 2011. Dkt. Nos. 1804 (McGregor Supp. Rule 29 Br.), 1805 (McGregor Motion to Dismiss), 1806 (Preuitt Motion to Dismiss), 1807 (Preuitt Br. in Support of Motion to Dismiss), 1808 (Preuitt Supp. Rule 29 Br.), 1809 (Smith Supp. Rule 29 Br.), 1812 (Crosby Supp. Rule 29 Br.), 1813 (Means Supp. Rule 29 Br.), 1814 (Walker Supp. Rule 29 Br.).

(Crosby), 1536 (McGregor), 1537 (Means), 1539 (Preuitt), 1543 (Smith), 1544 (Walker). Following ten hours of argument on the defendants' motions, (Trial Tr. vol. 32, July 27, 2011), and the government's written submission as to Count One (Conspiracy), Dkt. No. 1521, the Court denied their motions across-the-board. Dkt. Nos. 1556-57, 1559, 1561, 1564-66.

At the conclusion of the defense case, which consisted of just one witness, (Trial Tr. vol. 33, 27-178, July 28, 2011 (testimony of Richard Whitaker)), the defendants once again renewed their motions on July 29, 2011. Defendants McGregor, Crosby, and Walker submitted supplemental briefs at the request of the Court, as did the government. Dkt. Nos. 1576, 1579, 1580, 1588, 1597. On August 1, 2011, the Court dismissed a federal program bribery charge as to defendant McGregor and defendant Geddie (Count Three) and the conspiracy and honest services fraud counts as to defendant Crosby (Counts One and Twenty-Three to Thirty-Three). Dkt. Nos. 1601, 1609. The Court denied the remaining Rule 29 motions as to all other counts. Dkt. Nos. 1602-1608.

After the jury returned partial verdicts on August 11, 2011, acquitting defendants Geddie and Ross outright, the remaining defendants once again moved pursuant to Rule 29 for judgments of acquittal as to all remaining counts. For the most part, the defendants make the same arguments they advanced previously—the same arguments that the Court considered, in most cases, twice and rejected each time.[2] The evidence compels the same outcome once again. They can point to no new evidence that was not in the record the last time they moved for acquittals under Rule 29. There is none. The evidence is the same, the standard is the same, and, as before, each dictates denial.

Similarly, although the defendants raise previously unavailable double jeopardy claims, their

[2] In this regard, defendant Coker's motion is virtually identical to the one he filled at the close of the government's case, compare Dkt. No. 1758, with Dkt. No. 1531, which the Court properly rejected.

arguments also fail. A defendant's burden under the issue-preclusion doctrine of Ashe v. Swenson, 397 US 436, 444 (1970), is exceedingly heavy, and the defendants have made an insufficient showing to justify the sweeping relief they seek—dismissal of all remaining counts. On the contrary, there are numerous issues left for a new jury (or juries) to resolve, and the Court should deny the defendants' motions.

II. THE DEFENDANT'S HAVE NOT MET THEIR BURDEN UNDER RULE 29(c).

A. Standard of Review

Rule 29 of the Federal Rules of Criminal Procedure provides for a judgement of acquittal if the government's evidence is insufficient to sustain a conviction. When the Court assesses a motion for a judgement of acquittal, it "must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt." United States v. Miranda, 425 F.3d 953, 959 (11th Cir. 2005) (quoting United States v. Sellers, 871 F.2d 1019, 1021 (11th Cir. 1989)) (internal citations omitted in Miranda); see also Burks v. United States, 437 U.S. 1, 16 (1978) ("The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt."); United States v. Hernandez, 433 F.3d 1328, 1334 (11th Cir. 2005) ("That [the defendant's] statements and behavior are subject to innocent explanations is also immaterial. A jury is free to choose among reasonable constructions of the evidence. [The defendant] cannot prevail . . . by repeating his unsuccessful argument to the jury.") (citations and internal quotation marks omitted). In meeting this standard, "[t]he prosecution need not rebut all reasonable hypotheses other than guilt. The jury is free to choose between or among the conclusions to be drawn from the evidence

presented at trial, and the district court must accept all reasonable inferences and credibility determinations made by the jury." Id.

This standard remains unchanged regardless of the nature and substance of the evidence presented at trial. United States v. Lyons, 53 F.3d 1198, 1202 (11th Cir. 1995); United States v. Forszt, 655 F.2d 101, 103 (7th Cir. 1981) (applying usual Rule 29 standard of review to review sufficiency of evidence for bribery conviction). Indeed, the Court may neither weigh the evidence nor assess the credibility of witnesses. Burks, 437 U.S. at 16. The Court's inquiry must focus solely on the sufficiency of the evidence—allegations of error are irrelevant. Miranda, 425 F.3d at 962 (citing United States v. Fozo, 904 F.2d 1166, 1171 (7th Cir. 1990)) ("'The sole ground for a post-trial motion under Rule 29(c) is that the evidence was insufficient to sustain a conviction.'"); see also 2A Wright, et.al., Federal Practice and Procedure, Criminal 3d § 466 (2006) ("There is only one ground for a motion for a judgment of acquittal"—insufficiency of the evidence).

A defendant carries a "heavy burden" in challenging the sufficiency of evidence under Rule 29. See United States v. McCarrick, 294 F.3d 1286, 1290 (11th Cir. 2002) (noting the defendant's sufficiency of the evidence burden on appeal); United States v. Evans, 149 F. Supp. 2d 1331, 1336, 1345 (M.D. Fla. 2001) (in considering the defendants' post-trial motions for judgment of acquittal, the trial court noted that the defendants have the burden to establish that no reasonable jury could have found them guilty beyond a reasonable doubt), aff'd in part, vacated in part, 344 F.3d 1131 (11th Cir. 2003); see also United States v. Irving, 452 F.3d 110, 119 (2d Cir. 2006) (holding that the trial court did not err in denying the defendant's Rule 29 motion and noting that defendant did not meet his "weighty" burden); United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003) (noting that a defendant who, pursuant to Rule 29, challenges the sufficiency of the evidence supporting his

conviction bears a heavy burden); United States v. Ozsusamlar, No. S1 05 CR 1077(PKL), 2006 WL 2051117, at *3 (S.D. N.Y. July 20, 2006) (noting that the defendant's burden to persuade the trial court that no rational trier of fact could have found the elements of the offense charged beyond a reasonable doubt is a "'very heavy burden'") (quoting United States v. Scarpa, 913 F.2d 993, 1003 (2d Cir. 1990)).

Because the defendants cannot carry their "heavy burden" under Rule 29, their motions should be denied.

B. Federal Program Bribery Under 18 U.S.C. § 666(a)(1)(B) & (a)(2)

Following the jury's partial verdict, the remaining federal program bribery counts are as follows: Count Four (McGregor), Count Five (McGregor), Count Six (Means), Count Eight (McGregor, Coker, Walker), Count Nine (Preuitt), Count Fourteen (Smith), Count Fifteen (McGregor), Count Sixteen (Crosby). For purposes of the jury charge, the Court split the § 666 charges into two groups—non-campaign-contribution-based counts and campaign-contribution-based counts—and instructed accordingly. Dkt. No. 1640. With the exception of the quid pro quo instruction, all of the § 666 charges contain certain common elements, which we will take up first before turning to the sufficiency of the evidence under the applicable quid pro quo standard as instructed by the Court. Ultimately, as the evidence makes clear and as the government argued at length during the initial Rule 29 argument, the evidence adduced at trial supports denial of the defendants' motions irrespective of the type of bribe payment.

1. Common Elements

As an initial matter, although the sole ground for acquittal under Rule 29 is the insufficiency of evidence to sustain a conviction, various defendants rely on purely legal arguments

regarding the proper definition and scope of § 666. (See, e.g., Smith Supp. Rule 29 Br. at 19-20, Crosby Supp. Rule 29 Br. at 2-5, Means Supp. Rule 29 Br. at 29-32, Walker Br. at 3-6, Coker Br. at 20-23.) These contentions are more properly raised post-conviction in a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, not in a motion for a judgement of acquittal.[3] More to the point, these issues have largely been raised during pretrial litigation and disposed of by both the Magistrate Judge Capel and this Court. Nevertheless, brief analysis reveals that the defendants' scattershot arguments are unavailing and a mere distraction from the proper inquiry of whether the government's evidence was sufficient to withstand a Rule 29 challenge. It was.

2. **The Court's § 666 Instructions**

Pursuant to the Court's jury instructions, in order to sustain a conviction against the non-legislator defendants under § 666(a)(2), the government had to establish the following elements beyond a reasonable doubt:

> First: during the one year period asserted in the indictment, the State of Alabama received benefits greater than $10,000 under a Federal program involving some form

[3] See, e.g., United States v. Terlingo, Nos. CR. 99-525-06, -07, and -08, 2001 WL 474407, at *2 (E.D. Penn. Apr. 30, 2001) (noting that the trial court's denial of a defendant's requested jury instructions should be addressed in a motion for a new trial rather than in a motion for a judgment of acquittal); United States v. Ellis, 493 F. Supp. 1092, 1098 (M.D. Tenn. 1979) (noting that any error in the trial court's jury instructions is not a cognizable ground for a motion for a post-trial entry of a judgment of acquittal), aff'd, 617 F.2d 604 (6th Cir.) (table), cert. denied, 449 U.S. 840 (1980); see also United States v. Urena, 27 F.3d 1487, 1490 (10th Cir.) ("The proper basis for a Rule 29(a) motion for judgment of acquittal is a claim of insufficient evidence in light of the elements of the offense charged.") (emphasis added), cert. denied, 513 U.S. 977 (1994). Defendant Coker, in particular, raises additional purely legal questions dealing with whether the honest services statute is unconstitutionally vague, the application of the rule of lenity, and whether the statute requires personal gain, (Coker Rule 29 Br. at 29-32), all of which have been litigated previously and disposed of by the Court. See, e.g., Dkt. No. 863 (Magistrate Judge's Honest Services Recommedation).

of Federal assistance;

Second: during such one year period the defendant knowingly gave, offered, or agreed to give a thing of value to an agent of the State of Alabama, as charged;

Third: by giving, offering, or agreeing to give a thing of value, the defendant intended to influence or reward an agent of the State in connection with any business, transaction, or series of transactions of the State of Alabama, which business, transaction, or series of transactions involved something of value of $5,000 or more;

Fourth: in so doing the defendant acted corruptly; and

Fifth: there was a quid pro quo.

Dkt. No. 164 at 18-19.

Similarly, under § 666(a)(1)(B), the Court instructed the jury that the government was required to prove the following elements as to the state agent defendants:

First: the defendant was an agent of the State of Alabama, as charged;

Second: during the one-year period From May 1, 2009 to April 30, 2010, the State of Alabama received benefits greater than $10,000 under a Federal program involving some form of Federal assistance;

Third: during such one-year period the defendant solicited or demanded a thing of value for the benefit of any person, or knowingly accepted or agreed to accept a thing of value from any person;

Fourth: the defendant solicited or demanded for the benefit of any person, or accepted or agreed to accept the thing of value intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of the State of Alabama, which transaction or series of transactions involved something of value of $5,000 or more;

Fifth: the defendant acted corruptly; and

Sixth: there was a quid pro quo.

Id. at 24-25.

The defendants variously challenge the government's proof as to the $10,000 jurisdictional

threshold and the $5,000 value of the business, transaction or series of transactions. Each of these arguments fails.

3. The Evidence Was Sufficient to Establish the Jurisdictional Elements of § 666

Section 666 criminalizes bribery that seeks to "influence or reward an agent of an organization or of a State . . . in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." The statute defines "agent" to mean "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." § 666(d)(1).

In their motions seeking judgements of acquittal, the defendants contend that § 666 does not cover bribery relating to state legislators or legislative employees, such as LRS analysts, with respect to the drafting and passage of legislation. Their claims rely on two erroneous premises. First, the defendants incorrectly argue that state legislators and legislative employees do not qualify as "agents" under the statute. Second, they wrongfully allege that violating § 666 requires proving a connection between bribes paid to influence conduct involving the expenditure of federal funds. Because the defendants are wrong on both counts, their arguments fail.

Notably, the Court has already squarely rejected these arguments, which were raised in the defendants' pre-trial motions to dismiss, see Dkt. Nos. 206, 408, 437, 441, 443, 450, 456, 463, 474, and 486. In a written order rejecting the motions, Dkt. No. 1173, the Court adopted in pertinent part the Recommendation of the Magistrate Judge, Dkt. No. 862. Among the Recommendation's holdings adopted by the Court was the conclusion that state legislators, in addition to other state and

local employees, do, in fact, qualify as "agents" for purposes of federal-program bribery. See Dkt. No. 862 at 5-6.

The Recommendation further recognized that binding caselaw, United States v. Townsend, 630 F.3d 1003 (11th Cir. 2011), makes clear that § 666 does not require that bribery involve expenditures or commercial activity. Thus, "the drafting of and voting on legislation" falls squarely under the statute's reach. Dkt. No. 862 at 4. Indeed, under Townsend, § 666 "does not require a nexus between the federal funds and the transaction at issue." Dkt. No. 862 (quoting Townsend, 630 F.3d at 1009 n.3 (internal quotation marks omitted)). Put differently, § 666 criminalizes bribes paid to an agent of the State of Alabama without regard to whether the bribe-giver intends the payments to influence how the bribe-recipient controls federal funds. It is therefore irrelevant under § 666 whether an agent worked for an entity that directly received federal funds. The statute merely requires the showing of an agency relationship between such an entity and the purported agent—and nothing more.

