

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 ) No. 2:10 -CR-186-MHT  
 v. )  
 )  
 RONALD GILLEY, et al. )  
 )  
 Defendants. )

**MOTION OF RONALD E. GILLEY**  
**TO STRIKE AND TO PRECLUDE GOVERNMENT FROM**  
**FROM ARGUING THAT 18 U.S.C. § 666 DOES NOT REQUIRE A QUID PRO QUO**

Comes now Defendant Ronald E. Gilley and moves this honorable Court to strike footnote two in the United States’ Opposition to Defendant Gilley’s Motion to Dismiss on Free Speech and Due Process Grounds, Doc. 604 at p.4 (hereinafter, “footnote two”) and the second paragraph on page three of the United States’ Opposition to Defendant Gilley’s Motion to Dismiss for Failure to Inform the Grand Jury of the Elements of 18 U.S.C. §§ 2, 666, 1341, 1343 & 1346, Doc. 605. Gilley also moves the Court to preclude the Government from arguing that the Eleventh Circuit does not require a quid pro quo for a conviction under 18 U.S.C. § 666. This motion is relevant to Gilley’s motions to dismiss filed on February 14, 2011.

Mr. Gilley moves this Court to strike and to preclude the Government from arguing that the Eleventh Circuit does not require a quid pro quo for a conviction under § 666 because the Government successfully argued the opposite position before the United States Supreme Court in *United States v. McNair*, No. 10-533. Thus, to prevent the Government from being able to change positions at its convenience and to protect the courts from the appearance of being “hoodwinked,” this Court should prevent the Government from taking a position before this

Court which is in direct contradiction to the position the Government took on the very same issue before the Supreme Court. In support of this motion, Gilley states the following:

Before this Court, in two of the Government's oppositions to Gilley's motions to dismiss, Doc. 604 and Doc. 605, the Government stated that in *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010), the Eleventh Circuit held that *no* quid pro is required for a conviction under § 666. Doc. 604, p.4 n.2; Doc. 605, p. 3 ("Recently [in *McNair*] the Eleventh Circuit has concluded that a quid pro quo is not required to prove a violation of § 666.").

Thus, before this Court, the Government argued that the Eleventh Circuit does not require a quid pro quo for a conviction under § 666; however, before the United States Supreme Court, speaking for the Government, the Solicitor General took the opposite position. Before the Supreme Court, the Government argued that *McNair* does require a quid pro quo for a conviction under § 666, and that, instead of doing away with the quid pro quo requirement, *McNair* only stands for the rule that the items of exchange need not be identified at the time of the agreement.

Counsel for Gilley is also counsel for Chris McNair, one of the defendants in *McNair*. After the Eleventh Circuit affirmed McNair's conviction, *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010), McNair filed a petition for certiorari before the United States Supreme Court, attached as Exhibit A. McNair's petition was based entirely on his contention that in the *McNair* opinion, the Eleventh Circuit had deepened a circuit split by holding that a conviction under § 666 did not require proof of a quid pro quo.

Thus, before the Supreme Court, the crux of both McNair's petition for certiorari and the Government's opposition was the meaning of the Eleventh Circuit's opinion in *McNair*. In the Government's brief in opposition to McNair's petition for certiorari, attached as Exhibit B, the Government argued that the Supreme Court should deny certiorari because McNair's

interpretation of the *McNair* opinion was “erroneous.” The Government opposed McNair’s petition for certiorari by arguing that, in *McNair*, the Eleventh Circuit had *not* held that no quid pro quo is required for a conviction under § 666. Brief for the United States in Opposition to the Petition for Certiorari Nos. 10-516, 10-528, and 10-533 at \*19,<sup>1</sup> 2011 WL 381103, filed February 4, 2011 (“McNair’s argument is based wholly on his erroneous view that the court of appeals held that Section 666 does not require proof of any quid pro quo at all.”). Instead, the Government argued, in *McNair*, by holding that no “specific quid pro quo” is required for a conviction under § 666, the Eleventh Circuit merely meant that “bribery can be established by an intent to exchange something of value for official acts even where the official acts to be undertaken have not yet been determined.” *See id.* at \*13, \*14, \*15, \*16.

McNair’s petition for certiorari was denied on March 7, 2011. *McNair v. United States*, --- S.Ct. ---, No. 10-533, 2011 WL 767565 (March 7, 2011). Thus, although the Government had not yet done so at the time it filed its briefs in opposition to Gilley’s motions to dismiss in this case, the Government has now *prevailed* in its position before the Supreme Court. Therefore, this Court should not allow the Government to prevail before the Supreme Court by arguing one interpretation of *McNair* and then argue the opposite interpretation of *McNair* to this Court. Now that the Government has prevailed in *McNair*, this Court should use its discretion to preclude the Government from arguing to this Court that the Eleventh Circuit does not require a quid pro quo for a conviction under § 666. The Government should not be allowed to argue a position on the meaning of *McNair* before this Court which is directly contradicted by the position the Solicitor General took before the Supreme Court.

