IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
vs.	)	Case No. CC-2014-565
	)	
MICHAEL GREGORY HUBBARD,	)	
	)	
Defendant.	)	

DEFENDANT HUBBARD'S MOTION FOR JUDGMENT OF ACQUITTAL, NEW TRIAL, OR OTHER RELIEF PURSUANT TO ALA. R. CRIM. P. 20.3, 24.1, AND ANY OTHER APPLICABLE RULE

Michael Gregory Hubbard respectfully moves, pursuant to Ala R. Crim. P. 20.3, 24.1, and any other applicable rule, for a judgment of acquittal, a dismissal of the charges, or a new trial.[1] Hubbard adopts and incorporates as if herein set forth his previously filed motions, including but not limited to each and every Motion to Dismiss and Motion for Judgment of Acquittal.[2]

[1] This motion is filed within the time permitted by applicable rules, without benefit of final transcripts of many of the proceedings before this Court, including parts of the trial. Hubbard respectfully requests that he be allowed to supplement this motion, in writing and during oral argument on the motion.

[2] These motions include but are not limited to: Motion to Dismiss Indictment: Grand Jury Exceeded Its Jurisdiction filed on December 19, 2014; Motion to Dismiss Indictment: Special Grand Jury not Properly Impaneled filed on December 19, 2014 and the supplement thereto filed on June 10, 2015; Motion to Dismiss Indictment: Violations of Grand Jury Secrecy Act filed on December 19, 2014; Supplement to Motions to Dismiss Indictment: Prosecutorial Misconduct which was filed on March 30, 2015 (including supplemental proffers filed under seal on May 7 and 8); Motion to Dismiss for Selective and Vindictive Prosecution filed on August 13, 2015; Motion to Dismiss: Unconstitutionality of the Alabama Ethics Act filed on August 13, 2015; Motion to Dismiss: Recent Violations of Grand Jury Secrecy filed on August

26, 2015 and its supplement filed on September 25, 2015; Motion to Dismiss filed under Seal on November 19, 2015 (Under Seal); and the Motions for Judgment of Acquittal made orally and in writing at the close of the State's evidence and at the conclusion of the trial.

Grounds for new trial

Hubbard moves for a new trial because the verdict is contrary to law and is contrary to the weight of the evidence (Ala. R. Crim. P. 24.1(c)(1)) and because he has not received a fair and impartial trial (Ala. R. Crim. P. 24.1(c)(2)).

1) Hubbard requests a new trial under Rule 24.1(c)(2) because the State improperly presented putatively "expert" testimony from witness Sumner about the meaning, purpose, and application of the laws under which Hubbard was charged.

There can be no doubt that this testimony was an important factor in the case. As one trial observer wrote, Sumner "testified authoritatively and effectively with devastating consequences for the defense on Day Five of the criminal trial of Speaker Mike Hubbard." ALABAMA POLITICAL REPORTER, "Hubbard Trial Day Five: Sumner Fries Hubbard," June 1, 2016, at <http://www.alreporter.com/hubbard-trial-day-five-sumner-fries-hubbard/>.

It was improper for the State to present "expert" testimony about the "purpose" or "intent" of the statutes under which Hubbard was charged. And it was improper for the State to present "expert" testimony about what various portions of those statutes mean, and whether certain phrases or clauses within those statutes would or would not encompass certain situations or events.

Such evidence was manifestly inappropriate under Alabama's law of evidence. See Ex parte Dial, 387 So. 2d 879, 880 (Ala. 1980).

It has long been the law that a witness may not give his opinion on a question of law or upon matters which involve questions of law. In Fiorella

v. City of Birmingham, 35 Ala. App. 384, 48 So. 2d 761 (1950), Judge Harwood quoted from 20 Am. Jur. Evidence § 799 (1939), as follows:

> "It may be laid down as a general rule that a witness is never permitted to give his opinion on a question of law or upon matters which involve a question of law. This rule is applicable to both expert and non expert witnesses." See also Alabama Fuel & Iron Co. v. Adams, Rowe & Norman, 216 Ala. 403, 113 So. 265. The reason for such rule is that conclusions of law are exclusively for the courts.

35 Ala. App. at pp. 388-389.

Judge McElroy in McElroy's Alabama Evidence, 3rd Ed., § 128.07, states the rule as follows:

> A witness, be he expert or lay, cannot give his opinion when such constitutes a legal conclusion or the application of a legal definition. Harris v. State, 39 Ala. App. 139, 99 So. 2d 201, cert. denied, 266 Ala. 697, 99 So. 2d 204 (1957).

The rule is restated in 31 Am. Jur. 2d Expert and Opinion Evidence § 69 (1967), as follows:

> The rule prohibiting a witness from presenting his opinion on a question of law is applicable to both expert and nonexpert witnesses. Testimony of expert witnesses is, in general, confined to matters of fact, as distinguished from matters of law. Opinion testimony of expert lawyers upon legal questions, other than that as to the law of another jurisdiction, or expert or nonexpert opinion generally, that amounts to a conclusion of law, cannot be properly received in evidence, for the determination of such questions is exclusively within the province of the court.

See also, e.g., Montgomery v. Aetna Casualty, 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness also may not testify to the legal implications of conduct; the court must be the jury's only source of law."); United States v. Oliveros, 275 F.3d 1299, 1306-07 (11th Cir. 2001) ("Domestic law is properly considered and determined by the court whose function

it is to instruct the jury on the law; domestic law is not to be presented through testimony and argued to the jury as a question of fact.").

This Court should have been the jury's sole source of information about what the law is, and what particular words and phrases within the law mean. That is what jury instructions are for.[3]

To have a witness usurp the Court's function is impermissible and prejudicial even if the witness happens to be right about the meaning of the law: because even then, the jury (having been led to believe that "what the law means" is a question to be answered through witness testimony) will naturally infer that "what the law means" is a question to be answered by the jury, based on its belief or disbelief in the witnesses and its inferences from their testimony. So, even if the witness happens to have been "right" about what the law means, the jury will believe that it is up to the jury whether to credit that testimony, and up to the jury to determine the purpose and scope of the law.

[3] The State will rely on Fitch v. State, 851 So. 2d 103 (Ala. Crim. App. 2001) (finding no reversible error where an Ethics Commission official was allowed to give testimony about what was permissible). However, the issue in Fitch was addressed solely as an issue under Ala. R. Evid. 704, and the "ultimate issue" doctrine. Id. at 116-18. Here, the question encompasses not only that, but also the general impropriety of allowing any witness – even an expert – to tell the jury what the law is, what the purpose or intent of the law was, what the law means, and how it applies to a given situation. As stated above, that task is for the Court alone.

