

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA**

**UNITED STATES,**

**Plaintiff,**

**v.**

**JARRELL W. WALKER, JR.,**

**Defendants.**

**CASE NO. 2:10-cr-00186-MHT-WC**

**DEFENDANT JARRELL W. WALKER, JR.'S MEMORANDUM OF LAW IN RESPONSE  
TO THE COURT'S JULY 20, 2011 ORDER REGARDING DIEZ**

Defendant Jarrell W. Walker, Jr. respectfully submits this memorandum of law in response to the Court's Order on July 20, 2011 directing the parties to explain whether the quoted portion of the opinion in *United States v. Diez*, 515 F.2d 892, 898-99 (5th Cir. 1975) supports the admission of FBI Agent George Glaser's testimony in its entirety "as long as taken as a whole, Defendant Preuitt's statements. . .[were] made in furtherance of the alleged conspiracy." Order at 2. Mr. Walker contends that the quoted portion of the *Diez* opinion does not support the admission of Agent Glaser's testimony (in whole or in part). Neither the counterfactual assumption that Senator Preuitt *intended* to mislead the authorities (that he was in fact trying to do so) during his April 1, 2010 interview with FBI personnel nor any *effect* of his statements on the authorities support the conclusion that Senator Preuitt's statements to FBI personnel were made *in furtherance of the alleged conspiracy.*" *Id.* (emphasis added).

As a threshold matter, it is crucial to note that the Indictment (Doc. No. 3) does not charge Defendants with any *conspiracy to conceal* the conspiracy charged, *i.e.*, bribery in connection with the Alabama Legislature's vote on Senate Bill 380. Nor do the factual

allegations in the Indictment and the testimony elicited by the prosecution to date suggest that Defendants entered into any agreement to conceal their alleged wrongdoing. It is well-established that a conspiracy does not include an agreement to conceal the conspiracy. *See Krulewitch v. United States*, 336 U.S. 440, 442 (1949); *Lutwak v. United States*, 344 U.S. 604, 616 (1953); *Diez*, 515 F.2d at 897.<sup>1</sup> In the absence of an agreement to conceal the conspiracy, in order for Senator Preuitt's purported attempt to mislead the authorities to be made "in furtherance of the alleged conspiracy," the Government would have to establish that attempting to conceal the alleged conspiracy – two days after the vote on Senate Bill 380 – could advance Defendants' alleged conspiracy to influence the outcome of the vote on Senate Bill 380. Mr. Walker respectfully submits that the Government has neither attempted nor succeeded in satisfying that evidentiary burden. It is also noteworthy that the conspiracy charged in the indictment would not be thwarted in any direct and certain way by its discovery after the vote on Senate Bill 380 occurred.

In the absence of a conspiracy to conceal, the scope of potential acts and statements by members of the conspiracy in furtherance of its central objective are defined by the nature of that objective. Where, as in *Diez*, the conspiracy involved deception of authorities, misleading statements made to public officials may be deemed to be in furtherance of a conspiracy that is continuing. Where, as here, however, no such deception was agreed upon and discovery of the conspiracy would not certainly thwart the outcome of the Alabama legislature's vote, *Diez* stands

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<sup>1</sup> In contrast, in *Diez*, as well as the Supreme Court decisions on which the Fifth Circuit Court of Appeals relied in *Diez*, namely, *Krulewitch*, *supra*, *Lutwak*, *supra*, and *Forman v. United States*, 361 U.S. 416, 423-24 (1960), a conspiracy to conceal was not only charged, but the primary conspiracy was such that misleading the relevant authorities was core objective. *See Diez*, 515 F.2d at 898 (discussion "conspiracy to conceal" and role of deception in achieving objectives of the conspiracy charged, namely, to impede the IRS's collection of taxes).

for the proposition that the statements are not made in furtherance of the conspiracy and are as such inadmissible.

Any attempt to mislead authorities on Senator Preuitt's part are largely immaterial to whether his statements were made in furtherance of the conspiracy. To reach the opposite conclusion would render the "in furtherance of" requirement meaningless (any member of the conspiracy could broaden its scope and take virtually any act during the course of the conspiracy "in furtherance" thereof). Deeming Senator Preuitt's post-vote statements as made in furtherance of the alleged conspiracy also vitiates the agency principles justifying the admission of co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E).

Dated: July 21, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HERBY CERTIFY that the foregoing *Memorandum of Law in Support of Oral Objections to the Testimony of FBI Special Agent George E. Glaser and Response to the United States' Memorandum of Law Regarding Applicability of Bruton* was served via ECF Filing on all counsel of record listed below this 20th day of July, 2011.

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