At trial, the Court implicitly echoed this understanding in its instructions to the jury regarding federal-program bribery: "The term "agent" means a person authorized to act on behalf of the government, and as relevant to this case means any employee, officer, representative, or director of the State of Alabama." Dkt. No. 1640 at 19-20 (emphasis added).

Here, the evidence establishes that the relevant agency relationship was that between the State of Alabama and State legislators and their staff. Through the power to legislate, Alabama State legislators are agents of the Alabama State government for purposes of § 666. So too are the employees of the Alabama State legislature, such as defendant Crosby, who, as an LRS analyst, helped legislators draft bills. As "employees" and "servants" who serve the State of Alabama

through its legislature, they also fall directly under the definition of government agents found in § 666(d)(1).

The defendants nevertheless claim that under new caselaw, Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011), legislators categorically cannot be agents of the State of Alabama because they represent their constituents, rather than the State. Carrigan is inapposite. The case was a civil—not criminal—matter focused solely on whether restrictions on legislator voting infringe First Amendment freedoms. It simply did not speak to agency under § 666—or to federal program bribery at all. Thus, there is nothing new that calls into question the Court's reasoning since the last time it rejected the defendants' arguments regarding § 666.

Looking beyond the defendants' legal arguments to the sole question of sufficiency under Rule 29, it is clear that the government offered sufficient evidence at trial regarding the agency relationship between the legislator/legislative staff defendants and the State of Alabama, the threshold value of transactions, and the federal-funds elements required under § 666 with respect to Count Sixteen.

Specifically, James Sumner (Chairman of the Alabama Ethics Commission) established that defendant Crosby had been an agent of the State of Alabama when Sumner testified that LRS analysts, such as defendant Crosby, were employees of the State, which paid LRS analysts' salaries directly. (Trial Tr. vol. 9, 200:6-9, June 23, 2011.) Similarly, Barry Mask, a member of the Alabama House of Representatives, who acts on behalf of the state in his legislative capacity, testified that he was also paid out of the state fisc, (Trial Tr. vol. 6, 17:2-4, June 20, 2011), providing sufficient proof that defendants Means, Preuitt, and Smith, as legislators paid by Alabama, are similarly agents of the state.

In addition, Gail Traylor, Director of the State Audit Division for the State of Alabama's Department of Examiners of Public Accounts, established the requisite federal-program amounts required under §666(b) when she testified that the State of Alabama received in excess of $10,000 per year from the federal government from 2008 through 2010, (Id. at 141:22 -142:13), a period spanning all of the charged one-year periods.

Finally, the evidence met the $5,000 threshold for the value of the business, transaction, or series of transactions under § 666. Government Exhibit 1273 comprised a Fiscal Note prepared by the State of Alabama that detailed the tax revenues—well in excess of $5,000—that legalization of gambling through public ratification of SB 380 would have generated. Gov. Ex. 1273.

In sum, the government adduced sufficient evidence as to the agency relationship and the jurisdictional dollar amounts as to all defendants, such that their claims as to these elements must fail.

4. Non-Campaign-Contribution Charges

Three of the remaining § 666 counts involve allegations of non-campaign-contribution bribes: Count Four (McGregor), Count Fifteen (McGregor), and Count Sixteen (Crosby). Because these charges do not implicate the First Amendment concerns associated with campaign contributions, the government was not required to prove an explicit quid pro quo. Indeed, with respect to the payments made by defendant McGregor to defendant Crosby, as charged in Counts Fifteen and Sixteen, the evidence was sufficient if it established simply that defendant McGregor retained defendant Crosby's official services on an as-needed basis—without tying a specific payment to a specific official action. To that end, the Court's non-campaign-contribution instruction read in pertinent part:

> Count 4 charges McGregor with promising Senator Scott Beason one million dollars a year, to use at his discretion, in connection with his vote on Senate Bill 380. Counts 15 and 16 charge McGregor with giving Crosby $ 3,000 a month, and Crosby with accepting those payments, for the alleged purpose of drafting gambling legislation favorable to McGregor. For these three counts only, the government must prove that things of value were solicited, promised, or exchanged for official action by an agent or official of the State of Alabama. In other words, the government must prove that there was a quid pro quo.
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> . . . .
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> Though bribery requires a solicitation, promise, or exchange of money or other thing of value for official action, a payment, or promise of a payment, need not be correlated with a specific official act. And with respect to Counts 15 and 16, the requirement that there be payment of a thing of value in return for the performance of an official act is satisfied so long as the evidence shows a "course of conduct" of things of value flowing to an agent in exchange for a pattern of official actions favorable to the donor. Further, it is not necessary for the government to prove that the agent intended to perform a set number of official acts in return for the payments. Thus, all that must be shown is that payments were made with the intent of securing a specific type of official action in return, such as securing the official's services on an "as-needed" basis.

Dkt. No. 1640 at 26-28.

Applying the Court's instruction, as it must at the Rule 29 stage, the evidence is more than sufficient to conclude that, taking all inferences in favor of the government, a reasonable juror could find defendants McGregor and Crosby guilty beyond a reasonable doubt on these counts.

a. Count Four – Defendant McGregor

Defendant McGregor expends significant energy in his brief arguing that the evidence at trial was insufficient to establish his guilt as to Count Four, involving the $1 million bribe to Senator Scott Beason. (McGregor Supp. Rule 29 Br. at 2-14.) Despite the overwhelming evidence of defendant McGregor's involvement in the effort to secure Beason's vote in favor of SB380, he nevertheless asks the Court to split hairs and agree with his view that the evidence

established merely that he was complicit in a contribution-based bribery offense involving Beason—and not the non-contribution, million-dollar offer of a public relations job. (Id. at 8-9.) The Court should reject defendant McGregor's efforts. Application of the appropriate Rule 29 standard makes clear that a reasonable juror could conclude beyond a reasonable doubt that defendant McGregor was guilty of bribery as charged in Count Four.[4]

To that end, the evidence established defendant McGregor was an active participant during the critical meeting he attended on February 18, 2010, with Beason, Massey, and Gilley in Massey's lobbying office. See Ex. J-008. Early in the conversation, defendant McGregor made clear that he was seeking Beason's vote. Id. at 21:6-7 ("Here's where we are, we need, we need your help, we need your vote in support in the people having a right to vote on the issue."). Later in the conversation, after articulating the dire financial straits defendant McGregor faced, id. at 16:1-2 ("My ass is on the line, I've got a $200,000,000 million dollars note that I've got to pay with interest."), the conversation turned to the topic of public relations work—the subject of Count Four.

After Beason mentioned that he had spoken with Massey about "doing some PR stuff," id. at 46:23, and that he was looking for other job opportunities in addition to construction work, Gilley told him that "[w]e'll tie you in our, we'll tie you into our, uh, uh, uh, our entertainment, uh, uh, PR firm, which is the biggest in the country . . . and that will be a–perfect correlation for you to . . . to advance your political career." Id. at 47:14-25. Gilley continued, "Our PR firm is the best,

[4] Much of defendant McGregor's argument pays mere lipservice to the extremely deferential Rule 29 standard. Indeed, he recites much of the most incriminating evidence as to defendant McGregor, downplays any inference that would establish his complicity, and trumpets the exact opposite—i.e., least-incriminating—view of the evidence as the only reasonable appraisal. These logical gymnastics defy the simply conclusion drawn from the following evidence.

and–and–and, uh, there–there's a relationship there, uh, there's a, matter of fact there's a big relationship there. [The owner's] going to want to put somebody on the ground here." Id. at 48:41-43. After Beason noted that he would "still be able to do [the work] out of Birmingham maybe," Gilley confirmed, "Without a doubt." Id. at 49:17-21.

A reasonable inference from this exchange, in which defendant McGregor was both present and active, is that he was aware of discussions with Beason about his vote and support in the form of a public relations job—not, as he now argues, solely support for Beason's campaign. Indeed, defendant McGregor made as much clear with his own words, telling Beason that "this is probably the perfect setting for you to be politically active in some other campaigns, other than in your own." Id. at 51:1-2 (emphasis added).

The next day, on February 19, 2010, Massey solidified specifics of the public relations job, offering Beason, on behalf of Gilley and defendant McGregor, $1 million funneled through the public relations firm, which Beason could use at his discretion. Ex. J-009 at 19:34-37. Moreover, Gilley testified that Massey relayed the offer to him, (Trial Tr. vol. 10, 166:17 - 167:2, June 24, 2011), and that he, in turn, passed the information on to defendant McGregor (id. at 167:12-14). More specifically, Gilley testified that he and defendant McGregor had already discussed giving Beason $500,000 to secure his vote, and that defendant McGregor would have to foot the bill because Gilley was "broke." (Id. at 167:15-24.) In response, defendant McGregor told Gilley, "[W]e have to have his vote, Ronnie. Twenty votes is no different than two votes." (Id. at 168:3-4.)

Four days later, on February 23, 2010, Gilley testified that he met with Beason and Massey and confirmed the public relations job. (Id. at 171:15-19; Ex. J-013 at 6:45 - 7:2 ("I'm excited about the opportunities. I'm excited about the uh, the PR, uh, my PR firm's excited.").) Gilley also

testified as to his understanding of the agreement that he and Massey had confirmed on behalf of themselves and defendant McGregor, (Trial Tr. vol. 10, 172:4-5 ("Big Boy, you can handle that one, but we got to have it. Go get 'em.").), stating "[t]hat [they] were going to pay a million dollars a year for campaigns that he would orchestrate and manage, and that he was going to be a yes vote for our legislation." (Id. at 172:14-16.) Regarding defendant McGregor's knowledge of the meeting, Gilley testified that he "called Mr. McGregor before the meeting and after the meeting and also went by his office later." (Id. at 171:8-9.) Again, this testimony establishes that defendant McGregor was certainly aware of and ratified non-contribution bribes to Beason—i.e., money funneled through a public relations job that he could use, at his discretion, for other campaigns.

Defendant McGregor stakes his whole argument on the fact that Gilley testified that the money was for campaigns—and not for Beason's personal use. This is a red herring. Putting aside the fact that defendant McGregor was actually present during the February 18, 2010, meeting during which the group actively discussed securing a public relations job for Beason—as opposed to simply campaign contributions for his campaigns—the law does not require that an individual know the exact factual contours of a crime in order to be held liable as an aider and abettor.

Indeed, as the Court instructed, aiding and abetting requires that the defendant "willfully join[] together with [the principal] in the commission of a crime." Dkt. No. 1640 at 46. The crime charged in Count Four is federal program bribery under § 666(a)(2), and so long as the evidence establishes that defendant McGregor was a willing participate in the effort to bribe Beason, that is sufficient. See, e.g. United States v. Camacho, 233 F.3d 1308, 1317 (11th Cir.2000).("To prove guilt under a theory of aiding and abetting, the government must prove: (1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered

the offense; and (3) the defendant intended to aid in its commission."). Gilley and Massey have pleaded guilty for their roles in bribing Beason, and the evidence of defendant McGregor's participation in the events between February 18 and 23, 2010, is more than enough to establish his liability as an aider and abettor for Rule 29 purposes.

And yet there is more evidence supporting the fact that defendant McGregor was involved in the effort to bribe Beason. For example, later in the legislative session, Gilley and defendant McGregor discussed reaching back out to Beason, and each time Gilley referenced the earlier deal (which they believed he had rejected when he voted no on the BIR). On March 13, 2010, after defendant McGregor told Gilley to contact Beason, Gilley referenced the prior agreement and said it would not be "what I had agreed to before," to which McGregor responded, "I understand." Ex. J-174 at 4:10-11. Later the same day, defendant McGregor spoke to Gilley again and told him to hold off on contacting Beason:

MCGREGOR:	Let's wait and see if we even need him, cause you don't wanna . . .
GILLEY:	(inaudible)
MCGREGOR:	I'd rather that mother-fucker come to you anyway.
GILLEY:	Yeah, especially after the way he did <u>us</u> last time, and, uh, the deal, what I had worked out with him ain't gonna fly now.
MCGREGOR:	I, I, I, that's what I know, understand an, and what I'm thinking is, we shouldn't need him, okay?

Ex. J-175 at 1:21-36 (emphasis added). These calls provide further support for the conclusion that defendant McGregor was well aware and an active participant in the bribery charged in Count Four.

Finally, as the Court recognize during the original Rule 29 arguments following the close of

the government's case, the defendants' conduct with respect to other counts is relevant in evaluating whether there is sufficient evidence as to a particular count. (Trial Tr. vol. 32, 30:23-25, July 27, 2011.) ("Well I agree if there is other evidence that Mr. McGregor engaged in bribes, I can transfer that intent over to this count. I understand that.") To that end, the Court should view defendant McGregor's conduct as to Count Four in the broader context of his similar actions with respect to defendants Means, Preuitt, and Crosby, discussed infra as to Counts Six, Eight, and Fifteen, respectively. The evidence as to each of those counts makes clear that, here, as to Count Four, defendant McGregor possessed the requisite criminal intent to bribe Beason.