Moreover, the crucial points in Fitch, to a reasonable reader, were (1) that the defendant was acquitted on the charge to which that testimony was relevant, thus making the issue "moot" and (2) the trial court had given a curative instruction telling the jury to ignore important parts of the testimony. Id. at 118-19. Thus the Court's earlier suggestion that the evidence was properly admissible is not of strong precedential value. This is underscored by the fact that, when denying certiorari, the Supreme Court stated not only: "this Court does not wish to be understood as approving all the language, reasoning, and statements of law in the opinion of the Court of Criminal Appeals," but also that such

denial "is not an endorsement of the opinion of the lower appellate court." Ex parte Fitch, 851 So. 2d 141 (Ala. 2003).

Such testimony is all the more impermissible and prejudicial, of course, where the witness is wrong about the law in any respect. And that is the case here, as will be shown in the subsequent section of this motion dealing with the judgment of acquittal – for instance, as to who is a "principal" under the statute, or what the "friendship exception" means.

It is also especially impermissible and prejudicial when a witness is allowed to testify that a law was "intended" or "meant" to be read broadly or in any other way, or that the law had a given "purpose." As discussed in regard to the judgment of acquittal below, this law (like all laws) is meant to be read according to its text. It is not proper to apply a criminal law "broadly" beyond what its text actually says, or to rely on a presumed legislative "intent" or "purpose" that is not found in the text. When a certified "expert" tells the jury that this should be done, that is highly prejudicial.

2) Even if testimony such as Sumner gave would be properly admissible in some cases, Hubbard was denied a fair trial in this case because the State presented such "expert" testimony without having disclosed that such expert testimony would be presented from Sumner. Hubbard asked for discovery regarding any expert the State would use. Even if the State had no plans to use Sumner as an expert when the State initially answered Hubbard's discovery requests, the State still had a continuing duty to disclose under Ala. R. Crim. P. 16.3, and the State should have corrected its initial answer in this respect. Had Hubbard been given notice that the State would present an "expert" to testify about the reach and application of the statutes at issue, Hubbard

would

have known of the necessity of calling his own expert on the same issues. Here, however, Hubbard was blindsided by the testimony of an expert whom the State had not disclosed. This issue was compounded when the defense was not allowed to question former Governor Bob Riley with similar questions to those asked of Sumner, despite the fact that Governor Riley called the special session and proposed the very ethics reform legislation at issue.

3) Hubbard has previously filed a motion, and made related filings, seeking an investigation into juror misconduct. Hubbard now moves for a new trial on the basis of juror misconduct: i.e., the misconduct identified in that previously-filed motion seeking an investigation, as well as any other misconduct that comes to light during the investigation.

Hubbard notes that the evidence presented in support of the motion for investigation is not the sort of testimony that is barred by Ala. R. Evid. 606(b). That rule bars testimony by a juror "as to any matter or statement occurring during the course of the jury's deliberations" and some other types of testimony that are less pertinent here. The evidence on which Hubbard is relying, here, is not evidence "as to any matter or statement occurring during the course of the jury's deliberations" (id., emphasis supplied). It is evidence of matters and statements occurring before deliberations.

"The proper standard for determining whether juror misconduct warrants a new trial, as set out by this Court's precedent, is whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant. ... The 'might-have-been-

prejudiced' standard, of course, casts a 'lighter' burden on the defendant than the actual-prejudice standard." Marshall v. State, 182 So. 3d 573, 607 (Ala. Crim. App. 2014).

Just the evidence already presented in support of Hubbard's prior motion meets this standard. Hubbard was plainly prejudiced by an admittedly false answer by one juror in voir dire: Hubbard would obviously have stricken that juror had that juror answered truthfully to the pertinent voir dire question about whether that juror could be fair. And Hubbard may have been prejudiced as well – indeed, clearly was prejudiced – by jurors having admittedly made their minds up before hearing all the evidence contrary to this Court's instructions.

4) Hubbard also moves for a new trial under Ala. R. Crim. P. 24.1(c)(2) because the Court should have granted his motions for continuance. As shown in previous motions, adequate trial preparation was impossible especially given the State's near-trial "dump" of many more documents that had not previously been produced.

5) Hubbard also moves for a new trial because the verdict is contrary to law and to the weight of the evidence. In this regard, Hubbard relies on the points argued below in support of his motion for judgment of acquittal, as well as the points argued previously in support of motions for judgment of acquittal made during trial. Even if the Court concluded that there were some evidence that made a judgment of acquittal inappropriate, the State's evidence was so weak – and the evidence supporting a not-guilty verdict so strong – that relief is appropriate under the "new trial" standard of "contrary to … the weight of the evidence." Ala. R. Crim. P. 24.1(c)(1).

Grounds for judgment of acquittal, dismissal of charges, or similar relief

Hubbard moves for a judgment of acquittal, dismissal of all charges, or similar relief, under Ala. R. Crim. P. 20.3 and any other applicable rule. In this renewed motion, Hubbard incorporates all previous grounds argued in prior motions to dismiss and motions for judgment of acquittal. As stated in motions for judgment of acquittal during trial, the State failed to prove the necessary elements of all charges, as further explained in those prior motions for judgment of acquittal.

Here, Hubbard focuses in particular on the following grounds and arguments.[4]

In interpreting the statutes at issue in this case, two considerations are paramount.

First, no criminal statute – especially not those at issue in this case – should be read to cover situations that are not within the actual text of the statute. There is no room for creative and expansive reading of statutes in the criminal law. To give a criminal statute a creative reading that goes beyond the ordinary meaning of its text would be a usurpation of the legislative function, and a violation of Alabama's "separation of powers" doctrine. Ex parte W.F.,___So.3d____, 2015 Ala. LEXIS 140 (Ala. 2015) ("the constitutional doctrine of separation of powers precludes the judiciary from changing a criminal offense. … Appellate courts are 'not at liberty to rewrite statutes.'"). Such a reading also violates the defendant's due process rights.

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[4] In a motion for judgment of acquittal filed after conviction and sentencing, like this motion, the defendant is not limited to the same grounds raised in a prior motion. Indeed, a prior motion for judgment of acquittal need not have been filed at all, in order to preserve arguments raised in a motion like this one. See Ala. R. Crim. P. 20.3(a) ("It shall not be necessary to the making of the motion after a verdict or judgment of conviction

that a similar motion have been made prior to the submission of the case to the factfinder.").

> It is a fundamental tenet of due process that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.

