

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

UNITED STATES OF AMERICA, *

PLAINTIFF, *

V. * CR. No. 2:10CR186-MHT

JARRELL W. WALKER, JR., *

DEFENDANT. *

BRIEF IN SUPPORT OF MOTION FOR
JUDGMENT OF ACQUITTAL AFTER TRIAL

I.

Prior to verdict Mr. Walker filed for acquittal by written motions and argument on July 26, 2011 (Doc. 1544), July 29, 2011 (Doc. 1580) and July 31, 2011 (Doc. 1597). On August 25, 2011, Mr. Walker renewed his motions for acquittal post verdict. (Doc. 1757)

On September 7, 2011 this Court set today's date as submission deadline for brief in support of Walker's post verdict motion for acquittal. (Doc. 1799) This Court also ordered that the brief "must explain in detail how, point by point, the trial evidence is allegedly lacking or is adequate. Second, any brief addressing the trial evidence should cite where the evidence can be found in

the trial transcripts, by page and line.” (Doc. 1799, p. 2)

Mr. Walker cannot represent to the Court that he has any argument or evidence that is new or different from that previously submitted in documents 1544, 1580 and 1597, other than the legal argument submitted below in sections II and III of this supplemental pleading. In Walker’s judgment the evidence of whether he is guilty of the conspiracy charged in counts one and eight of the indictment stands or falls on the tape recordings and testimony referred to in the previous motions for acquittal. See pp. 2, 3, 5-8,10-15 of Doc 1544; pp. 1-7 of Doc. 1597. Mr. Walker is unable to make any better argument now than he did then regarding those matters. Therefore, Walker stands on his previous filings, including evidentiary citations.

II¹

Mr. Walker was charged as part of a conspiracy to commit bribery in count one of the indictment, and for a substantive charge of bribery in count eight. See redacted indictment, Doc. 1632. More specifically, as set out in count eight, Mr. Walker was charged with bribing Senator

¹Walker borrows from Coker’s submission filed on August 25, 2011 (Doc. 1748, pp.19-23) for this issue.

Preuitt:

[A] member of the Alabama Senate, being an agent of the State of Alabama, which received benefits in excess of \$10,000 in the one-year period from May 1, 2009, to April 30, 2010, from federal programs involving a grant, contract, subsidy, loan, guarantee, insurance and other forms of federal assistance, to influence and reward PREUITT in connection with an upcoming vote on pro-gambling legislation.

A. \$10,000 Requirement

Walker does not dispute that the Government established that the State of Alabama received \$10,000 in federal funding. However, the Government's proof was that the recipient of the federal funds was the State of Alabama. Tr. Vol. 7, p. 83. However, the purpose of the conspiracy as established in the Indictment was directed toward the Alabama Legislature (see paragraphs 29, 30 and 31 of the Indictment). The Government wholly failed to prove that the Alabama Legislature received any federal funds. In fact, the evidence was exactly the opposite. Although Gail Traylor of the Alabama Examiners of Public Accounts testified that the Alabama Legislature was a branch of State Government, she only testified the State as a whole received in excess of \$10,000.00 in federal program funds, not specifically the

legislature. TR. Vol. 7, pp. 79, 80, 83, 89.

B. Agency

The Government has failed to establish the "Agent" status of the individuals supposedly bribed in this matter. "Agent" status (or not) is ultimately a conclusion about applicability of a legal term as used in this specific statute with a specific definition. See § 666(d)(1):

"the term 'agent' means 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."

The conclusion about whether somebody is an agent, for § 666 purposes, can be based on proof of facts about the relationship. E.g., *U.S. v. Langston*, 590 F.3d 1226, 1234 (11th Cir. 2009) ("Next, we must determine whether the Government produced sufficient relevant evidence at trial to allow a jury to conclude that Langston was an agent of the state. We conclude that it did not.") State laws defining the nature of the relationship can also be relevant.

Langston, 590 F.3d at 1234 ("Our task then is to determine whether the applicable law creating the Executive Director's employment with the Fire College also made the Executive Director an agent of the state Based upon our examination of

the relevant state law, we conclude that it does not.").

Legislators just aren't "agents" as that word is used in this law. Members of the Alabama Senate or House of Representatives are not "agents" of the State, simply in that capacity. *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 747 (9th Cir. 2003) (although in a different legal context-not a § 666 case-held that State Legislators aren't agents of the State). The statutory definition of "agent," as quoted above in § 666(d)(1) begins with the basic concept of what agent status is all about: "the term 'agent' means a person authorized to act on behalf of another person or a government." This is consistent with the general legal understanding of the concept: an agent is somebody who is "authorized to act for or in place of another" (Black's Law Dictionary (8th ed.); see also definition of "agency" is a relationship "in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions"). The Eleventh Circuit has used this basic "act on ... behalf' concept in discussing agent status under § 666. *Langston*, 590 at 1234 ("We must necessarily scrutinize that which purports to create the employment relationship with the agency to determine if the

employee is authorized to act on the principal entity's behalf.")

A State Legislator is not authorized to act "for or in the place of," or even "on behalf of," the State. That's not what a Legislator is doing when he or she votes — they're not acting on behalf of the State as an agent. They're doing something conceptually different from that. A legislator again is not a "representative" of the State, but a representative of his or her constituents.

Finally, nobody is an "agent" within the meaning of § 666 unless the Government proves that he or she is authorized to act on behalf of the principal (here, the State) with respect to its funds. *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) ("*In United States v. Phillips*, we held that for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.' 219 F.3d 404, 411 (5th Cir. 2000).") The Government has not met its burden of proof.