Likewise, the evidence at trial dealing with defendant McGregor's solicitation of Representative Barry Mask's vote supports a similar inference. In February 2010, defendant McGregor attempted to contact Representative Mask by telephone and left a message when Mask did not answer. Ex. J-003. Mask subsequently returned defendant McGregor's call on February 15, 2010. Ex. J-004. During the ensuing conversation, defendant McGregor told Mask that he needed Mask's vote on the upcoming pro-gambling legislation, id. at 13:38 ("I need you to be part of the 63."), and that "I can get you significant help for your campaign not from me, from people that I have a great working relationship with, business type people." Id. at 17:18-21. As he did with with Beason and defendants Preuitt and Means, defendant McGregor tied his "significant support" to Mask's vote on pro-gambling legislation.

Later that day, Bob Geddie and another lobbyist from his firm delivered two $2,500 campaign contributions to Mask at a fundraiser he was hosting in Tallassee, Alabama. (Trial Tr. vol. 6, 248:10-15, June 16, 2011.) The very next day, on February 16, 2010, defendant McGregor verified explicitly that he had instructed Geddie to make the contributions to Mask. Ex. J-006 at

2:27-31 ("Yeah I had, I had meetings in, well till about 11:30 last night but I, I called Bob right at well, about 30 minutes after I talked with you to see if he could go and represent, represent me and, and he said he'd be glad to and, uh, so anyway we talked about what, what I wanted him to do and, uh, and he did it.") (emphasis added). Defendant McGregor's conduct with respect to Mask, therefore, sheds additional light on his intent with respect to Beason in Count Four. This evidence, taken together with all of the other evidence of defendant McGregor's involvement with Beason, is sufficient to clear the exceedingly low bar set by Rule 29, and the Court should once again deny defendant McGregor's motion as to this count.

b. Count Sixteen – Defendant Crosby

The evidence similarly establishes that both defendant Crosby and defendant McGregor are guilty of § 666 charges found in Counts Fifteen and Count Sixteen, predicated on defendant McGregor's $3,000 monthly payments to defendant Crosby. The evidence of their culpability overlaps significantly, but we will begin with the state agent—Crosby—and Count Sixteen.

As the Court recognized in its jury instruction regarding Count 16, where bribes take the form of a stream of revenue paid over time, "all that must be shown is that payments were made with the intent of securing a specific type of official's services on an 'as-needed' basis." Dkt. No. 1640 at 27; see, e.g. United States v. Kincaid-Chauncey, 556 F.3d 923, 944 n.15 (9th Cir. 2009) ("It is sufficient, for example, if the evidence establishes that the government official has been put on 'retainer'—that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked."); United States v. Ganim, 510 F.3d 134, 149 (2d Cir. 2007) ("the government need not show

that the defendant intended for his payments to be tied to specific official acts (or omissions)"); United States v. Kemp, 500 F.3d 257, 281 (3d Cir. 2007) (same).

Disregarding the jury instructions, Crosby nonetheless tries to narrow that requirement. He argues that the government must prove a "specific" quid pro quo to establish defendant Crosby's guilt. In doing so, he relies principally on United States v. Siegelman, 640 F.3d 1159 (11th Cir. 2011) for the erroneous proposition that "the quid-pro-quo agreement must be for a 'specific' official action." (Crosby Supp. Rule Br. at 7.)[5] Siegelman is inapposite, however, because it addressed quid pro quos in the context of isolated bribes that take the form of campaign contributions. 640 F.3d at 1169-72. Count Sixteen, on the other hand, alleges a stream of revenue ($3,000 per month) paid to retain defendant Crosby's services in relation to his employment as an LRS analyst. The Court recognized this distinction when it instructed the jurors regarding Count Sixteen that "because the allegations . . . do not involve campaign contributions," the quid-pro-quo requirement "is satisfied so long as the evidence shows a 'course of conduct' of things of value flowing to an agent in exchange for a pattern of official actions favorable to the donor." Dkt. No. 1640 at 27.

At trial, the United States offered sufficient evidence from which a reasonable juror could conclude that defendant Crosby accepted monthly payments from defendant McGregor as a retainer fee in exchange for defendant Crosby's official assistance, as needed, with respect to the passage of

[5] He also cites United States v. Bryant, —F.3d—, 2011 WL 3715811 (3d Cir. 2011), for the proposition that "there is a requirement of an intent to alter conduct." (Crosby Supp. Rule 29 Br. at 8; McGregor Supp. Rule 29 Br. at 28.) However, Bryant, a non-binding Third Circuit case, merely emphasizes, in dicta, the uncontroversial point that a bribe must be intended to influence official action. Bryant, 2011 WL 3715811 at *9. The court did not hold that proof of intent to influence is the same as intent to alter or change the official action. A contrary holding would lead to the bizarre conclusion that no defendant could be found guilty for making payments meant to keep a public official on board with their current position.

pro-gambling legislation. Witness Lynn Byrd provided testimony regarding the $3,000 payments, (Trial Tr. vol. 9, 146:22 -148:4, June 23, 2011), which was corroborated by photocopied reproductions of the checks, Gov. Ex. 1164. Notably, Byrd testified that she recorded the payments in an accounting ledger devoted to lobbying fees. (Id. at 149:8-19.) This suggests that defendant Crosby received the money in exchange for personal services to defendant McGregor in relation to legislative activity.

FBI Special Agent Nathan Langmack testified regarding the many telephone calls between the two defendants, particularly during the legislative session when defendant McGregor would have most required defendant Crosby's services. (Trial Tr. vol. 31, 52:12-19 & 54:13-20, July 26, 2011.) The timing and volume of these calls further show that defendant Crosby made himself particularly available to defendant McGregor with respect to legislative issues, such as gambling bills.

In response, defendant Crosby claims that such evidence is consistent with defendant McGregor's authorization by the sponsors of bills to discuss particular legislation with LRS analysts on behalf of Alabama State legislators. But this fails to explain why in a recorded telephone intercept of a conversation between defendants McGregor and Crosby regarding SB380, defendant McGregor told defendant Crosby not to tell the bill's sponsor, Senator Bedford, about their discussion. Ex. J-127 at 1:29.

Defendant Crosby also argues in his motion that he did not always favor defendant McGregor's interests when performing his LRS duties. Whether or not this is true, Count Sixteen is based on the theory that defendant McGregor bribed defendant Crosby to do his bidding when needed. Thus, defendant Crosby did not necessarily have to favor defendant McGregor's interests all the time. Indeed, to have done so might have exposed the illicit relationship between the two

defendants, costing defendant Crosby the very job that justified defendant McGregor's monthly payment. Put differently, protecting both his job and his illicit arrangement required taking action that was not necessarily always consistent with defendant McGregor's interests.

The corrupt nature of the monthly payments accepted by defendant Crosby is further reinforced by two facts. First, the payments stopped in April 2010, shortly after the investigation that resulted in the Indictment became public knowledge. (Trial Tr. vol. 14, 28:24 - 29:1, June 30, 2011.) Second, as both Sumner and Special Agent McEachern testified, after the investigation became public knowledge in 2010, defendant Crosby amended his required financial conflicts disclosures ("Statements of Economic Interest") filed in 2008 and 2009 so that they reflected the previously unlisted payments. (Id. at 30:15-25, 31:4-8 & 31:19-21; Trial Tr. vol. 9, 209:15-25 & 210:6-7, June 23, 2011; Gov Ex. 1193.) The timing of this tardy disclosure and the fact that he had previously hidden the payments indicates defendant Crosby's consciousness of guilt.

Moreover, when he finally did disclose the payments in 2010, defendant Crosby used an acronym for the payments' source—"MCGP"—rather than the full name of defendant McGregor's business, "Macon County Greyhound Park." Although in his motion defendant Crosby makes light of the use of this acronym, comparing it to the many acronyms used by organizations such as the F.B.I., there is a difference between an acronym designed to facilitate communication through brevity, and one designed to conceal something, a reasonable inference in light of the other evidence of the defendants' corrupt arrangement.. As Mr. Sumner, who was ultimately charged as the Director of the Alabama Ethics Commission with maintaining and assessing the Statements, testified, he would not have recognized "MCGP" for what it represented. (Trial Tr. vol. 9, 211:19-21, June 23, 2011.)

Taken as a whole, the evidence establishes the necessary quid pro quo at the heart of Count Sixteen: In exchange for accepting defendant McGregor's monthly $3,000 payments, defendant Crosby made himself available at defendant McGregor's beck and call to perform official action relating to gambling legislation.

c. Count Fifteen – Defendant McGregor

Defendant McGregor has argued repeatedly essentially that "we just don't know why" defendant McGregor was paying defendant Crosby $3,000 a month. Claiming that the government has failed to prove a particular reason, he asks the Court to acquit him on Count Fifteen. As with his other remaining counts, defendant McGregor fails to appreciate the Rule 29 standard of review, which dictates that, if there is a criminal inference to be drawn from the evidence, the Court must adhere to it. Here, as discussed, the evidence is quite clear that defendant McGregor had defendant Crosby on a $3,000 retainer, defendant Crosby took favorable official action on defendant McGregor's behalf, see, e.g., Ex. J-127 at 4:1-16 (defendant McGregor dictates to defendant Crosby a reduction in the time period by which gaming appointments would be made), and defendant McGregor ceased the payments as soon as the instant investigation became public. (Trial Tr. vol. 14, 28:24 - 29:1, June 30, 2011.) While other inferences may be drawn from this evidence, a single rational juror no doubt could conclude that defendant McGregor possessed the criminal intent required to engage a stream-of-benefits quid pro quo. Only one rational juror is necessary, and, therefore, defendant McGregor's Rule 29 challenge as to Count Fifteen must fail.

5. Campaign-Contribution Charges

The other remaining § 666 counts involve allegations of campaign-contribution-based bribes: Count Five (McGregor), Count Six (Means), Count Eight (McGregor, Coker, Walker), Count

Nine (Preuitt), and Count Fourteen (Smith). As a result, the Court instructed the jury on the heightened explicit quid pro quo standard, which has been litigated repeatedly during the pendency of this matter, and which, at base, requires a direct connection between an offer of campaign contributions and a specific official action:

> For a defendant to be guilty under this statute, the government must prove that there was a quid pro quo. The term "quid pro quo" is Latin for "this for that," or "these for those." For all of the alleged bribes in these counts, the thing of value allegedly promised or exchanged took the form of a campaign contribution. Campaign contributions and fundraising are an important, unavoidable and legitimate part of the American system of privately-financed elections. The law recognizes that campaign contributions may be given to an elected public official because the giver supports the acts done or to be done by the elected official. The law thus also recognizes that legitimate, honest campaign contributions are given to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future.
>
> Lobbyists, as well as private individuals and other entities, often donate to the political campaigns of public officials and there is nothing illegal about this practice. Official acts that advance the interests of a lobbyist's clients, taken shortly before or after campaign contributions are solicited or received from the lobbyist, can, depending on the circumstances, be perfectly legal and appropriate.
>
> Therefore, the solicitation or acceptance by an elected official of a campaign contribution does not, in itself, constitute a federal crime, even though the donor has business pending before the official, and even if the contribution is made shortly before or after the official acts favorably to the donor.
>
> However, when there is a quid pro quo agreement, orally or in writing, that is, a mutual understanding, between the donor and the elected official that a campaign contribution is conditioned on the performance of a specific official action, it constitutes a bribe under federal law. By this phrase, I mean that a generalized expectation of some future favorable action is not sufficient for a quid pro quo agreement; rather, the agreement must be one that the campaign contribution will be given in exchange for the official agreeing to take or forgo some specific action in order for the agreement to be criminal. A close-in-time relationship between the donation and the act is not enough to establish an illegal agreement.
>
> A promise of a campaign contribution or a solicitation of a campaign contribution may be an illegal quid pro quo, as well. But to be illegal (1) it must be

> a promise or solicitation conditioned on the performance of a specific official action as I explained that phrase in the preceding paragraph; (2) it must be explicit; and (3) it must be material. To be explicit, the promise or solicitation need not be in writing but must be clearly set forth. An explicit promise or solicitation can be inferred from both direct and circumstantial evidence, including the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence, as well as the rational or logical inferences that may be drawn from them.
>
> Finally, the word material is a legal term, and it does not indicate whether something is tangible or intangible. Rather, it means that the promise or solicitation is one that a reasonable person would view as having the capacity or natural tendency to influence a person's decision. It does not matter whether the decision-maker actually accepted the promise or solicitation and acted accordingly. Again, a close-in time relationship between the donation and the act is not enough to establish an illegal promise or solicitation.

Dkt. No. 1640 at 20-23.

Nevertheless, despite the heightened showing necessary to establish an explicit quid pro quo, the evidence at trial, viewed in the light most favorable to the government at the Rule 29 stage, establishes the necessary connection to a specific official action such that the remaining counts involving campaign contributions remain viable on retrial.

a. Count Five – Defendant McGregor

The evidence at trial was sufficient to convince a rational juror beyond a reasonable doubt that defendant McGregor offered a campaign-contribution bribe to defendant Means as alleged in Count Five. Once again, as he did with Beason and Mask, defendant McGregor explicitly tied a legislator's vote to his offer of campaign support.