Ex parte Tulley, _ So.3d____, 2015 Ala. LEXIS 106 (Ala. 2015), quoting United States v. Batchelder, 442 U.S. 114, 123 (1979) (internal quotation marks, brackets and citations omitted).

Second, when interpreting laws that would seem to criminalize the actions of public officials, it is especially important that any possible ambiguities in the law are resolved with a narrow reading rather than a broad one. This is important, first, because of due process concerns. See Johnson v. United States, _ U.S.____, 135 S.Ct. 2551 (2015). And even beyond that, there is real danger to the public, and to the ability of government to function, in overbroad readings of "public integrity"-type laws. There is the danger of overzealous prosecutors who choose their targets, and the danger that officials might be prosecuted when their actions are perfectly routine. As the Supreme Court of the United States reemphasized recently, statutes should not be read in such a way that they technically make criminal any "normal political interaction between public officials and their constituents," because "we cannot construe a criminal statute on the assumption that the Government will use it responsibly." McDonnell v. United States, ___ U.S.____, 136 S.Ct. 2355, _ (2016). And there is danger that, without the ability to determine with certainty in advance whether their actions are permissible or criminal, officials will be paralyzed by the "pall of potential prosecution," id. In order to reduce

these dangers, it is important to read criminal statutes in this area narrowly, and in a way that allows officials to know in advance exactly where the lines are.

A. Counts 16, 17, 18 and 19

Counts 16, 17, 18 and 19 charge violations of Ala. Code § 36-25-5.1(a), for the solicitation or receipt of investments in Craftmaster Printers from Mr. Brooke, Mr. Holbrook and/or Sterne Agee, Mr. Rane, and Mr. Burton respectively. By these investments, the investors purchased equity interests in Craftmaster, an ongoing and established business. The State's charge is that these investments were a "thing of value" and that this was prohibited because each investor was a "lobbyist, subordinate of a lobbyist, or principal." If the State is wrong on either point, these charges cannot stand. In fact, the State is wrong on both points.

i. Not a "thing of value"

These investments were not a "thing of value," because (among other reasons) the term "thing of value" does not include "[a]nything for which the recipient pays full value." See Ala. Code § 36-25-1(34)(b)(9).

"Anything" means "anything" – not just "some types of things" or "little things" or "personal property" or any other limitation. It means "anything." The Legislature would not have used this word "anything" unless it had truly meant to include "anything." It is well-established that, unless there is something else in the text of the statute that

shows the contrary, the word "any" in a statute is given its full, natural, broad meaning.[5] The same is true, all the more so, for the word "anything."

The State argued at trial that this portion of the statute had a narrow and particular focus, that it was merely designed to allow situations such as a public employee or official to reimburse a lobbyist or principal for things like tickets and the like. But that is clearly not right – not only because of the plain and ordinary meaning of the word "anything," but also because such an exclusion from the definition of "thing of value" is absolutely necessary to allow public officials and employees to live normally. They must be able to get a thing of value (light bulbs, gasoline or cable tv service) from General Electric, Exxon or Comcast, by paying for it. (Those companies are listed as principals on the Ethics Commission's public list of registered principals). They must be able to receive Apple computers, lumber from Great Southern Wood, Michelin tires, Rheem air conditioners, and many other things – all things of value – from those registered principals, so long as they pay full value. "Anything" truly does, and must, mean "anything" just as the Legislature said. Otherwise the statute is absurd.

Furthermore, this legislative permission for full-value exchanges allows for exchanges in which a lobbyist or principal is either buying or selling the "thing" for "full

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[5] See, e.g., Fuller v. Associates Commercial Corp., 389 So.2d 506, 507-09 (Ala. 1980) (explaining, at some length and with citation of precedent, that "any" is ordinarily given its common and very broad meaning); id. at 509 ("This Court must give effect to the legislature's choice of the word "any" rather than judicially rewriting the statute …"). "The word 'any' is commonly understood to mean 'every' or 'all.'" Ex parte McAllister, 541 So. 2d 1104, 1106 (Ala. 1989). "The word 'any' is a broad term, … synonymous with 'all' …" Ridnour v. Brownlow Homebuilders, Inc., 100 So. 3d 554, 557 (Ala. Civ.

App. 2012) (citations omitted)

value." So, for instance, a public employee could buy a car from a dealership (even if that dealership is the principal of a lobbyist) or could sell her car to the dealership. They must be able to receive money from eBay (a registered principal, according to the Ethics Commission) when they sell something on eBay; they have given "full value" by exchanging the thing sold, for the money paid. When people exchange cash for something of equal value, the person on each side of the exchange has paid full value for what they received (whether it be the cash or the thing exchanged for cash).

By simple logic and, more importantly, based on the statute's plain language, therefore, investments in Craftmaster were not "things of value" if investors paid "full value" for the equity they were buying.

The State completely failed to prove that there was not a full-value exchange; in fact the evidence is clear that this was a full-value exchange. These investors were offered the same equity at the same price as was offered to other potential investors. Other investors, who were neither principals nor lobbyists, entered into the same investment. All the evidence was that it was, in fact, a good investment for the amount invested, with a good return on investment.

This statute by its plain terms does not prohibit all such transactions between public officials and lobbyists or principals. It expressly permits them, so long as full value is exchanged.[6] Some may think that the law should be otherwise, and that the

[6] Even a full-value exchange can be a thing of value, under § 36-25-1(34)(b), and

therefore may give rise to a valid charge under § 36-25-5.1(a), if a "particular course of action [on the part of the public official or employee] is required as a condition" of the

Legislature should have banned all such transactions, but the Legislature did not do so. The prosecutors may think there is something unseemly about this, but prosecutors' sense of what is seemly or unseemly is not what criminal law is made of. The prosecutors may even think that some investors might have invested in order to enhance their standing with Hubbard; but this was not the charge here, and such insinuations do not make a full-value transaction illegal under the plain language of the statute.

Because these investments were a full-value exchange, they were not a "thing of value" and there must be a judgment of acquittal on these counts.

ii. Not "lobbyist, subordinate of a lobbyist, or principal."

These counts (or at least counts 16, 18, and 19) also fail because the people whom Hubbard is charged with having solicited and obtained investments were neither a "lobbyist, subordinate of a lobbyist, or principal." Ala. Code § 36-25-5.1(a).[7]

There is no evidence that any were lobbyists or subordinates of lobbyists. The State's theory is that they were principals.