The Eleventh Circuit has explained that “[j]udicial estoppel is an equitable doctrine invoked at a court’s discretion, designed to protect the integrity of the judicial process.” *Stephens*

---

<sup>1</sup> The star pages and hard copy page numbers for this brief are the same.

*v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006) (internal citations and quotations omitted). “A district court may invoke the doctrine to prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.” *Id.* (internal citations and quotations omitted).

There are no hard and fast rules as to when judicial estoppel may be applied. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (There are no “inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.”); *Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006). However, in general, courts look to the following factors:

(1) whether a later position asserted by a party was clearly inconsistent with an earlier position; (2) whether a party succeeded in persuading a court to accept an earlier position; . . . and (3) whether the party with an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Gilley asserts that, as shown by the facts recited above, the traditional factors for applying judicial estoppel are present in this instance. Thus, as a matter of consistency and integrity before the courts, the Government should be estopped from arguing to this Court that § 666 does not require a quid pro quo.

In addition, the main purpose of judicial estoppel is to prevent “judicial acceptance of an inconsistent position in a later proceeding [from creating] the perception that either the first or the second court was misled.” *See id.* (internal quotations omitted). Clearly, if this Court allows the Government to argue that the Eleventh Circuit does not require a quid pro quo for a conviction under § 666, then the Government misled the Supreme Court. Conversely, if the Government was correct in its prevailing argument to the Supreme Court, then its argument before this Court is incorrect. Therefore, even if the all of the typical factors for judicial estoppel

were not met, this Court should use its discretion to require the Government to adhere to the argument by which the Solicitor General prevailed before the Supreme Court.

Gilley's motion is bolstered by the fact that the Department of Justice's own manual assumes that, once the Solicitor General has taken a position on an issue in a brief to the Supreme Court, even a formal position on the same issue is "trumped" if it is in conflict with the position taken by the Solicitor General:

[Previously] it was the Department's opinion that federal jurisdiction [over offenses committed by non-Indians against non-Indians] was not exclusive of state jurisdiction. See Office of Legal Counsel Memorandum, dated March 21, 1979 . . . **This is no longer the case in as much as the Solicitor General has taken the position that federal jurisdiction is exclusive in an amicus brief recommending that certiorari be denied in *Arizona v. Flint*, 492 U.S. 911 (1989).**

Dept. of Justice, United States Attorneys' Manual § 9-685, online at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00685.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00685.htm) (as visited March 15, 2011 (emphasis added)).

Thus, it would appear that Department of Justice policy requires the same result as Gilley is requesting in this motion, that the Government not be allowed to argue a position before this Court which is contrary to the position taken by the Solicitor General before the Supreme Court on the very same issue.

In summary, now that the Government has prevailed in its argument to the Supreme Court that the Eleventh's Circuit holding in *McNair* stands only for the rule that the specific items to be exchanged need not be identified at the time of the agreement and not for the rule that no quid pro quo is required under § 666, the Government should not be allowed to take a contrary position before this Court. Therefore, Gilley moves this Court to enter an order striking

footnote two and precluding the Government from arguing to this Court that the Eleventh Circuit does not require a quid pro quo for a conviction under § 666.

Respectfully submitted,

/s/ G. Douglas Jones

G. Douglas Jones

ASB-3880-s82g

**OF COUNSEL:**

Thomas J. Butler (ASB-7790-T75T)  
Anil A. Mujumdar (ASB-2004-165m)  
Haskell Slaughter Young & Rediker, LLC  
1400 Park Place Tower  
2001 Park Place  
Birmingham, AL 35203  
Phone: (205) 251-1000  
[gdj@hsy.com](mailto:gdj@hsy.com)

Sandra Payne Hagood (ASB-0360-S73H)  
7660 Fay Avenue  
Suite H-526  
La Jolla, CA 92307  
Phone: 858-245-5741  
[sandra@hagoodappellate.com](mailto:sandra@hagoodappellate.com)

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this the 20<sup>th</sup> day of April, 2011 filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

Louis V. Franklin, Sr.  
Assistant U. S. Attorney  
131 Clayton Street  
Montgomery, Alabama 36104  
[Louis.franklin@usdoj.gov](mailto:Louis.franklin@usdoj.gov)

Stephen P. Feaga  
U.S. Attorney's Office  
P.O. Box 197  
Montgomery, AL 36101-0197  
[Steve.feaga@usdoj.gov](mailto:Steve.feaga@usdoj.gov)

Justin Shur  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Peter.Ainsworth@usdoj.gov](mailto:Peter.Ainsworth@usdoj.gov)