On March 22, 2010, defendant McGregor called defendant Means, who previously had abstained on the March 3, 2010, BIR vote on SB380, to discuss the legislation. Ex. J-146. During the conversation, defendant Means established a direct link between his vote and his desire to secure campaign contributions:

MEANS:	But anyway, I, you know, there's nothing I wanna do more than help you. I mean that, that, let, let me say up another thing, now this, this is another thing. I, apparently they've got a pretty strong Republican looks like they gonna run against me. Not this other guy that's already I, he hadn't qualified. But I'm gonna probably need a bunch a help now 'cause this guy's a reti . . . , he's a lieutenant colonel in the National Guard, he's been to Afghanistan twice, . . .
MCGREGOR:	(Inaudible)
MEANS:	. . . and the guy I beat, you remember Roy Smith, . . .
MCGREGOR:	Oh yeah.
MEANS:	. . . twelve years ago . . .
MCGREGOR:	I know Roy.
MEANS:	He's not over that election yet and he's the one that's, looks apparently talked him into running. So I'm gonna need some help from ya'll and I, you have already. I don't mean you hadn't.

Id. at 14:9-38.

In response to defendant Means's solicitation, defendant McGregor, who was aware of defendant's Means previously had abstained on the BIR vote, immediately responded that "you got my vote . . . [w]ell you got me and . . . whatever it takes for Larry Means to come back that's what we gonna do. That's the bottom line." Id. at 14:40-47 &15:9-11. Once again, the evidence is sufficient from this conversation alone to satisfy the Rule 29 standard as to Count Five.

Nevertheless, this conclusion is supported further by a subsequent conversation between defendant McGregor and Gilley. Gilley testified that on March 24, 2010, defendant Means solicited $100,000 for his campaign from Pouncy in exchange for his vote on SB380. (Trial Tr. vol. 11-B, 50, June 27, 2011; Exs. J-75 & J-76.) When Gilley relayed to defendant McGregor his agreement

to defendant Means's demand, defendant McGregor "was somewhat upset because he told me he already had Mr. Means under control, that he was going to be a yes vote from the beginning, but okay." (Trial Tr. vol. 11-B, 51:13-15.) In short, this conversation, in which defendant McGregor told Gilley that he had defendant Means "under control," provides additional support for the conclusion that defendant McGregor sought to keep defendant Means that way—under control—just two days earlier when he offered defendant Means an unspecified amount of campaign support after defendant Means indicated that he wanted—but wasn't yet committed—to "help" defendant McGregor on SB380. This quantum of proof therefore is sufficient for Count Five to survive a Rule 29 challenge.

b. Count Six – Defendant Means

Defendant Means's Rule 29 challenge regarding his $100,000 shakedown of Pouncy, Gilley, and Massey is baseless. The record is replete with evidence supporting his guilt on this charge—Count Six—and certainly enough to survive his third attempt to have the Court toss the count under Rule 29.

As noted, at this stage all credibility determinations are made in favor of the government. Analytically, so long as there is any evidence in the record to support the charge, all contradictory evidence should be disregarded. Pouncy's testimony alone therefore is sufficient to sustain Count Six. [6]She testified that on March 24, 2010, after informing defendant Preuitt that bribe offers made to him would be honored regardless of how SB380 fared in the House of Representatives, (Trial Tr. vol. 26, 182-86, July 19, 2011), she received a text message from defendant Means, a close friend

[6] As a result, defendant Means's lengthy recitation and analysis of Pouncy's cross-examination, (Means Supp. Rule 29 Br. at 12-15, 25-27), simply is irrelevant for Rule 29 purposes.

of defendant Preuitt, asking Pouncy to come to defendant Means's office (id. at 187:9). According to Pouncy, when she went to defendant Means's office, "[h]e said that he was going to have a real tough reelection campaign. He's going to have a real serious opponent and he needed a hundred thousand dollars and wanted [her] to ask [her] employer if he could get a hundred thousand dollars." (Id. at 187:18-21.) Pouncy testified further that defendant Means said he needed the money because he would lose support in his district if he voted in favor of SB380. (Id. at 189:12-13.) As a result, she believed that defendant Means's vote was contingent on the campaign contribution. (Id. at 194:10.)

After Pouncy secured Massey's and Gilley's approval to pay defendant Means the $100,000, Pouncy testified that she relayed their response to defendant Means the next morning, on March 25, 2010. When Pouncy told defendant Means, "They said, 'Yes.'" he responded, "Are we talking about the same thing?" (Id. at 196:16-18.) Pouncy confirmed that they were and testified that she believed they were referencing the exchange of defendant Means's vote for $100,000 in campaign contributions. (Id. at 197:8-9.) Based on Pouncy's testimony alone, there is sufficient evidence to establish defendant Means's guilt as to Count Six.

But, as is the case with his co-defendants, there is additional evidence that supports defendant Means's guilt. For example, defendant Means's $100,000 solicitation does not exist in a vacuum, and under Rule 29 the Court can consider it along with his solicitation of an unspecified amount of campaign contributions from defendant McGregor. See Ex. J-146. Likewise, defendant Means's corrupt intent also is supported by something else he told Pouncy. During the same conversation in which he solicited $100,000 in connection with a specific official action (his vote on SB380), he told Pouncy that defendant Coker "was putting a deal together for him for the rest of the tracks, for the

other tracks," (Trial Tr. vol. 26, 188:8-9), which Pouncy understood to mean that defendant Coker "was getting money from the those groups for [defendant Means]." (Id. at 188:18.)

Finally, the record also establishes conclusively that defendant Means was coordinating with defendant Preuitt to cash in on SB380. As they well knew, their votes were critical to the bill's passage. In addition to the inference that can be drawn from the timing of defendant Means's shakedown of Pouncy in relation to her earlier confirmation for defendant Preuitt that his offers would still be good regardless of how the House handled SB380, there is also direct evidence that the senators were coordinating. On March 20, 2010, Pouncy told Massey that defendant Means had suggested that Gilley go to defendant Preuitt's home in Talladega to discuss the legislation. Ex. J-051 at 1:14-31; see also Ex. J-054 at 1:16-21 (Pouncy tells Massey that defendant Means instructed her to tell Gilley to stop calling defendant Preuitt). On March 22, 2010, eight days before the final vote, defendant Means told defendant McGregor that he'd "still been talking to Jim [Preuitt]" and that they were "trying to stay together on this thing." Ex. J-146 at 16: 20 & :28-29. Two days later, on March 24, 2010, Massey relayed to Gilley a conversation he had with defendant Preuitt, in which Massey told defendant Preuitt, "I know you're rock solid with Larry [Means]. I know you're covering him." Ex. J-078 at 5:1-2. Defendants Means's coordination with defendant Preuitt, coupled with his independent efforts to secure favorable deals before voting for the legislation, provides additional evidence of his corrupt state of mind as to Count Six.

Ultimately, after abstaining from the March 3 BIR vote, defendant Means cast his vote in favor of SB380, notwithstanding the fact that the final bill did not protect one of his constituent counties, something he previously characterized as a dealbreaker. Gov. Ex. 1166 (WSFA broadcast) ("If Etowah County's not in it, I'm not gonna be for the bill.") The evidence adduced at trial makes

clear that his decision was not a curious aberration, but rather the fulfillment of his end of an explicit bribery agreement, whereby he agreed to trade his vote for $100,000 in campaign contributions.

c. Count Eight – Defendant Walker

Perhaps the most concerted effort to corrupt a legislator's vote on SB380 involved defendant Preuitt, who, on March 3, 2010, voted "no" on the BIR. In the span of twenty-seven days, defendants McGregor, Coker, and Walker, among others, including Gilley, Massey, and Pouncy, sought successfully to turn his vote around. The evidence as to each remaining defendant charged in Count Eight with bribing defendant Preuitt amply supports denial of their respective Rule 29 motions.

For instance, proof of defendant Walker's culpability as to Count Eight—the Preuitt bribe—comes straight out of his own mouth. In a conversation with Massey on March 24, 2010, defendant Walker discussed a meeting he had with defendant Preuitt and another political consultant, David Mowery. Ex. J-073. According to defendant Walker:

> Walker: Here's the thing. I, I, I went in and offered my services.
>
> Massey: Right, right.
>
> Walker: Along with Mowery.
>
> Massey: Right.
>
> Walker: And I said let me, let me do a poll so I, so Mowery and I can give you a scientific strategy and I said I'll do the poll. And uh, and of course I said all I need is your vote; so Mowery calls me last night and said, said that he called him and said to, to run with it. Now I'm assuming the mother fucker wouldn't call me and tell me to pay for a goddamn poll and he ain't gone be with us. But that's just me assuming.

Id. at 4:41 - 5:13 (emphasis added). Under Rule 29, defendant Walker's admission that he offered

defendant Preuitt his campaign services and a poll in exchange for defendant Preuitt's vote is enough to establish the required quid pro quo for Count Eight. See also Ex. J-193 at 1:24-26 ("I went in and I, I did my deal with Preuitt today and offered to do a fuckin' poll for him."); Gov. Ex. 1197A (text message from Pouncy to Massey, stating "Jay is meeting with Preuitt right now").

And yet this is not the only evidence supporting defendant Walker's guilt. For example, it was defendant who first pitched the idea of purchasing trucks from defendant Preuitt's dealership. According to Massey, sometime before the BIR vote on March 3, defendant Walker "suggested that we go buy a significant number of trucks from Senator Preuitt." (Trial Tr. vol. 19, 214:21-22, July 8, 2011.) Indeed, in a later conversation, on March 21, 2010, Gilley told defendant Walker that he could purchase trucks from defendant Preuitt:

> Gilley: Jamie, Jamie Johnson is calling him, Randy Owen is calling him, you can let him know we'll have our celebrities come in here and support you and we'll blow the competition away. We will, we'll wax their ass but you got to vote for us on this and you can buy a damn fleet from him if you have to while you're there.

Ex. J-184 at 2:34-42. Defendant Walker responded simply, "Alright." Id. at 2:44.

And although Gilley and Massey testified that they did not take the truck offer seriously,[7] the fact remains that defendant Walker did, as demonstrated by his eagerness to work closely with Gilley and Massey. To that end, in the same conversation, defendant Walker confirmed his allegiance,

[7] Gilley nevertheless referenced having country musician George Jones purchase a truck during a March 22 conversation with defendant Preuitt that was recorded while Gilley was on a wire-tapped line with Jeff Rubin. Ex. J-560 at 1, ll:21-27 ("I was talking to George Jones about the night we were having discussions back to the huh to the senate and I was sharing with him what our desires were with you and he obviously 100% committed, he needs to cut a commercial, whatever he needed to do and he huh..he huh . . . then he started [laughing] he started hitting me for another truck, uh, we, we got to get him a truck so we probably [inaudible] to you [inaudible] on a vehicle here in the next month . . . .").

telling Gilley, "I'm always on your team, brother" after Gilley assured defendant Walker that he'd start paying defendant Walker's salary. Id. at 6:18-22. The next day, Pouncy told Massey that defendant Walker was "pretty adamant" about going to Talladega to pitch defendant Preuitt on behalf of Gilley. Ex. J-053 at 4:25.

As such, the evidence of defendant Walker's culpability as to Count Eight is overwhelming. If nothing else, the evidence establishes that he offered defendant Preuitt a campaign contribution (campaign services and a poll) contingent specifically on defendant Preuitt's vote. He actively sought to bribe defendant Preuitt, both on his own and in concert with his co-conspirators, and the Court should reject his Rule 29 argument.

d. Count Eight – Defendant Coker

As with defendant Walker, defendant Coker's own words establish direct evidence of his guilt on Count Eight. In a conversation on March 23, 2010, a week before the final vote on SB380, defendant Coker provided defendant McGregor with one of several updates regarding his and Gilley's efforts to secure defendant Preuitt's vote. During the call, Ex. J-150, defendant Coker described a lunch he had with defendants Preuitt and Means:

> Coker: We had a good - had a good chance to talk and, uh, and I, I'm, you know, I, I think I've, you know, I like to try to give uh everybody credit, I think, uh, uh, Gilley's call and conversation with 'im, uh, helped him a great deal, too, I think he has that little added layer of uh what they offered in terms of, uh, entertainers and things like that . . .
>
> McGregor: Tight
>
> Coker: . . . during this campaign I think that meant a lot to 'im coz I'd already told 'im what we would do and what uh Nat would do, and . . .
>
> McGregor: That's right . . .

Coker: And, uh, I think, thuh, that, think uh, Gilley call give them credit for, uh, sortaputtin' a little icin' on the cake for it.

McGregor: Yep. That's good and they - and obviously they meant everything they said.

Coker: Yeah.

Id. at 7:6-30 (emphasis added). Not only does this conversation reveal that defendants Coker and McGregor were aware of and encouraged Gilley's illicit offers, but viewing the evidence in the light most favorable to the government, it also establishes that they had made additional promises in connection with defendant Preuitt's vote.

Additionally, defendant Coker actively coordinated the Preuitt effort with Massey. To that end, on March 26, 2010, defendant Coker spoke with Massey about how best to articulate for defendant Preuitt what they were willing to offer:

MASSEY: Yeah, and just so you'll know I actually ended up having a forty five minute conversation with him Wednesday, he just called me into his office, so, basically.

COKER: Yeah, yeah he, I mean he's fine, here's what, and I'm, I'm trying to figure out the best way to handle this, he wanted me to talk to, to Gilley, and uh, uh, you know he, he's talked about, you know said they say, want to be, you know real involved in my campaign, and all this kind of thing, uh.

MASSEY: Yeah.

COKER: Uh, uh, and I, I think what he's wanting me to find out and I guess I'm trying to figure out how, I mean I don't want to be getting into Ronnie's business, but I'm trying to figure out what's the best way to, uh, to get to Preuitt, uh, what uh, heavily involved means. Ha, ha, ha.