In this, the State depends on a theory espoused by Sumner in his testimony: that a lobbyist's "principal" is not just the entity that retains the lobbyist (such as the Business Council, Great Southern Wood, or Hoar Construction). The State's, and Sumner's, theory is that some unknown range of high-level officials or employees of that entity are also

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exchange. See § 36-25-1(34)(b). But there is no allegation and certainly no proof that these investments were conditioned on Hubbard taking any particular course of action.

[7] Count 17 may be different because the investment was made not by the individual to whom Hubbard spoke, but ultimately by Sterne Agee (which is indeed a principal). Yet

even then, Hubbard did not solicit the investment from Sterne Agee.

"principals" of the lobbyist. This is not what the statute says, and the Court must reject the State's attempt to expand the law's reach beyond its most natural narrow meaning.

The law defines "principal" as "[a] person or business which employs, hires, or otherwise retains a lobbyist." Ala. Code § 36-25-1(24).[8] The most natural reading of this statutory language is that it refers to the contractual agency relationship between the lobbyist and principal. Most principal-agent relationships, of course, are created by contract. Fisher v. Comer Plantation, Inc., 772 So. 2d 455, 465 (Ala. 2000). There can be implied agency relationships in some areas of law, see id.; but the principal-agent relationship at issue here is clearly one involving a contractual relationship. To employ, hire, or otherwise retain someone is to enter a contractual agency relationship with them. In other words, the definition is framed around this question: whom does the lobbyist represent? With whom does he have a contract of employment, hire, or retention? The answer here, as all the evidence shows, is the Business Council, Great Southern Wood, and Hoar Construction – not Mr. Brooke, Mr. Rane, or Mr. Burton. (It is, of course, hornbook law that when a corporate officer signs a contract in his capacity as a corporate officer, it is still the contract of the corporation – not of the officer himself.)[9]

[8] True, a "person" can be a principal under this definition, and "person" is defined broadly in § 36-25-1(23) to include individuals as well as entities and groups. But that makes sense because an individual person can, if he so chooses, retain a lobbyist on his own behalf. This does not mean that, when a business entity hires a lobbyist and thus becomes a principal, individuals associated with that business entity become principals

too.

Will Brooke and Rob Burton are even further removed as neither of them even signed the Principal Form on behalf of the principal!

If the Legislature had wanted to include officers, directors, or employees of principals within the prohibition of Ala. Code § 36-25-5.1(a), the Legislature could easily have done so. The Legislature would have done that either in the definition section, or in -5.1(a) itself. And the Legislature knew how to include subordinates of a covered entity, when it wanted to do so – as shown for instance by the fact that the Legislature did include subordinates of lobbyists in this very prohibition. Had it meant to include subordinates or other human affiliates of true "principals," it would have done so in the same breath. The Legislature decided not to do that, and the prosecutors cannot later expand the law beyond what the Legislature enacted.

The narrow natural reading of "principal" is confirmed by the law and by longstanding administrative practice regarding the filing of principals' reports. Under § 36-25-19, "every principal employing a lobbyist" must file quarterly reports in some detail. The Ethics Commission has promulgated a form, available through its website, titled "Principal's Form: Quarterly Statement of Lobbying Activities." The very first field that must be filled out, in that form, is titled: "Principal (Name of Business Entity, Association or Organization):" Then there is a field titled "Name and title of person signing for Principal:

" This confirms it: the principal is the entity for which the lobbyist actually works, with which the lobbyist has a contractual agency relationship. An individual signs for the principal, but is not thereby the (or a) principal himself.[10]

[10] This forms includes a separate field to be filled out "If principal is an individual only"

– because as noted above, individuals can themselves retain lobbyists if they so choose – but there is no suggestion that individuals within an organization that files a principal report are principals who must file a report.

Indeed, the Ethics Commission makes available on its website (http://ethics.alabama.gov/news2.aspx) a link to a downloadable file of the "2016 Principals List." It is a large spreadsheet containing over 800 registered principals. None appear to be individuals; if we have overlooked any, it is true that at least a very few registered principals are individuals. The spreadsheet contains the names of hundreds upon hundreds of organizations and entities of various sorts. All have officers, directors, owners or high-level officials. None of them, so far as it appears, get those individuals to file their own reports. That is, they all apparently recognize that such individuals are not principals within the meaning of the statute. If they were, they would have to file reports of their own.

No one has ever suggested that individuals must file such reports, no matter how high they are in the hierarchy of an entity that is a "principal." No one has ever suggested that individuals must file such reports, even if they were the ones who selected the lobbyist, negotiated his contract, and directed his activities for the entity that is the true "principal." The "principal" is the entity with a contractual agency relationship with the lobbyist. It is the entity that files reports. Individuals affiliated with that entity, no matter how high in the hierarchy, do not. Given this longstanding administratively-accepted norm, it would be wrong, unfair and unconstitutional to apply a different definition of "principal" in order to impose criminal liability.

Moreover, if the State's theory were correct, then it would be impossible for people to know in advance whether their behavior would place them under the "pall of

potential prosecution," McDonnell, supra. Even if someone knew that his employer was a

"principal" – that it had lobbyists – how would he know whether he, too, counted as a principal in the eyes of some zealous prosecutor? How would he know whether he is supposed to file quarterly reports, and how would he know whether he is subject to the statute in other ways? Sumner gave no precise definition of "principal," if that word is permitted to go beyond the actual principal itself. The State provided none.[11] Under their theory – a theory that expands the word "principal" yet gives no limiting factor or even any firm definition at all – the statute would be unconstitutional as a violation of due process. Johnson, 135 S.Ct. at 2556 ("the Government violates this guarantee [of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

Prominent observers have already remarked, in the Birmingham Business Journal, that the State's position in this case is a shock to many in the business community who have never believed the definition of principal to be so broad. They have remarked, as well, that the meaning of this new broad view of the word is still unclear even now.

> If the verdict stands, the meaning of principal would apparently be much broader than many believed prior to the Hubbard trial and places many businesses and associations at unknown risk if they employ lobbyists.
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> Under this new, broader interpretation, if the entity employing a lobbyist is a business, it is unclear which of its employees, officers, or directors individually would be considered a principal. …. Trade associations with

[11] The State and Sumer do not, for instance, contend that an individual is a principal only if he was the person within the organization who actually hired the lobbyist on behalf of

the organization; their theory is broader and more vague than that. In any event, even if that were their theory, the State's proof failed to show that the named individuals were all "principals" in that sense.

> volunteer boards face an even more serious issue because the verdict seems to indicate that being a volunteer board member of a trade association that employs a lobbyist renders that individual a principal under the Act.

Ted Hosp and Edward O'Neal, "What businesses should know about the Hubbard ruling and Alabama ethics laws," Birmingham Business Journal (June 16, 2016).