III²

Mr. Walker claims that a re-prosecution of him on Count 1 under the circumstances now presented violates his right not to be twice put in jeopardy for the same offense, as guaranteed by the issue preclusion component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and explained by the Supreme Court of the United States in *Yeager v. United States*, ____ U.S.____, 129 S.Ct. 2360 (2009) and *Ashe v. Swenson*, 397 U.S. 436 (1970).

Mr. Walker was originally indicted and charged with Counts 1, 8, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33. Walker was found not guilty of all Counts except Counts 1 and 8 upon which the jury could not reach a verdict. The pertinent Counts for purposes of this argument are as follows:

Count 1 - Conspiracy under 18 U.S.C. §371 along with named Defendants and others, to commit Federal Program Bribery to violate both 18 U.S.C. §666(a)(2) (corruptly giving, offering and agreeing to give campaign contributions to Alabama State Legislators in exchange for their vote in support of the pro-gambling legislation, SB 380), and

²

Walker borrows from Mean's submission filed on August 25, 2011 (Doc. 1750) for this issue.

§666(a)(1)(B) (corruptly soliciting, demanding and agreeing to accept campaign contributions intending to be influenced and rewarded with campaign contributions in exchange for their vote on SB 380). Count 1 in paragraphs 28 through 37 (Doc. 1632) sets forth the alleged conspiracy, i.e., the alleged agreement and plan, and the manner and means in which it was carried out.

Count 8 - Federal program bribery in violation of 18 U.S.C. §666(a)(1)(B), and aiding and abetting in violation of 18 U.S.C. §2, by corruptly soliciting, demanding, accepting and agreeing to accept something of value intending to be influenced or rewarded in connection with an upcoming vote in the Alabama Legislature on pro-gambling legislation in exchange for Senator Preuitt's vote in favor of the pro-gambling legislation (SB 380).

Counts 23-33 - Honest Services mail fraud and wire fraud in violation of 18 U.S.C. §§1341, 1343, and 1346, and aiding and abetting such violations in violation of 18 U.S.C. §2; in that Walker and the other Defendants named in Count 1 of the Indictment, devised or intended to devise a scheme and artifice to defraud and deprive the State of Alabama and others of the right to the honest services of

elected members and employees of the Alabama Legislature through bribery, and executed the said scheme and artifice to defraud and deprive by mailings and interstate telephone calls.

Count 1 and Counts 23 through 33

The conspiracy charged in Count 1 of the Indictment was the scheme described in Counts 23 through 33 of the Indictment. This is so because of the incorporation of the allegations of Paragraphs 28 through 37 of Count 1 of the Indictment into Counts 23 through 33. The conspiracy and "manner and means" in which it was to be carried out described in Count 1 represent in fact the scheme and artifice to defraud alleged in the Counts 23 through 33. The same persons named in Counts 23 through 33 are named as the participants in the conspiracy, and the scheme and artifice described in Counts 23 through 33 are alleged as occurring during the same time period as the conspiracy alleged in Count 1.

For the purposes of the honest services charges, the Court instructed the jury that the jury need only find that the accused, "knowingly" devised or participated in the

scheme (p. 31 Court's charges, Doc. 1640), while in its charge on conspiracy, the Court charged the jury that to convict the defendant of conspiracy, the Government must prove the defendants "willfully" participated in the alleged conspiracy (p. 48, Court's charges, Doc. 1640). At trial the mailings alleged in Counts 23, 24, 25, 26, and 27 and the interstate telephone calls alleged in Counts 28, 29, 30, 31, 32, and 33 were conceded by the Defendants and were not contested. The only factual issue tried by the jury as to Counts 23 through 33 was the existence of the alleged scheme and whether Defendant knowingly participated in it, a lesser burden than the requirement for "willful" participation under Count 1. By finding Walker not guilty of the accusations made against him in Counts 23 through 33 the jury necessarily found as a fact that Walker was not a participant in the scheme alleged in Counts 23 through 33. As noted previously, the "scheme" alleged in Counts 23 through 33 is defined and described by the conspiracy alleged in Count 1. Mr. Walker was found not guilty of offenses requiring a lesser burden to prove his participation in the alleged scheme. Therefore, to allow a re-trial of Walker for the charge made in Count 1

would amount to a re-trial of him for a charge on which he has been acquitted, and subject him to double jeopardy in violation of the Fifth Amendment of the United States Constitution.

Under *Yeager*, supra, if the jury "necessarily decided" in the defendant's favor during a previous trial, following an acquittal, " ' the Court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 1367. In *Yeager*, the issue was whether the acquittals on the fraud counts precluded the Government from retrying the defendant on the insider trading counts. The Fifth Circuit found that the jury must have found when it acquitted the defendant on the fraud count that the defendant did not have any insider knowledge. However, the Court of Appeals concluded that it was impossible to decide what the jury "necessarily decided" because of the hung jury. The Supreme Court in reversing the Fifth Circuit, held that the analysis must focus on what the jury did decide. Here, as in *Yeager*, the issue of

whether Walker was a participant in the conspiracy or scheme was a "critical issue of ultimate fact" in both the conspiracy and honest services charges, hence the jury verdict necessarily decided that issue in his favor in the honest services charge and therefore precludes him from re-prosecution on the conspiracy charge. *Yeager*, at 2369.

WHEREFORE, Mr. Walker moves the Court to acquit him of the charges made against him in Counts 1 and 8 of the Indictment.

Respectfully submitted this 16th day of September, 2011.

s/Jeffery C. Duffey
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2011, I served notification of the above to Justin Shur, USDOJ, and all counsel of record by email.

s /Jeffery C. Duffey
JEFFERY C. DUFFEY