MASSEY: Yeah, yeah.

COKER: And I'm not talking about just uh, campaign, the contribution, but uh, uh, you know what he's gonna have, I mean.

Ex. J-082 at 2:8-38 (emphasis added). Later, during the same conversation, Massey made clear that "I know roughly what we're talking about, I know roughly money and otherwise," id. at 3:4-6, and defendant Coker added shortly thereafter, "I think the money and, in y'alls effort helps a lot, and I hope Milton passed that on to Ronnie, but uh, if you feel comfortable with doing it, this, this way, call me." Id. at 4:36-41. In Massey's view, defendant Coker was "overseeing the effort" to secure defendant Preuitt's vote. (Trial Tr. vol. 19, 212:4-17, July 8, 2011; Ex. J-084 at 3:36-47 ("Tom is now kinda coming in to wrap up all our work, and so Tom called me this morning, he and Ronnie . . . . He and Ronnie are on the phone right now uh, kinda confirming all the things that we're gonna do, and make sure that gets articulated clearly versus kinda generally to Preuitt . . . .").)

Not leaving anything to chance, defendant Coker also visited defendant Preuitt on March 29, 2010—the day before the vote—at his home in Talladega. Ex. J-088 at 1:37-43 ("I was up in Talladega and Gadsden yesterday and uh . . . [u]h, visiting, and so I think everything's fine there."). Indeed, on the same day of his visit, defendant Coker told defendant McGregor that "our other two are fine" and that "I'm spending a lot of ya money though." Ex. J-160 at 5:17 & :26. In response, defendant McGregor asked, "Well you, you delivering the cheese. Ain't ya man?" Id. at 5:29-30. Critically, defendant Coker clarified that he was talking about "in the future, with two of those guys," to which defendant McGregor responded, "I understand." Id. at 5:32-36. A clear inference from this evidence is that defendant Coker had promised defendant McGregor's money to the "other two" and would spend it after the vote. Thus, as with defendant Walker, the evidence establishes defendant Coker's criminal culpability—namely, that he sought an explicit quid pro quo with defendant Preuitt and was willing to trade whatever he and Gilley could to get defendant Preuitt's vote.

e. Count Eight – Defendant McGregor

As the foregoing has made clear, the record also contains ample evidence to establish that defendant McGregor is liable on Count Eight on an aiding or abetting theory. On March 23, 2010, defendant McGregor told defendant Coker that they needed "to zero in on Preuitt like a, like a laser beam," Ex. J-147 at 12:37-38, and directed defendant Coker to "get with Preuitt today as soon as possible." Id. at 12:42-43. Later in the conversation, defendant McGregor reiterated defendant Coker's need to "zero in and focus on," defendant Preuitt, id. at 14:33, instructing that "[w]hen you get something lined up with Preuitt, let me know." Id. at 15:32-34. Later that same day, defendant Coker told defendant McGregor about how Gilley's promise of "entertainers and things like that" was "icin' on the cake." Ex. J-150 at 7:12-13 & :25.

Solidifying the fact that he was aware of Gilley's illicit efforts to secure defendant Preuitt's vote with the promise of campaign resources, defendant McGregor called Gilley three hours later and told him that "Preuitt was braggin on ya'll today," to which Gilley responded that "we gone stay on him like white on rice, now. We, we uh, we got some thangs lined up for him." Ex. J-192 at 6:1-2 & :10-12. When Gilley reaffirmed that "[w]e're working on it as hard as we can," defendant McGregor responded, "I know you are." Id. at 6:22-25. A week later, as noted, defendant Coker told defendant McGregor that he visited Talladega and said that he was spending a lot of defendant McGregor's money.

In sum, the evidence is sufficient for Rule 29 purposes to establish that not only was defendant McGregor aware of the efforts to bribe defendant Preuitt in exchange for his vote, he was actively encouraging defendant Coker and Gilley to get the job done. Coupled with Gilley's repeated testimony that he always kept defendant McGregor in the loop, it is simply implausible to conclude that no reasonable juror could find defendant McGregor guilty beyond a reasonable doubt as to

Count Eight.

f. Count Nine – Defendant Preuitt

Count Nine charges defendant Preuitt with soliciting the campaign-contribution bribes offered by the defendants (and their co-conspirators) charged in Count Eight. Much of the evidence establishing defendant Preuitt's intent overlaps with the evidence supporting convictions on Count Eight. And as with his co-defendants, this overlapping evidence, as well as additional evidence, is sufficient to defeat defendant Preuitt's Rule 29 challenge.

In under one month, defendant Preuitt went from a "no" vote on the SB380 BIR vote to a "yes" vote one the revised legislation. During that time, he actively pursued bribes from Gilley (through Pouncy, Massey, and defendant Walker) and defendant McGregor (through defendant Coker). Things of value offered to defendant Preuitt included: $2 million from Jennifer Pouncy, (Trial Tr. vol. 26, 172-73, July 19, 2011), defendant Walker's and David Mowery's campaign services, Ex. J-073, a poll for his campaign, id. the use of country music entertainers for his campaign, and a truck purchased by George Jones, Ex. J-560.

Critically, the evidence establishes that defendant Preuitt was not merely a passive participant in these discussions. Rather, as Pouncy testified, he knew exactly what he was doing when he asked whether Gilley's commitments would still be good if the legislation failed in the House of Representatives. (Trial Tr. vol. 26, 182-86; Ex. J-072 at 1:14-17.) Similarly, it was defendant Preuitt who affirmatively sought clarification through defendant Coker regarding what defendant Gilley meant when he promised defendant Coker that they would be "heavily involved" in his campaign if he supported the legislation. Ex. J-082 at 2:27-32.

Following defendant Preuitt's vote in favor of SB380 on March 30, 2010, he spoke with

Gilley using defendant Smith's cell phone on March 31, 2010. During the conversation, defendant Preuitt specifically mentioned the conversations he previously had with defendant Walker and defendant Coker:

> PREUITT: Well I think uh, you probably knew we had couple or uh, (inaudible) decent conversation prior and uh . . .
>
> GILLEY: Yes sir.
>
> PREUITT: . . . w . . . , w . . . , with Jay and uh, then I get back with Coker and uh . . .
>
> GILLEY: Yes sir and, and we are rock solid and we're ready, we're ready to uh, again we believe in supporting people who, who support democracy, as I told you before and we are, we are gung ho and ready to get started and we wanna prove a damn point on this situation. And I, and, and I just wanted to tell ya a, a big thank you and, and we're rock solid and a hundred percent behind you sir.
>
> PREUITT: Um, you know we talked about uh, if there's any headway could be made uh, not necessarily if but anything that could be done to kinda taper them off the other side a little if that would be possible.

Ex. J-215 at 4:43 - 5:21. This conversation crystallizes defendant Preuitt's understanding that the commitments he secured were tied explicitly to his vote on the bill. As soon as he held up his end, he turned to Gilley to remind him that the vote was not free.

In short, the trial record supports denial of defendant Preuitt's Rule 29 motion on Count Nine. In the weeks leading up to the vote on SB380, he was in constant communication with Gilley and defendant Coker to formalize illicit offers, see, e.g. Ex. J-085 at 1:28-30 (Massey to defendant Walker: "[W]e are fine tuning everything through Coker this morning for Preuitt."); id. at 1:34-36 ("Ronnie is gonna have a conversation with Coker just to verify all our commitments, and make sure he's clear on them so we can finalize everything."), as well as Massey, Pouncy, and defendant

Walker, even taking house calls from defendant Coker, and the evidence makes clear that his intent was to secure campaign-related benefits in exchange for his critical vote in favor of SB380. And yet when the FBI asked defendant Preuitt whether he had been offered any thing of value in exchange for his vote, he lied to cover it up, (Trial Tr. vol. 26, 97:2-23, July 19, 2011), providing even more evidence of his corrupt intent.

g. Count Fourteen – Defendant Smith

Defendant Smith is charged in Count Fourteen with soliciting a $400,000 campaign-contribution from Gilley in connection with the upcoming vote on SB380. The evidence, viewed in the light most favorable to the government, makes clear that not only was Gilley buying defendant Smith's vote, he was buying her influence over other legislators in relation to SB380. The evidence at trial established that in 2008, after Gilley funneled $40,000 in conduit payments to defendant Smith's campaign—at her direction—(Trial Tr. vol. 10, 43:2-21, June 24, 2011; Gov. Exs. 1002 & 1005), defendant Smith thanked Gilley and told him, "Thank you, and I'm yours. Whatever you need, you just let me know." (Trial Tr. vol. 10, 44:20-21.) And from then on, the evidence shows that she was.

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. Beason testified, for example, that defendant Smith offered him several hundred thousand dollars in campaign contributions, through Gilley, if Beason voted for the Sweet Home Alabama bill introduced by defendant Ross. (Trial Tr. vol. 2, 31:22 - 32:8, June 13, 2011.). Lewis recalled receiving a similar offer during his testimony. (Trial Tr. vol. 8, 28:18 - 31:23, June 22, 2011.) Beason further recalled being specifically told by Smith that he would receive $500,000 in

contributions for his prospective lieutenant gubernatorial campaign if he supported the legislation. (Trial Tr. vol. 4, 134:6-14, June 15, 2011.) Lewis recalled this offer to Beason during his testimony, as well. (Trial Tr. vol. 8, 37: 9-19.)

After the 2009 legislation failed to gain traction, defendant Smith worked with Gilley, Massey, and other co-conspirators during the 2010 legislative session to secure passage of SB380. In exchange for her official actions, Gilley helped secure hundreds of thousands of dollars in direct and in-kind campaign contributions to defendant Smith's campaign beginning in December 2009. (See, e.g., Trial. Tr. vol. 10, 72.) Later, in February 2010, she told Gilley that Beason was "back in play," and inquired whether Gilley and defendant McGregor were still willing to fund Beason's campaign because they had a "prime opportunity to obtain his vote." (Id. at 136:9-12.)

Critically, defendant Smith's role also involved gathering the votes of other legislators in 2010. To that end, defendant Smith facilitated and made bribe offers to defendants Preuitt and Means, as well as then-Senator Steve French. Indeed, on March 2, 2010, defendant Smith and Massey met with defendant Preuitt in an unsuccessful effort to get him to vote for the BIR on SB380 the next day. (Trial Tr. vol. 19, 218:2-6, July 8, 2011.) According to Massey, defendant Smith acted at the direction of Gilley and Massey. (id. at 157:9-16.) Indeed, when defendant Preuitt spoke to Gilley and referenced commitments he received from defendant Coker and defendant Walker on March 31, 2011, he spoke to Gilley on defendant Smith's phone. Ex. J-215.

In exchange for her behind the scenes efforts in connection with SB380, Gilley testified that he agreed to funnel $400,000 in campaign contributions to defendant Smith. (Trial. Tr. vol. 10, 192:12 -194:17.) Moreover, Gilley clarified that in exchange for his campaign contributions defendant Smith had agreed to "vote yes on the bingo and help any way she could [to] pull other

legislators into the same position." (Id. at 194:5-6.)

During a conversation on March 11, 2010, defendant Smith called Gilley and during their conversation solicited the $400,000, before instructing Gilley to speak with Rick Heartsill about which PACs to use. Ex. J-172 at 1:43 -3:41. Trial testimony from Gilley established that defendant Smith facilitated payment of half of the money, $200,000, in four separate checks to four separate PACs. (Trial. Tr. vol. 10, 198:12 & 226: 22.) Bryant Raby, administrator of those four PACs, testified that he had received the four checks. (Trial Tr. vol. 13, 31-32, June 29, 2011.) Raby further testified that defendant Smith's campaign consultant at the time, David Mowery, had instructed him to transfer the funds to other PACs after they had been deposited into Raby's initial four PACs. (Id. at 38-39.) Photocopies of the checks marked and admitted as Government Exhibit 1065, as well as an e-mail from Raby to Heartsill, who had been defendant Smith's campaign consultant, Mowery, Gilley, and defendant Smith that listed the names and addresses of the PACs, see Gov. Ex. 1066, corroborate Raby's testimony.

In addition, the evidence establishes that, on at least two occasions, defendant Smith agreed to pressure other legislators to vote in favor of SB380 during a conversation in which she followed up with Gilley about the promised money. See, e.g., Ex. J-190 at 1:43-46 (Gilley to Smith: "Do me a favor, uh Beason won't call me back, see if you can lean on him a little bit or any damn body else for that matter."); Ex. J-195 at 2:47 - 3:13 (Gilley tells Smith to "stay tough on them now" and "lean on every one of 'em you can" and Smith responds "I will"). This evidence is sufficient to establish defendant Smith's understanding that her receipt of Gilley's money was premised on her official action with respect to the upcoming vote on SB380, as charged in Count Fourteen.

Finally, testimony from former Senator Steve French on July 22, 2011, provided additional

evidence of defendant Smith's efforts to buy votes. On the floor of the Alabama State Senate during the legislative session, on March 11, 2010, defendant Smith explicitly and repeatedly offered campaign contributions in exchange for French's vote in favor of SB380. (Trial Tr. vol. 29,198: 3-20, July 22, 2011.) In short, the evidence at trial established that, after forming an illicit alliance with Gilley as far back as 2008, defendant Smith solicited an additional $400,000 in campaign contributions, which was tied to her support for SB380, both personally and through her influence over other legislators. Under the deferential Rule 29 standard, the evidence is sufficient to satisfy the explicit quid pro requirement in campaign-contribution-based bribe cases.