Some may think it would be good to prohibit high-level officials of principals from doing what principals themselves are prohibited from doing. And the Legislature could make that choice, if the Legislature set out a constitutionally-adequate definition of who is covered by such law. But the Legislature made a different choice, to cover only a true principal who actually has a contractual agency relationship with a lobbyist. It is not for prosecutors or courts to override that legislative choice.

iii. Friendship Exception

Under § 36-25-1(34)(b)(3) things that fall within the "friendship exception" are not things of value. If the friendship exception is ever to have application it applies to the actions of Mr. Brooke, Mr. Rane and Mr. Burton. Each of these men testified that he was a long-time friend of Mike Hubbard, that the actions he took were because of that friendship, and because the investment made good business sense. Their actions fall within the friendship exception as it is described in the statute. However, the State and Sumner were improperly allowed to present a different definition of friendship and to, in effect, create a much narrower friendship exception which is contrary to that implemented by the Legislature as stated in the plain language of the statute. Once again, it is not for the prosecutors or courts to override that legislative choice. Instead, the

friendship exception must be applied as written.

B. Count 23

Count 23 charges a violation of the same statute, § 36-25-5.1(a), an alleged soliciting or receiving from Mr. Brooke of some intangible business assistance. As with the counts discussed above, judgment of acquittal is due to be entered on this count because Mr. Brooke is not a lobbyist, subordinate of a lobbyist, or a principal. The State's theory is as discussed above: that Mr. Brooke is a principal because of his status as a Board member of the Business Council, which is a principal. (He is a volunteer member of that board, as are a large number of others.) For the reasons discussed above, the State's theory is wrong as a matter of law. Individuals do not become "principals" by virtue of their status as officers, even directors, of a principal. The principal is the entity which has the contractual employment, hire or retention relationship with the lobbyists, under § 36-25-1(24). Further, there is no evidence that Mr. Brooke was acting on behalf of the Business Council when assisting Hubbard with these business matters, or that he personally hired or otherwise retained lobbyists in any sense. Moreover, Mr. Brooke testified he had provided similar advice or services for other friends without charge.

C. Counts 6 and 10

Counts 6 and 10 charge a violation of the same statute, § 36-25-5.1(a), arising from consulting or business contracts which Hubbard had with APCI and Edgenuity, respectively. The charge, here, is not that Hubbard used the power of his office in any way to benefit them; it is nothing of that sort. It is simply that the prosecutors believe it was wrong for them to enter into these business relationships at all. The money that

Hubbard earned through those contracts is said, by the State, to be a "thing of value" which he received from a principal (i.e., APCI and Edgenuity).

It should be noted that both of these consulting contracts were for Hubbard's services outside the State of Alabama. The significance of this was highlighted by Mike Humphrey's testimony that when he first met Hubbard, it was at an education conference in San Francisco and after their lengthy conversation, he still had no idea Hubbard was Speaker of the House. Not only did Hubbard not utilize his office but Humphrey had no need for him to do so. Humphrey specifically stated that they were in good hands in Alabama and didn't need or want Hubbard's help inside the State but rather outside the State. Both the APCI and Edgenuity contracts expressly stated they were for consulting work outside the State.

Regardless, the money earned through these contracts was not a "thing of value" because it comes within statutory exceptions to the definition of that term, in Ala. Code § 36-25-1(34)(b).

As discussed above, constitutional due-process principles require that a statute give fair notice of what is permitted and what is prohibited. Keeping in mind those principles, the first thing to consider in regard to these counts is the Ethics Commission's "Extraordinary Filing 2012-0004," the January 27, 2012 letter to counsel for the Southeast Alabama Gas District approving a similar consulting agreement with Mr. Hubbard. That letter explains that Sumner and the General Counsel of the Commission "do not see any problems with this arrangement." They explain that "it is currently being

done in several circumstances around the state by various members of the Legislature."

They explain that the fact that it is a consulting agreement, rather than an employment agreement, "makes the matter that much cleaner." Counsel for the Ethics Commission clearly referenced similar contracts that other members of the Legislature had, yet Hubbard was prohibited during trial from presenting evidence or asking questions about the current and former legislators (including Hubbard's immediate predecessor as speaker) who had similar contracts. Thus, Hubbard was prohibited from eliciting facts at trial that would allow the jury to fully understand a crucial piece of evidence.

Our point in relying on this letter, here, is not that it creates a defense to these charges under any express statutory bar based on Ethics Commission approval. Our point is instead based upon due process: the State cannot call these contracts criminal, where the Ethics Commission's own top officials have said they saw no problem in a materially similar contract, and where the Ethics Commission's own top officials noted with approval that other legislators around the state were doing similar things. If the statute did not clearly tell the Ethics Commission's top officials that this was criminal, it certainly did not give fair notice to people such as Hubbard that it was criminal. To prosecute under the ethics law, for something that the top ethics officials had seen as presenting no problem, would violate due process.

> It is a fundamental tenet of due process that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.

Ex parte Tulley, _ So.3d____, 2015 Ala. LEXIS 106 (Ala. 2015), quoting United States v. Batchelder, 442 U.S. 114, 123 (1979) (internal quotation marks, brackets and citations omitted).

And the same Ethics Commission officials were right: these contracts were permissible, because the money earned through them was not a "thing of value." This is so under two exceptions to the definition of "thing of value": §§ 36-25-1(34)(b)(9) and (10). The State would have to prove that neither exception applies; if either applies, then the money earned was not a "thing of value" and there was no offense committed.

Exception (9) to the definition of "thing of value," which has also been discussed above, excepts "Anything for which the recipient pays full value." Here, the State failed to prove beyond a reasonable doubt that either APCI or Edgenuity got less in value, from its contract with Hubbard, than it paid.

Exception (10) to the definition of "thing of value" excludes "Compensation … earned from a non-government ... client … under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient's public service as a public official or public employee." Here, the State failed to prove beyond a reasonable doubt that APCI or Edgenuity paid Hubbard for reasons that were "[]related to [his] public service as a public official."

In considering whether the State has proved its way "out" of these exceptions, the Court must interpret the exceptions in a way that comports with due process and that does not unduly interfere with the functioning of Alabama's government. In our State, with its

citizen legislature, almost every member of the Legislature has an outside occupation.

Opinion of Justices No. 317, 474 So. 2d 700, 704 (Ala. 1985) ("Most legislators have other occupations which they continue after they are elected."). The statute must be interpreted in a way that allows all of them – and all of the entities that they have business dealings with – to know with certainty in advance what is permissible. The statute must be interpreted in a way that reduces the danger of overzealous prosecutions, and that does not paralyze citizen-legislators with a fear of possible prosecution.