Eric Olshan  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Eric.olshan@usdoj.gov](mailto:Eric.olshan@usdoj.gov)

Barak Cohen  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Barak.cohen@usdoj.gov](mailto:Barak.cohen@usdoj.gov)

Brenda Morris  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Brenda.Morris@usdoj.gov](mailto:Brenda.Morris@usdoj.gov)

Emily Rae Woods  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Rae.woods@usdoj.gov](mailto:Rae.woods@usdoj.gov)

Joe Espy, III  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)

William M. Espy  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)

Benjamin J. Espy  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[bespy@mewlegal.com](mailto:bespy@mewlegal.com)

Fred D. Gray Waiter E. McGowan  
GRAY, LANGFORD, SAPP MCGOWAN,  
GRAY, GRAY & NATHANSON, P.C.  
P.O. Box 830239  
Tuskegee, AL 36083-0239  
[fgray@glsmgn.com](mailto:fgray@glsmgn.com)  
[wem@glsmgn.com](mailto:wem@glsmgn.com)

Robert D. Segall  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[segall@copelandfranco.com](mailto:segall@copelandfranco.com)

David Martin  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[martin@copelandfranco.com](mailto:martin@copelandfranco.com)

Shannon Holliday  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[holliday@copelandfranco.com](mailto:holliday@copelandfranco.com)

Sam Heldman  
THE GARDNER FIRM, P.C.  
2805 31st Street NW  
Washington, DC 20008  
[sam@heldman.net](mailto:sam@heldman.net)

Stewart D. McKnight  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, AL 35233  
[dmcknight@bddmc.com](mailto:dmcknight@bddmc.com)

Joel E. Dillard  
Baxley, Dillard, Dauphin, McKnight  
& Barclift 2008 Third Avenue South  
Birmingham, AL 35233  
[jdillard@bddmc.com](mailto:jdillard@bddmc.com)

William J. Baxley  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, AL 3523  
[wbaxley@bddmc.com](mailto:wbaxley@bddmc.com)

William N. Clark  
Stephen W. Shaw  
Redden Mills & Clark  
505 North 20th Street, Suite 940  
Birmingham, AL 35203  
[wnc@rmclaw.com](mailto:wnc@rmclaw.com)  
[sws@rmclaw.com](mailto:sws@rmclaw.com)

Ron W. Wise  
Attorney at Law  
200 Interstate Park Drive, Suite 105  
Montgomery, AL 36109  
[ronwise@aol.com](mailto:ronwise@aol.com)

H. Lewis Gillis  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[hlgillis@tmgslaw.com](mailto:hlgillis@tmgslaw.com)

Latasha M. Nickle  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[lameadows@tmgslaw.com](mailto:lameadows@tmgslaw.com)

Tyrone C. Means  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[tcmeans@tmgslaw.com](mailto:tcmeans@tmgslaw.com)

J. W. Parkrnan, III  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[parkman@parkmanlawfirm.com](mailto:parkman@parkmanlawfirm.com)

Richard M. Adams  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[adams@parkmanlawfirm.com](mailto:adams@parkmanlawfirm.com)



William C. White, II  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[wwhite@parkmanlawfirm.com](mailto:wwhite@parkmanlawfirm.com)

Susan G. James  
Denise A. Simmons  
Susan G. James & Associates  
600 S. McDonough Street  
Montgomery, AL 36104  
[sgjamesandassoc@aol.com](mailto:sgjamesandassoc@aol.com)  
[dsimlaw@aol.com](mailto:dsimlaw@aol.com)

Thomas M. Goggans  
Attorney at Law  
2030 East Second Street  
Montgomery, AL 36106  
[tgoggans@tgoggans.com](mailto:tgoggans@tgoggans.com)

Samuel H. Franklin  
Jackson R. Sharman, III  
LIGHTFOOT, FRANKLIN  
& WHITE, L.L.C.  
The Clark Building  
400 North 20th Street  
Birmingham, AL 35203  
[sfranklin@lightfootlaw.com](mailto:sfranklin@lightfootlaw.com)  
[jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)

John M. Englehart  
Englehart Law Office  
9457 Alysbury Place  
Montgomery, AL 36117-6005  
[jminglehart@gmail.com](mailto:jminglehart@gmail.com)

Joshua L. McKeown  
The Cochran Firm Criminal Defense-  
Birmingham LLC  
505 20<sup>th</sup> Street North  
Suite 825  
Birmingham, AL 35203  
[jmckeown@parkmanlawfirm.com](mailto:jmckeown@parkmanlawfirm.com)

Jeffery Clyde Duffey  
Law Office of Jeffery C. Duffey  
600 South McDonough Street  
Montgomery, AL 36104  
[jcduffey@aol.com](mailto:jcduffey@aol.com)

/s/ G. Douglas Jones  
OF COUNSEL

---