C. Conspiracy Under 18 U.S.C. § 371

Six of the remaining seven defendants—defendants McGregor, Coker, Means, Preuitt, Smith, and Walker—are charged with conspiracy to commit federal program bribery. The existence of a criminal conspiracy in this case also has been litigated extensively prior to and during trial. The parties submitted individual briefs solely on this issue. And, except as to defendant Crosby, the Court twice has denied motions under Rule 29 (as well as motions to dismiss) challenging Count One.

Indeed, prior to the parties' summations, the Court found by a preponderance of the evidence that a single conspiracy existed and that the then-eight defendants (except for Crosby), as well as Pouncy, Massey, and Gilley, and other unindicted co-conspirators were all members. (Trial Tr. vol. 36, 52:23 - 53:11, August 3, 2011.) As with the other charges, there has been no additional evidence since the Court's last ruling at the close of all evidence, and the Court once again should deny motions under Rule 29 as to Count One—the conspiracy to corrupt the legislative process through federal program bribery.

1. Applicable Law

In order to prevail in a Rule 29 challenge to conspiracy charges, the government need only present sufficient evidence to prove that "an agreement existed between two or more persons to commit a crime and that the defendants knowingly and voluntarily joined or participated in the conspiracy," as well as the commission of an overt act in furtherance of the conspiracy.[8] United States v. Seher, 562 F.3d 1344, 1364 (11th Cir. 2009) (quoting United States v. Silvestri, 409 F.3d 1311, 1328 (11th Cir. 2005)); see also, e.g., United States v. Moore, 525 F.3d 1033, 1039 (11th Cir. 2008) ("The elements of the offense of conspiracy are: (1) an agreement between the defendant and one or more persons, (2) the object of which is to do either an unlawful act or a lawful act by unlawful means.") (internal quotation marks omitted); United States v. Gupta, 463 F.3d 1182, 1194 (11th Cir. 2006) (government must show "the existence of an agreement to achieve an unlawful objective, the defendant's knowing and voluntary participation in the conspiracy, and the commission of an overt act in furtherance of it") (quoting United States v. Suba, 132 F.3d 662, 672 (11th Cir. 1998)) (internal quotation marks omitted).

In proving the existence of a conspiracy, "direct evidence of an agreement is unnecessary." United States v. McNair, 605 F.3d 1152, 1195 (11th Cir. 2010) (citing United States v. Jennings, 599 F.3d 1241, 1250-51 (11th Cir. 2010). "Since illegal conspiracies are secretive by nature, the existence of the agreement and the defendant's participation in the conspiracy may be proven entirely from circumstantial evidence." United States v. U.S. Infrastructure, Inc., 576 F.3d 1195, 1203 (11th Cir. 2009) (citing Suba, 132 F.3d at 672).

Thus, the agreement "may be inferred from the relationship of the parties, their overt acts and

[8] This formulation is consistent with the Court's jury instructions. Dkt. No. 1640 at 15.

concert of action, and the totality of their conduct." United States v. Schwartz, 541 F.3d 1331, 1361 (11th Cir. 2008) (citing United States v. Guerra, 293 F.3d 1279, 1285 (11th Cir. 2002)). To that end, "[p]roof that the accused committed an act which furthered the purpose of the conspiracy is an example of the type of circumstantial evidence the Government may introduce to prove the existence of an agreement." United States v. Moore, 525 F.3d 1033, 1040 (11th Cir. 2008) (citing United States v. Sullivan, 763 F.2d 1215, 1218-19 (11th Cir. 1985)).

Further, "[i]t is not necessary for the government to prove that a defendant knew every detail or that he participated in every stage of the conspiracy." McNair, 605 F.3d 1152, 1196 (11th Cir. 2010) (quoting United States v. Jones, 913 F.2d 1552, 1557 (11th Cir. 1990)) (internal quotation marks omitted). "A defendant may be found guilty of conspiracy if the evidence demonstrates he knew the 'essential objective' of the conspiracy, even if he did not know all its details or played only a minor role in the overall scheme." Id. at 1195-96 (quoting Guerra, 293 F.3d at 1285) (internal quotation marks omitted).[9] Likewise, "[t]he government need not show 'each defendant had direct

[9] The defendants consistently ignore this well-settled principle, (see, e.g., Means Supp. Rule 29 Br. at 21-24 (listing charged conspiracy conduct to which defendant Means was not a party; McGregor Supp. Rule 29 Br. at 36-39 (same as to defendant McGregor)), such ignorance does not change the principle's validity: put simply, a defendant need not know all the details of the agreement or play a large role in its execution. See, e.g., Blumenthal v. United States, 332 U.S. 539, 557 (1947) (holding that conspiracy law does not require "evidence" that each co-conspirator had "knowledge of all [of the conspiracy's] details or of the participation of others"); accord United States v. Richardson, 532 F.3d 1279, 1284 (11th Cir. 2008); United States v. Edouard, 485 F.3d 1324, 1347 (11th Cir. 2007); United States v. Alvarez, 755 F.2d 830, 853 (11th Cir. 1985); United States v. Payne, 750 F.2d 844, 859 (11th Cir. 1985); United States v. Brito, 721 F.2d 743, 746 (11th Cir. 1983); United States v. Watson, 669 F.2d 1374, 1379 (11th Cir. 1982).

Indeed, the law is also clear that defendants can squabble and act at cross-purposes and yet still be liable as members of an overarching conspiracy. See United States v. Hamilton, 689 F.2d 1262, 1270 (6th Cir. 1982) (holding that a conspirator "must have some stake in the conspiracy" but "each party need not have the same stake"); United States v. Warner, No. 02 CR

contact with each of the other alleged co-conspirators.'" Id.

2. Summary of the Evidence

Here, the evidence adduced at trial is sufficient to satisfy the deferential Rule 29 standard as to each remaining defendant charged in Count One of the Indictment. Indeed, both direct and circumstantial evidence, in the form of witness testimony, documentary exhibits, and recorded conversations, establish the defendants' roles in the overarching, unitary conspiracy. Because there is significant overlap between the evidence supporting the remaining § 666 counts and the defendants' participation in the conspiracy, and because this issue has been briefed previously, the following sections contains only capsule summaries of the evidence sufficient to establish that the defendants knowingly joined a conspiracy to commit bribery.

a. Defendant McGregor

The evidence at trial established that defendant McGregor was the kingpin of

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506-1,4, 2006 U.S. Dist. LEXIS 64085, at *9-11 (N.D. Ill. Sept. 7, 2006) (holding that co-conspirators' potentially "competing goals" did not "indicate multiple conspiracies" where different goals were still "integral to conspiracy's overall objective to use state resources for personal benefit"); United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990) ("The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes."); see also United States v. Heinemann, 801 F.2d 86, 92 (2d Cir. 1986) (finding single conspiracy even where co-conspirators "were at times hostile to each other," noting that in an "ongoing, unitary conspiracy," disputes might arise between co-conspirators and "switches in affiliation might occur from time to time"); United States v. Kelly, 892 F.2d 255, 259-60 (3d Cir. 1989) (rejecting defendant's argument that conspirators were "not working in concert" because they displayed "infighting" amongst themselves); United States v. De Varona, 872 F.2d 114, 120 (5th Cir. 1989) (holding that "disputes between participants do not necessarily defeat a single conspiracy theory"); United States v. Nersesian, 824 F.2d 1294, 1303 (2d Cir. 1987) (finding that distrust, anger, argument, and "acrimony exhibited among the conspirators" were consistent with the single conspiracy charged); United States v. Rhoads, 48 F. Supp. 175, 176 (D.D.C. 1942) (holding that some co-conspirators "have different benefits from others and to that extent may be acting in legal opposition to others charged with the wrong").

the conspiracy. He recruited defendant Gilley as his business parter and funded Gilley's efforts to secure passage of pro-gambling legislation. According to Gilley, defendant McGregor was aware of all of the illicit offers he made during the 2010 legislative session. Moreover, defendant McGregor spoke regularly with defendant Coker regarding their efforts to bribe defendant Preuitt. The evidence also established that defendant McGregor was involved in illicit efforts to secure the votes of a myriad of legislators, including, among others, Beason, Mask, Ross, defendant Means, defendant Preuitt. In light of defendant McGregor's rampant efforts to pass pro-gambling legislation, the evidence easily establishes that he participated in a far-reaching conspiracy to corrupt the legislature through vote-buying.[10]

b. Defendant Coker

Similarly, the evidence established that defendant Coker also joined the conspiracy no later than February 2010. As noted, he had frequent conversations with Massey, who has pleaded guilty to conspiracy, regarding their efforts to secure defendant Preuitt's vote. Likewise, defendant Coker relayed the information he gathered from Gilley and Massey to defendant McGregor, who would direct defendant Coker on how to proceed. Defendant Coker was the de facto dean of lobbyists for the senate in 2010, and, according to Massey, he took the lead on shoring up defendant Preuitt's vote. Pouncy also testified that defendant Coker was working with with other bingo operators to put together a deal for defendant Means.

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[10] As a result of defendant's culpability under Count One, he also is similarly liable for the substantive bribery offenses charged in Counts Four, Five, and Eight under a Pinkerton theory. Contrary to defendant McGregor's position, the bribery allegations contained in the substantive counts with which he is charged because, as the Court instructed, the evidence establishes that those offenses were committed during the period of the conspiracy and were reasonably foreseeable to defendant McGregor. Dkt. No. 1640 at 48.

c. Defendant Means

Defendant Means's participation in the conspiracy is established in several ways. Not only did he seek bribes from defendant McGregor and defendant Coker, he also independently carried out the $100,000 shakedown of Pouncy, Massey, and Gilley. Perhaps most importantly, the record contains overwhelming evidence that defendant Means and defendant Preuitt were also communicating regularly regarding SB380 in a concerted effort to secure the best possible deals.

d. Defendant Preuitt

Likewise, the evidence, viewed in the light most favorable to the government, supports the conclusion that defendant Preuitt was a member of the conspiracy. Not only did he coordinate with defendant Means, he also had multiple conversations with defendants Walker, Smith, and Coker, as well as Massey and Gilley. During several of these conversations, defendant Preuitt actively inquired about what Gilley, Walker, McGregor, Coker, and Pouncy were willing to offer and whether their offers were in any way contingent on the bill's fate in the House of Representatives. Indeed, defendant Preuitt, like defendant Means, took official action as a result of their conspiratorial efforts—ultimately voting in favor of SB380 on March 30, 2010.

e. Defendant Smith

The evidence also established defendant Smith's involvement in the conspiracy, as early as 2008, when she committed her support to Gilley after he funneled unlawful contributions to her congressional campaign. Later, in 2009, the evidence, viewed in the light most favorable to the government, established that Smith, along with Massey, Gilley, and others, sought to bribe Beason and Lewis at (and after) the dinner at Garrett's restaurant on March 3. Gilley

testified that he frequently discussed with defendant Smith the types of offers they could make other legislators in order to secure their votes on pro-gambling legislation. Indeed, in 2010, around the time that she solicited $400,000 from Gilley, she attempted to bribe Steve French and helped facilitate defendant Preuitt's favorable vote. Furthermore, in order to hide payments from Gilley, defendant Smith actively conspired with him to funnel money through various PACs, which would hide the source of the money.

f. Defendant Walker

The evidence at trial similarly proved defendant Walker's involvement in the conspiracy to corrupt the legislative process. In March 2010, he was an integral member of the group of co-conspirators that was lobbying defendant Preuitt. Indeed, defendant Walker spoke frequently with admitted conspirators Pouncy, Gilley, and Massey, working actively to buy off Preuitt, including, in one instance, offering defendant Preuitt a poll and his campaign services in exchange for defendant Preuitt's vote. In light of defendant Walker's conduct during March 2010, a reasonable juror certainly could have concluded that he actively participated in the conspiracy and that, in fact, he undertook many of the overt acts in support of the pact's unlawful goal.

D. Honest Services Mail and Wire Fraud Under 18 U.S.C. §§ 1341, 1343 & 1346

Defendants McGregor, Smith, and Coker move for a judgment of acquittal as to the remaining honest services counts. However, they fail to articulate any new ground for why the evidence was insufficient for a reasonable juror to find them guilty beyond a reasonable doubt. As a result, the Court should reject their arguments.

The Court instructed the jury on the following five essential elements that the government must prove to establish a defendant's guilt under the honest services mail and wire fraud statutes:

> First: the defendant knowingly devised or participated in a scheme to defraud the public of its right to the honest services of a public official through bribery, using false or fraudulent pretenses, representations, or promises
>
> Second: the false or fraudulent pretenses, representations, or promises were about a material fact;
>
> Third: the defendant did so with an intent to defraud;
>
> Fourth: the defendant did either of the following: (1) used the United States Postal Service by mailing or causing to be mailed, or used a private or commercial interstate carrier by depositing or causing to be deposited with such carrier, something meant to help carry out the scheme to defraud through bribery; or (2) transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud through bribery; and
>
> Fifth: there was a quid pro quo in the scheme to defraud through bribery.

Dkt. No. 1640 at 31-32.