There is, furthermore, nothing in the statutes that subjects consulting contracts or the like to any prohibition different from, or more stringent than, other sorts of transactions or relationships between officials and principals. That is, the State in this case insinuated that there is something inherently more suspicious about a public official offering consulting work, than there is about the same official offering legal services, selling cars, or performing any other occupation. But the Legislature has made no such distinction, and there clearly is no such distinction in the law. This is reflected in the Ethics Commission's officers' approval of Hubbard's consulting contract with the Gas District: consulting contracts are not ipso facto unlawful, or even ipso facto suspicious. Consulting is every bit as legitimate an occupation for a citizen-legislator as any other; it is up to the Legislature and not to the Courts or prosecutors to say otherwise.

In fact the Legislature made clear that one of the primary concerns behind its legislation was recognition that public officials and public employees must – to the fullest extent compatible with the law – be able to have the same sorts of business opportunities as other citizens. This is not just important to public officials. It is important to the People

as a whole, because preserving this right is important if the State wishes to encourage the

most highly qualified people to engage in public service. And this is especially important for the Legislature, because (as discussed above) most legislators have other occupations. As the law states,

> It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided.

Ala. Code § 36-25-2(b). Providing consulting services is a substantial sector of a modern economy. The Legislature did not enact any law that makes it improper for legislators to engage in this part of the economy, or any law subjecting them to more scrutiny or skepticism than their colleagues when they do so.

So, in interpreting exceptions (9) and (10) to the definition of "thing of value," consider the hypothetical case of a legislator who is also an attorney in private practice. (There are several.) Consider such a legislator having clients that include major corporations – some that are principals to lobbyists. (This is not far-fetched by any means.)

The statute must be interpreted such that this legislator, and his client, can be sure that their lawyer-client relationship will not be the subject of prosecution from some over-zealous prosecutor claiming (as to exception (9)) that the lawyer's rates were too high (i.e., that the lawyer did not give "full value" for the money he got) – or claiming (as

to exception (10)) that the client hired the lawyer in part because of his prominence in the community, which (one might say) is not "unrelated to the recipient's public service as a public official or public employee." The statute must not be interpreted in a way that leaves this lawyer-legislator, and his clients, subject to criminal prosecution at the whim of a zealous prosecutor, and to criminal conviction based on a jury's ad-hoc and after-the-fact subjective notion that the lawyer's fees were too high, or that he was hired for his local prominence.

So, the statutory exceptions must be interpreted, at least, to require something more than a question of subjective judgment that the legislator's service under a business contract was not really worth what his client paid or that the legislator's prominence and connections were part of what attracted his client to him. That is all that the State could offer, here, in its attempt to evade the "thing of value" exceptions.

But the law must be interpreted to require more. As to exception 9 (the "full-value" exception to the definition of "thing of value"), the prosecution should have to provide clear and objective evidence that the amount paid was plainly and objectively inflated over the value of the lawful goods or services provided. There was no such proof here. And as to exception 10 (the "compensation from a client" exception), the prosecution should have to provide clear and objective evidence that the client was paying not just for the official's prominence and connections, but also for the exercise of the official powers of his office. Again there was no such proof here; there was nothing but insinuation, linked to an incorrect belief that there is something particularly suspicious about

consulting services in contrast with other sorts of economic activity.

Further, Sumner testified that a legislator who owns a business cannot provide his services or sell his wares (the example used was vacuum cleaners) within the State of Alabama, but could do so in Montana. Thus, according to Sumner and the prosecution, every legislator who has an occupation that involves business within the State of

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Alabama is potentially violating the Ethics Law. This hypothetical demonstrated the lengths Sumner's testimony diverged from the ethics law as written, and as it impacts our historical citizen-legislature. Per the State's theory, no legislator should do business within the State due to concern that the purchaser of such services or products may be

acting simply because of the mantle of the legislator's office.[17] Even more frightening,

some of the counts on which Hubbard was convicted involved consulting contracts expressly limited to services rendered by Hubbard out of state – services clearly permissible under Sumner's hypothetical.

Again, without this requirement of clear and objective proof, all legislators who have occupations are working at their peril any time they deal with a principal or lobbyist via any arms'-length transaction. If a legislator owns an antique store, and a major corporation wants antiques to decorate the lobby of its office – they'd both better watch out for a zealous prosecutor deciding to take them down. If he decides the corporation overpaid for a desk, or that the corporation went into his antique store rather than one down the road for reasons the prosecutor imagines to be suspicious – a criminal trial will

[12] It should be noted that the prosecution repeatedly asserted that using the “mantle of your office” is a crime, despite those words not appearing anywhere in the ethics law. This misleading representation was further compounded by Sumner defining the mantle of your office as “the aura of the office”. Convictions based on using your aura are the epitome of vagueness and per se violations of due process.

result. This cannot be the law that our Legislature made; if it were, it would be unconstitutionally vague.

D. Count 5

Count 5 charges a violation of Ala. Code § 36-25-5(b), based on the contention that Hubbard voted for a bill when he had a conflict of interest by virtue of his consulting contract with APCI. Here again, a familiar problem raises its head: the prosecution is attempting to ignore the ordinary meaning of the language of the statute itself, and is attempting to create its own definitions and its own standards in place of what the Legislature enacted.

And let us be clear at the outset of this argument that the State did not charge or allege that Hubbard voted on this bill because of any contractual payment to him by APCI. That would be a bribery-type charge under laws such as § 36-25-7, and the State (correctly) does not claim Hubbard engaged in that sort of activity. The only charge here is that he had a conflict of interest that should have led him to abstain from the vote.

Section 36-25-5(b) states in part, "A member of a legislative body may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest." But what is a conflict of interest? That term is defined by the Legislature. First, in this very same statutory section, the Legislature provided:

> A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending

legislation; or who is an officer or director for any such corporation,

> company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation.

Ala. Code § 36-25-5(f). This language is plain in its meaning: there is a conflict of interest when the proposed legislation would uniquely affect a business entity, and the legislator either (1) owns or otherwise controls more than five percent of the business entity, or (2) is an officer or director of the business entity. It is undisputed that Hubbard did not own any portion of APCI and was not an officer or director. So, under the text of § 36-25-5 itself, Hubbard plainly did not violate this conflict-of-interest-in-voting rule.