As to each of the remaining honest services counts, the evidence at trial was sufficient to establish the existence of a scheme to defraud and the defendant's participation in it. Indeed, the trial evidence described supra establishes a far ranging scheme, co-extensive with the conspiracy charged in Count One,[11] to deprive the citizens of Alabama of the honest services of certain legislators and legislative staff, including defendants Means, Preuitt, Smith, and Crosby, among others. The defendants' previously discussed conduct supports the conclusion that a rational juror could conclude that defendants McGregor, Coker, and Smith participated in a scheme to defraud.

Contrary to defendant McGregor's assertion, (McGregor Supp. Rule 29 Br. at 66-68), the evidence at trial established that the scheme involved the concealment of material information—namely, the fact that the defendants were engaging in secret, behind-closed-doors

[11] That there was significant factual overlap between the conspiracy and the honest services scheme in no way supports the defendants' speculative double-jeopardy claims, discussed infra.

meetings with each other, during which they sought to corrupt the legislative process through bribery. As the evidence showed, the scheme involved the use of secret "drop phones," as Gilley verified in his testimony, (Trial Tr. vol. 10, 185:9-24), and as defendant McGregor acknowledges on recorded phone calls, Ex. J-174. Indeed, the defendants' actions were designed to achieve maximum concealment, using PAC-to-PAC transfers as necessary to conceal bribe proceeds, J-197 at 1:12-36, in order to ensure that the public at large would have no idea that their elected representatives had been bribed in exchange for their votes on pro-gambling legislation.

Defendant McGregor's reliance on the United States v. Langford, 2011 U.S. App. LEXIS 16131 (11th Cir. 2011), for the proposition that the government must prove hidden payments is an attempt at misdirection. Defendant McGregor's view of the law would completely exempt campaign-contribution-based bribes from prosecution, so long as the contribution itself was reported. His position is ludicrous. The critical inquiry is not whether the payment went reported, but whether the bribery offer or agreement underlying the payment is revealed to the public. Moreover, concealment is an inherent component of bribery. See United States v. Frega, 179 F.3d 793, 804 (9th Cir. 1999) ("[B]ribery and concealing bribery are part and parcel of the same scheme.").

Moreover, all of the remaining mail and wire fraud counts were reasonably foreseeable to the defendants. For example, regarding the remaining counts as to defendant McGregor, Counts Twenty-Three through Twenty-Seven were all foreseeable , since four of the mailings involve checks from his company to defendant Crosby and the fifth similarly involves mailed checks. Defendant McGregor's argument that the use of the mail to transmit bribe payments to defendant Crosby, the principle drafter of the legislation, is somehow not in furtherance of the fraud scheme turns Rule 29 and the law on its head. The law does not require that co-schemers be part to the mailing or wiring.

More importantly, the fraud scheme charged in the Indictment (and supported by the evidence at trial) entailed payments to legislative staff. Likewise, Counts Twenty-Eight and Thirty through Thirty-Two are each interstate telephone calls to which defendant McGregor was a party.

As to defendant Coker, the fact that he was a party to one of those interstate calls, Count Thirty-One, establishes conclusively that the use interstate wire facilities was foreseeable to him in the commission of the honest services scheme—certainly in light of the fact that, in the call, he and defendant McGregor discuss defendant Preuitt and his vote.

It was similarly foreseeable to defendant Smith that checks she demanded from Gilley, Count Twenty-Six, would be mailed. She nevertheless argues that there was insufficient proof that the checks were actually mailed. (Smith Supp. Rule 29 Br. at 25-26.) She is wrong. Bryant Raby testified that it was the routine practice of the PACs he ran to receive checks by mail. (Trial Tr. vol. 13, 31-32, June 29, 2011.) The law makes clear that circumstantial evidence of routine practice is sufficient to prove the predicate use of mail necessary for § 1341 convictions. United States v. Waymer, 55 F.3d 564, 570 (11th Cir. 1995) ("[p]roof of a routine practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance."); see also Stevens v. United States, 306 F.2d 834, 835 (5th Cir. 1962) (no direct testimony is necessary and "[t]he showing of the customs, usages, and practices in the course of business with evidence of the letter appearing in the customary channel of mail matter is enough to carry the question to the jury.") The testifying witness need not have actually handled the mail as long as they can testify as to the general office custom. See United States v. Joyce, 499 F.2d 9, 15 (7th Cir. 1974); United States v. Wall, 130 F.3d 739, 742 (6th Cir. 1997) ("[B]usiness practice may be established by the testimony of anyone with personal knowledge of the business custom and

practice; it is not necessary that someone actually employed in the mail room establish this fact." (quoting United States v. Hannigan, 27 F.3d 890, 894 (3d Cir. 1994))).

Similarly, defendant Smith's variance claim, (Smith Supp. Rule 29 Br. at 26), as to Count Thirty Three based on charging language that varied from the evidence—e.g., interstate wire originating in Mississippi and not Tennessee—is similarly flawed. The Supreme Court has held that, in determining whether the variance is fatal, the "true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." Berger v. United States, 295 U.S. 78, 82 (1935). According to the Court, the rule that the allegations in the indictment must correspond to the proof offered at trial is based on the "obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." Id. Defendant Smith can hardly claim that she was not apprised of the charges against her—wire fraud—which requires an interstate transmission. The evidence at trial, i.e., Gilley's testimony, established an interstate transmission as to Count Thirty-Three. That the originating state differed from the charging language cannot plausibly be considered as affecting defendant Smith's substantial rights, and her argument fails. Cf. United States v. McCrary, 699 F.2d 1308, 1310-11 (11th Cir. 1983) (holding no variance occurred where indictment charged cigarette smuggling and proof at trial established qualude smuggling). As such, the use of an interstate wire in Count Thirty-Three was reasonably foreseeable to defendant Smith, a party to the phone call.

In short, the evidence adduced at trial, which similarly supported the substantive § 666 charges and conspiracy count, established for Rule 29 purposes that defendants McGregor, Coker,

and Smith engaged in a mail and wire fraud scheme to deprive the citizens of the honest services of their elected officials through bribery and concealment of material information.

E. Money Laundering Under 18 U.S.C. § 1956(a)(1)(B)(i)

Counts Thirty-Four through Thirty-Seven charge defendant Smith with committing money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), and aiding and abetting in violation of § 2. The Indictment makes clear that each of those four counts corresponds to a particular $50,000 check. Notwithstanding defendant Smith's baseless claims that she deserves to be acquitted as to these four counts, sufficient evidence was admitted at trial for a reasonable jury to find her guilty of committing the charged offenses.

1. Elements of the Offense

The jury charge as to money laundering contained the following five elements:

> First: the defendant knowingly conducted or tried to conduct financial transactions;
>
> Second: the defendant knew that the money or property involved in the transactions were the proceeds of some kind of unlawful activity;
>
> Third: the money or property did come from an unlawful activity, specifically money and other things of value given, offered, and agreed to be given to Alabama State legislators, including defendant Smith, with intent to influence and reward the recipients in connection with pro-gambling legislation, in addition to money and other things of value corruptly solicited, demanded, accepted, and agreed to be accepted by defendant Smith and other Alabama state legislators with the intent to influence and reward them in connection with pro-gambling legislation; and
>
> Fourth: the defendant knew that the transaction was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds.

Dkt. No. 1640 at 39-40.

2. Summary of the Evidence

As previously described, Gilley testified that he agreed to send defendant Smith $400,000 in the form of campaign contributions as part of their illicit arrangement to trade her support for gambling legislation for his campaign money. (Trial Tr. vol. 10, 192: 12-17 & 194: 11-17, June 24, 2011.) His testimony further established that defendant Smith arranged to receive half that amount ($200,000) as four separate checks made out to four separate PACs. (Id. at 198:12 & 226:22.) At trial, Gilley explained to the jury that on March 17, 2010, he had received an e-mail, which was admitted into evidence as Government Exhibit 1066, from Rick Heartsill, who had worked on defendant Smith's campaign. (Id. at 222-23.) The e-mail directed that the four separate checks were to be sent to four specified PACs. (Id.) Furthermore, Bryant Raby, administrator of those four PACs, testified that he had, in fact, received the four checks, see Government Exhibit 1065, which corresponded exactly to the four checks listed in Counts Thirty-Four through Thirty-Seven, respectively. (Trial Tr. vol. 13, 31-32.)

Defendant Smith contends that once money is sent to a PAC, the donor loses control of the funds, but this is directly contradicted by Raby's testimony. Raby told the jury that defendant Smith's campaign consultant at the time, David Mowery, had instructed him to transfer the funds to other PACs after they had been deposited into Raby's initial four PACs; the clear inference of this testimony was that Mowery, acting as defendant Smith's mouthpiece, had instructed Raby to move the money to other PACs. (Id. at 38-39.) Raby testified that he followed these instructions by transferring defendant Smith's funds from his PACs to PACs run by someone else. (Id. at 45:18-25; 46:1-3; Gov. Ex. 1070.)

Thus, the testimony showed that not only was defendant Smith able to have Gilley send money to her through PACs, she was further able to have those same funds transferred to other

PACs. Indeed, in a recorded conversation , defendant Smith made clear her intent to hide the bribe proceeds through use of PAC-to-PAC transfers:

Gilley: Hey. Harri Anne, are you famil . . . , are you, are you aware that one of those PACs is, is the real Democrat PAC?

Smith: Yes.

Gilley: Okay, you're good with that?

Smith: Yes.

Gilley: Okay, alright that's all I needed to know.

Smith: Cause, yeah, cause what we're gonna do is put it through another.

Gilley: Okay. Alright.

Smith: Like what we'll do, it will go to that one.

Gilley: I got you.

Smith: And then we're gonna move it to a different one.

Ex. J-192 at 1:12-37. Raby further explained that such PAC-to-PAC transfers could be used to disguise the original source of contributions. (Trial Tr. vol. 13, 47:18-20.) In short, the evidence at trial was sufficient to establish that defendant Smith is guilty of money laundering based on the use of interstate commerce to conceal the proceeds of Gilley's bribe payments.

F. False Statement Under 18 U.S.C. § 1001

Defendant Preuitt is charged in Count Thirty-Nine with making a false statement to a Special Agent of the Federal Bureau of Investigation regarding whether he had been offered anything of value in exchange for his vote on SB380 or knew of anyone else being offered or offering things of value in exchange for votes. To establish defendant Preuitt's guilt under 18 U.S.C. § 1001, the

evidence must establish each of the following five elements:

> First: the defendant made the statement as charged;
>
> Second: the statement was false;
>
> Third: the falsity concerned a material matter;
>
> Fourth: the defendant acted willfully, knowing that the statement was false; and
>
> Fifth: the false statement was made or used for a matter within the jurisdiction of a department or agency of the United States.

Dkt. No. 1640 at 43.

Defendant Preuitt claims that the government offered insufficient evidence at trial for a reasonable jury to convict under Count Thirty-Nine for making a false statement in violation of 18 U.S.C. § 1001(a)(2). To the contrary, FBI Special Agent George Glaser testified that he and Joe Herman, an agent of the Alabama Bureau of Investigation, had interviewed defendant Preuitt on April 1, 2010, regarding bribery or illicit activity connected with Senate Bill 380. (Trial Tr. vol. 26, 93, 95, July 19, 2011.) Glaser told the jury that he and Herman had identified themselves as law-enforcement agents to defendant Preuitt at the beginning of the interview, and that he would have customarily displayed his FBI credentials to a person being interviewed when identifying himself. (Id. at 96.) After informing defendant Preuitt that they wished to question him regarding bribery allegations, they asked defendant Preuitt how he defined a bribe. (Id. at 96-97.) Glaser testified that defendant Preuitt responded by defining a bribe as "anything of value" offered or given to him "in exchange for an official act in his office as Senator." (Id. at 97.) Glaser added that defendant Preuitt had explained that accepting campaign contributions in exchange for an official act, i.e., a "quid pro quo," also constituted bribery. (Id.) Notably, Glaser testified that defendant Preuitt told him that he

had never in his career accepted a bribe, never been offered a bribe in relation to Senate Bill 380, and had no knowledge of individuals, lobbyists, or legislators being involved in the offer or acceptance of things of value in exchange for votes to pass Senate Bill 380. (Id. at 97-98.) Likewise, when Glaser asked defendant Preuitt whether Jennifer Pouncey, a lobbyist, had ever offered him anything of value in exchange for his vote to pass Senate Bill 380, defendant Preuitt responded "no." (Id. at 98.) Defendant Preuitt does not deny that he made these statements during his interview. (Preuitt Supp. Rule 29 Br. at 3.)

In light of the significant evidence discussed supra that defendant Preuitt was offered things of value in exchange for official action, Glaser's testimony provides ample evidence to satisfy the requisite elements of § 1001(a)(2), establishing that defendant Preuitt provided a materially false statement to the FBI during an official investigation. Defendant Preuitt's contentions to the contrary, and his terse recitation of Pouncy's, Gilley's, and Massey's testimony, (Preuitt Supp. Rule 29 Br. at 4-6), ignore, among other pieces of significant evidence: defendant Walker's statement that he offered a poll in exchange for defendant Preuitt's vote, Pouncy's testimony that defendant Preuitt specifically asked if the bribe commitments would still be honored regardless of how the bill did in the House of Representatives, and defendant Preuitt's reminder of his discussions with defendants Coker and Walker in a conversation with Gilley the day after the vote. This evidence reveals plainly that defendant Preuitt's denials to the FBI were lies. As such, the Court should deny defendant Preuitt's Rule 29 motion as to Count Thirty-Nine.