The Legislature also provided another definition of conflict of interest in § 36-25-1(8). That definition is, on the best reading of the Ethics Laws as a whole, not applicable to § 36-25-5(b); the best reading is that for purposes of § 36-25-5, the definition of "conflict of interest" is set forth in that section itself. (Even the prosecutors made this point to the Court, in argument on the motion for judgment of acquittal).

But even if the definition of "conflict of interest" in -1(8) could govern a matter under -5(b), still the definition in -1(8) is inapplicable here on the undisputed facts. That definition states:

> A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs.

So, in order for a conflict of interest to exist here, it must be proven that Hubbard's vote (1) "would materially affect" (2) the financial interest of (a) the official or his family or

(b) a business with which the official is associated, (3) "in a manner different from the manner it affects the other members of the class to which he or she belongs."

None of those things were proven.

Let us focus first on prong (2), and ask first whether APCI was a "business with which [Hubbard] is associated"? The answer is clearly "no" as a matter of law on undisputed facts. The Legislature defined that phrase, "business with which the person is associated," in § 36-25-1(2); it means "Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business." It is undisputed that neither Hubbard nor any of his family members were officers, owners, partners, directors, employees, or more-than-5-percent owners of APCI.

So, any impact of the vote on APCI – even if there had been any – would not constitute a "conflict of interest" under this law.

As usual, prosecutors may think the law should be different. But it is not up to the prosecutors to write the law. And there are very good reasons why the Legislature chose a precise and narrow definition of "conflict of interest": because every time a Legislator recuses himself from a vote, his constituents have no voice in the legislative process. The Legislature thus struck a balance as to what sorts of conflicts of interest are disqualifying. It is not up to prosecutors to adopt a different balance; they cannot change the standard from the one the Legislature wrote, for to do so would violate Hubbard's due process rights.

The remaining question is whether there was a conflict of interest on a theory that the vote "would materially affect" Hubbard's own financial interest "in a manner different from the manner it affects the other members of the class to which he or she belongs." The answer again is no, for myriad reasons. Casting this vote – or the outcome of the vote as a whole – "would" not materially affect Hubbard's financial interest. ("Would," in this phrase, is a very different thing from "could"; "would," a form of the word "will," implies the certainty of an impact had the bill in question passed.) The bill would have no impact on Hubbard, financially, at all; and the State failed to prove any such impact. If there "would" be any impact on Hubbard, it would not be "in a manner different from the manner it affects the other members of the class to which he or she belongs." That prong of the test, plainly, exists in recognition of the fact that (for instance) a teacher-legislator can vote on a school budget bill, and a lawyer-legislator can vote on laws that would make his practice of law more or less financially remunerative. See, e.g., Opinion of Justices No. 317, 474 So. 2d 700, 704 (Ala. 1985) Such legislators can vote on such laws, because they do not affect the legislator "in a manner different from the manner it affects the other members of the class to which he or she belongs" – i.e., the class of teachers, or the class of lawyers. Here, if Hubbard were thought to have personally benefitted from this bill – by virtue of the fact that it might trigger a chain of events that would help APCI, with which he had a business contract – it would not affect him in that way, in a manner different than it would affect other contractors who might be indirectly benefitted by APCI's business success.

Had the Legislature meant to enact a law that prohibits a legislator from voting on a bill that somehow benefitted an entity with which he has a business contract, then the Legislature would have said so. The Legislature, though, pointedly did not say so. It did not include that sort of situation in the definition of "business with which the person is associated." This charge is ultimately a prosecutorial effort to impermissibly expand that definition beyond what the Legislature wrote.

Additionally, the language complained of was a few short sentences in the vast general budget bill. It did not give anything to APCI but rather would have charged Medicaid with studying whether a Pharmacy Benefit Manager was appropriate. Even so, before voting on the bill, Hubbard agreed that the language be removed, knew it would be removed and then afterward, made sure that it was removed. He knew when he cast his vote that the language presented no conflict.

The mismatch between the statutory language and the theory of the prosecution, like others mentioned above, has been recognized by prominent commentators on this case. Recognizing that the facts of this case do not demonstrate a conflict of interest as the statute defines the term, they note that the upshot of this conviction – if not overturned – is that "[t]he definition of a legislative 'conflict of interest' is broader than the language of the Act itself." They further note that the best interpretation of this conviction, if not overturned, is that "a conflict of interest requiring recusal of a member of a legislative body exists if a member has any interest or is paid in any way by a business that is affected by legislation. Whether or not that would be good policy, it is not

what the plain language of the law prohibits." Ted Hosp and Edward O'Neal, "What

businesses should know about the Hubbard ruling and Alabama ethics laws," Birmingham Business Journal (June 16, 2016).

E. Counts 11 through 14

Finally, Counts 11 through 14 all have to do with Hubbard's business contract with Capitol Cups, Inc. (a contract for business-related services having nothing to do with legislative policy), and his alleged action on behalf of a distinct entity, CV Holdings, LLC. Capitol Cups, Inc., is a corporation, the shares of which are owned by CV Holdings, LLC. CV Holdings, LLC, also owns the shares of, or is a parent to, other business entities. Some are significant employers in Lee County and make products very different from those made by Capitol Cups, Inc.

Boiled down to its essence, the prosecution claims that it was criminal for Hubbard to advocate on behalf of CV Holdings – in a way that would benefit not Capitol Cups but other entities that had manufacturing facilities in Lee County – because he had a business contract with Capitol Cups.

The problem which is no surprise given all the discussion of other counts above, is that once again the prosecution is trying to make the law conform to its own instinct about what "should" be illegal, rather than following the law as written. In this instance, the prosecution does so largely by attempting to have the Court ignore fundamental concepts of corporate law – the separate legal identity conferred by the corporate form – and thereby expand the Ethics Law beyond what the Legislature wrote.

When the Legislature enacts a law, it is presumed to know existing law. City of

Montgomery v. Town of Pike Rd., 35 So. 3d 575, 584 (Ala. 2009).

A fundamental part of the existing law, as every law student learns and every lawyer knows, is that a corporation is a legal entity, separate from any other legal entity. "The mere fact that a party owns all or a majority of the stock of a corporation does not, of itself, destroy the separate corporate identity." Econ Mktg. v. Leisure Am. Resorts, 664 So. 2d 869, 870 (Ala. 1994).

To be sure, there are situations in which the law will allow a "piercing of the corporate veil," such as where the corporation is created as a subterfuge, id. But there is no proof in this case that would allow the prosecutor, or the Court, to "pierce the veil" to make Capitol Cups, Inc., CV Holdings, LLC, and Robert Abrams (the founder) the same legal entity. Nor is there any basis in the language of the Ethics Law for any conclusion that they are all to be treated as the same legal entity in this case.

Given these basic legal principles and indisputable facts, the State has simply failed to prove the required elements of each statute at issue in Counts 11 through 14. The Ethics Law does not command that a Legislator abstain from governmental efforts to help a manufacturing employer in his county, simply because he has a business relationship with a legally-separate corporation that makes a different product.

i. Count 11

Count 11 charges, under § 36-25-5(a) that Hubbard used his official position to obtain personal gain for himself or Auburn Networks from "Robert Abrams d/b/a CV Holdings, LLC." But "Robert Abrams d/b/a CV Holdings LLC" is not a legally meaningful phrase. The acronym "d/b/a" is used to refer to a trade name, such as when a

corporation has a boring legal name but “does business as” (i.e., under) a more consumer-

friendly name. Robert Abrams, while an officer of CV Holdings, LLC, is not "doing business as" CV Holdings, LLC. CV Holdings, LLC, is a legal entity separate from Mr. Abrams. This is basic first-year law school "stuff" that the prosecution ignores.

The prosecution also ignores that CV Holdings, LLC, had no contract with Hubbard. His contract was with Capitol Cups, Inc. – but there is no suggestion and no proof that Hubbard used his official position to benefit Capitol Cups, Inc. Nor is there any proof that Capitol Cups, Inc. paid Hubbard for advocacy on behalf of job growth in Lee County that would obtain via economic development funds for CV Holdings, LLC.

Hubbard's consulting contract was entirely proper, as explained above regarding other counts. Citizen legislators may engage in a consulting business, just as they may engage in other lawful businesses. There is no proof that Capitol Cups, Inc., was paying for anything other than the consulting services which Hubbard provided, separately from his position as Legislator. There is no proof that Hubbard obtained that consulting opportunity through use of his official position.

There is only the prosecutors' insinuation that he advocated for a separate entity, CV Holdings, Inc., not because it would help the economy in Lee County but because of his consulting relationship with Capitol Cups, Inc. There is no proof of this; but even if it were true, it would be insufficient to make out a violation of § 36-25-5(a). There was no proof that continuation of his consulting relationship with Capitol Cups, Inc., depended on whether he took or did not take any action in his official legislative capacity. Hence, there is no proof that he used his official position to obtain personal gain.

ii. Counts 12 and 13

Counts 12 and 13 allege that Hubbard "represented" "Robert Abrams d/b/a CV Holdings, LLC" before the Governor and Commerce Department, respectively, and that he did so for compensation – the alleged "compensation" being payment from "Robert Abrams d/b/a CV Holdings, LLC" to Hubbard or Auburn Network. The charge is under Ala. Code § 36-25-1.1 ("No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.").

It is a legislator's obligation to look after the interests of his constituents. Hubbard testified that there were many instances where he helped dozens of businesses and individuals in his district in similar fashion. SiO2 was a major employer in his district. Therefore, Hubbard contacted the Commerce Department and the Governor's office and arranged meetings between those offices and representatives of SiO2. Hubbard did not attend these meetings. Under similar circumstances, in McDonnell, supra, the U.S. Supreme Court held that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as 'official action'" Id. at p.14.

Again, the allegation of the indictment is false under the undisputed evidence. Neither Robert Abrams nor CV Holdings, LLC had a contract with Hubbard. Hubbard had a contract with Capitol Cups and performed services for Capitol Cups in its plastic-cup manufacturing business. Separately, he advocated for an economic growth

opportunity for Lee County that involved funds for CV Holdings, LLC, for other

manufacturing in the county (not for Capitol Cups). Again, there is no proof that Capitol Cups paid Hubbard for doing that advocacy that benefitted a separate entity (and thereby benefitted Lee County). There is only insinuation; and insinuation is not sufficient.

iii. Count 14

Finally, Count 14 is in the same vein: the charge is that Hubbard used state property and employee time (some emails, a subordinate's telephone call, and the like) for his personal benefit. The alleged personal benefit, again, is alleged in the indictment in a way that is indisputably false: money for Hubbard or Auburn Network from "Robert Abrams d/b/a CV Holdings, LLC." And again, once one recognizes the separate legal identities of Capitol Cups, Inc. and CV Holdings, LLC – and recognizes that the Legislature has not prohibited a legislator from advocating for something that would benefit constituents simply because he has a business relationship with an entirely separate corporation – this charge collapses, as well. Capitol Cups, Inc. paid Hubbard for assistance in its business manufacturing and selling cups; Hubbard provided that assistance. There is no proof that Capitol Cups paid Hubbard for any use of public time or resources.

It must be remembered that the conduct complained of was simply making phone calls to get a patent issued that had already been granted. The U.S. Patent Office had already reviewed and formally granted the patent to CV Holdings. This was done without any actions by Hubbard (or Josh Blades). A patent was simply lost in bureaucratic paperwork and needed to be printed by the Government Printing Office. It

would have been issued whether phone calls were made or not.

Throughout all these charges, the prosecution's theory depends on the insinuation that there is something particularly suspicious about consulting relationships. If a public official owned a car dealership and sold a fleet of cars, no one would automatically assume or suspect that a crime had been committed if he also took some minor action on behalf of another corporation that was a substantial employer in the area. No jury would be invited to speculate about whether the business was "really" paying not for the cars, but for advocacy on behalf of an affiliate corporation. But when the Legislator's outside occupation is consulting rather than cars, the prosecution in this case was allowed free rein to engage in exactly this kind of speculation, without real proof. This is contrary to the text of the Ethics Laws, and to their legislatively stated goal of protecting the ability of citizen-legislators to engage in the full range of business interests that other citizens can pursue.

Conclusion

In every aspect of this case, the prosecution was allowed to stretch the law beyond what the Legislature wrote. It is trying to support a conviction based not on actual evidence and actual laws as written, but on prosecutors' suspicions and on their personal sense of what the law ought to be. But this is a court of law, operating under laws enacted with particular language by the Legislature. Hubbard did not violate the laws.

In addition to this motion, which addresses trial issues, Hubbard expressly refuses to waive and affirmatively adopts, reasserts and incorporates (as if herein set forth), all other motions he has made which have been denied by this Court (or remain pending),

including all made pre-indictment, post-indictment but pretrial, during trial and post-trial.

On the basis of those motions, in addition to this motion, Hubbard moves this Court to enter a judgment of acquittal as to each and every Count, or in the alternative, to grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2016, a true and correct copy of the foregoing pleading was filed electronically with the Clerk of the Court in a manner that will result in its automatic service upon all counsel as follows:

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