III. THE DEFENDANTS' DOUBLE-JEOPARDY ARGUMENTS FAIL BECAUSE THEY CANNOT AND DO NOT SPECIFY WHICH ISSUES ARE PRECLUDED FROM BEING RETRIED

Defendants Smith, McGregor, Walker, and Coker contend that the Fifth Amendment's

Double Jeopardy Clause forecloses retrying hung counts where common elements were necessarily decided by verdicts of acquittal as to other counts.[12] The defendants downplay, however, the great burden that they bear in having to identify what the jury necessarily or must have decided as to any particular count on which they acquitted. Because it is impossible to ascertain what issues necessarily were decided based on the acquitted counts, precluding retrial of any remaining counts is unwarranted.

A. Legal Standard

While "the Double Jeopardy Clause . . . does not apply in the context of a retrial of mistried counts," estoppel principles may preclude the government from relitigating certain issues on retrial. United States v. Shenberg, 89 F.3d 1461, 1478 (11th Cir. 1996) (citing Richardson v. United States, 468 U.S. 317, 323 (1984)). Collateral estoppel in the criminal context "is a narrow exception to the Government's right to prosecute a defendant in separate trials for related conduct." United States v. Quintero, 165 F. 3d 831, 835 (11th Cir. 1999) (quoting United States v. Brown, 983 F.2d 201, 202 (11th Cir. 1993)) (emphasis added).

Courts examine criminal collateral estoppel claims using a two-step analysis. Quintero, 165 F.3d at 835. First, the court must decide if it can determine the basis for the acquittals at the original

[12] Specifically, defendants argue that all hung counts based on violations of § 666 in which they have been charged, including the conspiracy charged in Count One, are precluded because of acquittals as to counts charging violations of Honest Services Fraud; defendant McGregor additionally argues that retrial of the Honest-Services Fraud charged in Counts Twenty-Eight and Thirty through Thirty-Two are precluded because he was acquitted as to Honest-Services Fraud charged in Count Twenty-Nine; defendant Coker argues that retrial of Count 31 charging him with Honest-Services Fraud should be precluded because he was acquitted as to his other Honest-Services Fraud charges; and defendant Smith further argues her acquittal as to Hobbs Act Extortion charged in Count 21 precludes her being retried for violating § 666 as charged in Count 14.

trial. Id. Put "more precisely," the court must determine if the acquittals were "based upon reasonable doubt about a single element of the crime which the court can identify." Brown, 983 F.3d at 201. Second, the court must determine whether the elements of the crime upon which the prior acquittals were based are also essential elements of the counts to be retried. Quintero, 165 F.3d at 835. The burden of persuasion is on the defense as to both steps. Id.

A defense claim of collateral estoppel necessarily fails where "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 US 436, 444 (1970) (emphasis added). "That the jury may have based its verdict on this issue is not enough; [defendants] have the burden to show that the [issue to be barred] was necessarily determined in their favor in the former trial." United States v. Mulherin, 710 F.2d 731, 740 (11th Cir.1983) (citing United States v. Giarratano, 622 F.2d 153, 155–56 (5th Cir.1980)) (emphasis added). If something other than the issue the defense seeks to have barred might have served as the basis for the jury's verdict, collateral estoppel cannot apply. Mulherin, 710 F.2d at 740.

The burden in proving such claims is extremely high "since it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974). It is, in fact, a "rare case where a defendant can sustain his burden of establishing that the prior jury necessarily decided an essential issue in his favor." United States v. Cala, 521 F.2d 605, 609 (2d Cir. 1975); United States v. Mahaffy, 499 F. Supp. 2d 291, 296 (E.D.N.Y. 2007) ("It is unusual for a defendant to be able to meet this burden.") (citing Cala). Absent "specific evidence" to know the basis of a prior acquittal "with certainty," the claim of collateral estoppel must be rejected. See Giarratano, 622 F.2d at 156; see also id. n.4 ("The burden

is on the defendant to show that the judgment in the original trial necessarily decided a crucial issue in the second trial.").

B. The Defendants Cannot Satisfy The Exacting Ashe Standard

Here, the defendants have not carried their burden, and therefore cannot move past the first step of the analysis: determining the basis for the prior verdicts. The basis for a general verdict of not guilty "usually cannot be determined with any certainty." United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974). That is certainly true here. While convenient for the defense to speculate that the acquittals here mean that the jury found that the government failed to prove certain elements of the hung counts,[13] it is mere speculation because a general not-guilty verdict does not have that effect. As the 11th Circuit explained, "a not guilty verdict is not fairly to be characterized as a finding that even one [factual proposition] is false." United States v. Hogue, 812 F2d 1568, 1578 (11th Cir. 1987). Nothing can be concluded with certainty from such a verdict except that the government did not prove all of the elements of each acquitted count beyond a reasonable doubt.

The defendants fail to offer any specific evidence regarding the basis for the jury's acquittals in this case—because they cannot. Instead they, and most primarily defendant McGregor, rely on their own logical gymnastics in an attempt to establish what the jury must have decided. Absent such "specific evidence," the defendants' Double Jeopardy claims fail. Giarratano, 622 F.2d at 156. As explained in Ashe, it is exactly the possibility that the jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," 397 U.S. at 444,

[13] Yeager v. United States, 129 S. Ct. 2360 (2009), cited repeatedly in the defendants' briefs does not change the Ashe standard. Rather, it stands for the proposition that hung counts are not to be considered in evaluating what the jury necessarily decided. The government's analysis, therefore, does not address the hung counts.

that defeats the defendants' claims of collateral estoppel. Such speculation cannot meet the high standard required to prevail here.

For example, honest services fraud requires, among other elements, an intent to defraud; the use of false or fraudulent pretenses, representations, or promises regarding a material fact; and the use of a wire transmissions that were caused by or foreseeable to the defendant. Dkt. No. 1640 at 31-32. Federal program bribery under § 666, on the other hand, does not require any showing whatsoever as to these elements. Thus, if the jury acquitted on certain mail and wire fraud counts because they determined any of these elements was not satisfied as to a particular defendant, the acquittal could not preclude retrial of a count charging the defendant with federal program bribery. A rational jury certainly could have focused on any one of those elements.

Indeed, review of the Court's jury instructions makes clear that the gravamen of honest services fraud is the "scheme to defraud someone of a right to honest services." Dkt. No. 1640 at 31. And central to any such scheme is deception, such that liability only attaches upon proof that the defendant had the intent to deceive and that the scheme involved lies, half-truths, or concealment. Id. at 32-33. Here, in reviewing the honest services fraud charges, the jury could have decided as to particular defendants that he or she was not party to any scheme involving the requisite lies or deception. Such a determination as to this required element would not preclude retrial on the federal program bribery or conspiracy counts, as neither requires deception or fraudulent conduct of any kind. See id. at13-16 (conspiracy instruction) & 17-28 (federal program bribery instruction)

The same analysis holds true as between honest services mail and wire fraud counts. Although each count requires proof of the same elements, the individual mailings or wirings in this case did not consist of the same evidence. For example, defendant McGregor struggles to argue that

his acquittal on Count Twenty-Nine, which alleged that he committed honest services wire fraud, precludes his being retried on Counts Twenty-Eight, and Thirty through Thirty-Two, alleging the same offense. In essence, he contends that the counts are indistinguishable. Contrary to defendant McGregor's assertions, however, a rational jury may very well have identified significant differences in the charges. In contrast to multiple wire fraud counts predicated on identical wire transfers, the wire counts in this case are based on individual telephone calls, each of which contained different substantive conversations of varying length on different days and with varying parties. As such, a rational jury could have concluded that any of the acquitted counts involved communications that were not in furtherance of the alleged bribery or reasonably foreseeable to a particular defendant. This reasonable basis for an acquittal, therefore, would not preclude retrial on the remaining honest services counts. Similarly, because all of the honest services wire fraud acquittals very well could have been based on the "in furtherance" element as to each mailing or wiring, precluding retrial of the remaining non-honest-services counts is unwarranted.

The outcome is no different with respect to the Hobbs Act extortion counts, which also contrasts with federal program bribery and conspiracy. The former requires proof of, among other elements, "extortion under color of official right" and interference with "interstate commerce." Id. at 29. Neither federal program bribery nor conspiracy requires such a showing. A rational jury could have acquitted the defendants based on the interstate nexus requirement. Indeed, because the core factual allegations in the Indictment focus almost exclusively on conduct within the State of Alabama—e.g., in-state politicians, lobbyists, legislation, businessman,and businesses—it is possible that the jury determined that "the natural consequences of the acts described in the indictment would [not] be to somehow delay, interrupt, or affect interstate commerce." Id. at 30. Indeed, it is quite

possible that the jury acquitted on this issue exactly because it was not argued, leaving the decisionmakers to wonder whether they had received sufficient evidence to satisfy this element. Regardless, the interstate element plays no role in the legal or factual requisites of the remaining charges, and because the jury could have acquitted on this ground, retrial on the remaining counts is not precluded. Cf. Mahaffy, 499 F. Supp. 2d at 297-300 (rejecting double jeopardy arguments in multi-defendant prosecution where jury reached verdicts as to all counts except for a conspiracy charge, holding repeatedly that the "jury could have based its verdict of acquittal on reasonable doubt as to any of the elements listed") (emphasis added).

Indeed, the danger of improper speculation regarding the basis of the acquittals grows in a complex case, such as this one, involving numerous allegations of misconduct charged against various defendants under multiple statutes requiring discrete proof of various factual propositions.[14] Identifying "with certainty" a specific basis for the jury's discordant verdicts is impossible. In contrast, a sample of cases suggests that collateral estoppel is typically granted only where a single issue is in dispute at trial. See, e.g., Ashe, 397 U.S. at 445 ("The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."); Ohayon, 483 F. 3d at 1287 ("The lone dispute at trial was whether Ohayon was aware of the contents of the

[14] In only the first 10 of 41 pages of the closing summation by counsel for defendant McGregor, nine different issues were raised as potential bases for acquittal: (1) a "total failure of proof" by the government (Trial Tr. vol. 36, 186: 3-4, Aug. 3, 2011); (2) the funds were used only for lawful purposes (id. at 189); (3) that "nobody [got] anything in this bill" (id. at 192:24-25); (4) the bill "puts you on a fair and level playing field" (i.e., no corrupt purpose) (id. at 193:7-8); (5) there was no effort to bribe anyone (id. at 194); (6) there was no unlawful agreement (id. at 194, 196); (7) the goals of the parties were "nothing but good" (id. at 195:12); (8) the cooperating defendants were the "crooks" (id. at 195:15); and (9) the defendant had no knowledge of illegal acts (id. at 196). The jury "could have" based its not guilty verdicts on any or all of these rational bases for acquittal, but—critically—it is impossible to know based on the acquittals whether any of these grounds necessarily was decided.

bags."); Brown, 983 F.2d at 204 ("[T]he only rational basis [the jury] could have had is a reasonable doubt about whether Brown had acted willfully."). Here, the jury could have acquitted for any number of reasons, and it is impossible to conclude with certainty that the jury "necessarily determined" any given issue. Thus, relitigation of the hung counts in a subsequent trial should not be precluded.

In attempting to side-step the thrust of the law, the defense improperly minimizes the importance of considering whether multiple rational bases exist as to which the jury at trial "could have" decided the acquitted counts. (See, e.g., McGregor Supp. Rule 29 Br. at 47.) Indeed, the defendants refer to numerous cases, all of which apply the "could have" standard established in Ashe, the seminal criminal collateral estoppel case. See, e.g., Ohayon, 481 F.3d at 1286 (quoting Ashe, 397 U.S. at 444); United States v. Kramer, 73 F.3d 1067, 1074 (11th Cir 1996) (same); Johnson v. Estelle, 506 F.2d 347, 349 (5th Cir. 1975) (same). As explained above, Ashe makes clear that collateral estoppel must be rejected where "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe, 397 US at 444 (emphasis added). No "mental gymnastics" or "semantic engagements," (McGregor Supp. Rule 29 Br. at 48), are required to conclude that the jury in this case "could have" based its acquittals on any of a number of rational bases. See United States v. Zane, 495 F.2d 683, 691 (2d Cir.1974) ("Although further examples of conjecture as to the jury's mental gymnastics are possible, the danger inherent in such endless surmise, absent a set of specific and detailed findings of fact, is readily apparent.").

Because it is impossible to determine with any certainty what the jury "necessarily decided" in rendering acquittals, defendants Smith, McGregor, Walker, and Coker, it is likewise impossible

to identify the issues that should be barred in a retrial. As such, the defendants' double jeopardy claims therefore fail.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the defendants' motions.

Respectfully submitted,

LANNY A. BREUER
Assistant Attorney General, Criminal Division
Attorney for the United States
Acting Under Authority of 28 U.S.C. § 515

JACK SMITH, Chief
Public Integrity Section

By: /s/ Eric G. Olshan
Eric G. Olshan
Trial Attorney
Public Integrity Section
1400 New York Ave. NW
Suite 12100
(202) 514-1412
eric.olshan@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I filed the foregoing using the Court's CM/ECF system, which will provide notice to counsel of record.

/s/ Eric G. Olshan
Eric G. Olshan
Trial Attorney
Public Integrity Section
1400 New York Ave. NW
Suite 12100
(202) 514-1412
eric.olshan@usdoj.gov