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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
RONALD GILLEY, et al.	)	
	)	
Defendants.	)	

BRIEF OF RONALD E. GILLEY
IN SUPPORT OF RULE 12(b)(3)(B) MOTION TO DISMISS FEDERAL PROGRAMS BRIBERY COUNTS FOR FAILURE TO STATE AN OFFENSE

Comes now Defendant Ronald E. Gilley and submits this brief in support of his Rule 12(b)(3)(B) motion to dismiss counts under 18 U.S.C. § 666 ("Federal Programs Bribery") for failure to state an offense. All Federal Programs Bribery counts against Gilley are due to be dismissed.

The indictment fails to name the federal program which allegedly brings the allegations of the indictment under Federal Programs Bribery. In addition, the indictment fails to show any connection whatsoever between the conduct alleged and any federal dollars. Thus, the indictment is insufficient because, even assuming everything in it to be true, if there is any limit whatsoever to the reach of Federal Programs Bribery, then this indictment is outside it. Furthermore, if the allegations of this indictment are sufficient to state a crime under Federal Programs Bribery, then any bribe by any state official of any state in the country is a federal crime.[1] Such a result would surely extend federal power beyond its proper bounds. In addition, by failing to identify the federal program at issue, the government prevents this Court and Gilley

[1] This statement assumes, for the sake of argument, that every state in the country receives "benefits" under "a federal assistance program" of more than $10,000 in a given year as required by § 666.

from determining whether the program provided "benefits" under "a federal assistance program" under the analysis required by the Supreme Court in *Fischer v. United States*, 529 U.S. 667 (2000). Finally, because of the constitutional protection against double jeopardy and general principles of due process, Gilley is entitled to know exactly which federal program the government is relying on to satisfy the jurisdictional requirement of Federal Programs Bribery.

I. BY FAILING TO IDENTIFY THE ALLEGED FEDERAL PROGRAM, THE INDICTMENT FAILS TO ALLEGE FACTS SUFFICIENT TO BRING THE CONDUCT ALLEGED WITHIN FEDERAL PROGRAMS BRIBERY.

The jurisdictional provision of § 666 is that an "organization, government, or agency receiv[e], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 USC § 666(b).

In an attempt to satisfy this jurisdictional requirement the Indictment alleges merely the following:

- "The Alabama Legislature (the "Legislature") was a political subdivision within the State of Alabama." Doc. 3, Indictment, ¶1.
- "In fiscal years 2009 and 2010, the State of Alabama received more than $10,000 per year in funds from the United States Government in the form of grants, contracts, subsidies, loans, guarantees, insurance, and other forms of federal assistance." Doc. 3, Indictment, ¶2.
- "The Legislature was composed of two chambers: the House of Representatives . . . and the Senate . . . Members of the House of Representatives and the Senate were agents of the State of Alabama." Doc. 3, Indictment, ¶3.

The above allegations are insufficient to show that the indictment meets the jurisdictional element of Federal Programs Bribery because they do not *specify* the federal program which provided the federal "benefits" under Federal Programs Bribery.

The indictment's failure to specify the federal program meeting the jurisdictional element demonstrates that the relationship between the alleged conduct and any federal money is either non-existent or so attenuated as to render the application of Federal Programs Bribery to the facts alleged in the indictment unconstitutional. In this indictment, the Government merely alleges that the entire state of Alabama received the requisite amount of federal assistance without any effort at all to show that any particular assistance had anything to do with the conduct alleged or any of the public official targets of the indictment. As noted *supra*, if the indictment in this case is sufficient, then any act of bribery by any state official in the country is a federal crime. An interpretation of Federal Programs Bribery which would "turn almost every act of fraud or bribery into a federal offense [,] [would upset] the proper federal balance." *Fischer v. U.S.*, 529 U.S. 667, 676 (2000).

II. IF THERE IS ANY LIMIT WHATSOEVER TO THE REACH OF THE FEDERAL GOVERNMENT TO CONTROL STATE REPRESENTATIVES THROUGH FEDERAL PROGRAMS BRIBERY, THIS CASE IS BEYOND IT.

Congress' power under the spending clause is not unlimited. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, and n. 13 (1981), but is "subject to several general restrictions." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "[T]he spending power requires, at least, that the exercise of federal power be related to the federal interest in particular national projects or programs." *Id.* For that reason, dissenting on other grounds, in *Fischer*, Justice Thomas, joined by Justice Scalia, noted that the jurisdictional provision of § 666 is "constitutionally required." *Fischer*, 529 U.S. at 689 n.3.

The statutory language of § 666 is extremely broad. *Sabri v. U.S.*, 541 U.S. 600 (2004); *Salinas v. United States*, 522 U.S. 52 (1997). In *Salinas v. United States*, 522 U.S. 52 (1997), the Supreme Court held, the *text of § 666* "does not require the Government to prove the bribe in

question had any particular influence on federal funds." However, *Salinas* was limited to its facts, and the Court left open the possibility that some application of §666 could "extend federal power beyond its proper bounds." The Court explained,

> [T]here is no serious doubt about the constitutionality of § 666(a)(1)(B) *as applied to the facts of this case*. Beltran was without question a prisoner held in a jail managed pursuant to a series of agreements with the Federal Government. The preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program. *Whatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds.*

Salinas v. United States, 522 U.S. 52, 60-61 (emphasis added). In other words, the Supreme Court did *not* hold that there was no *constitutional* requirement of some federal connection. The Court only held that the *statute* did not require one, and further that, on the facts of *Salinas*, there was clearly no constitutional issue. *Id*.

In *Salinas*, a sheriff and deputy sheriff had been convicted under Honest Services Bribery for accepting bribes from a federal prisoner in exchange for conjugal visits. The defendants in *Salinas* were county employees who worked at a county prison which housed *federal* prisoners under an agreement under which the federal government provided grant money to the county and paid a daily amount for each federal prisoner in the county prison. *Salinas*, 522 U.S. at 54. The Supreme Court held that the text of § 666 did not require that the bribe affect federal funds and that the statute was constitutional as applied to the sheriff and the deputy sheriff. *Salinas*, 522 U.S. at 56-57.

As the Fifth Circuit noted in *United States v. Lipscomb*, however, in *Salinas*, the Supreme Court "suggest[s] that there might be obstacles to applying § 666 to different facts." *United States v. Lipscomb*, 299 F.3d 303, 311-12 (5th Cir. 2002). The Fifth Circuit explained, "[Under *Salinas*, § 666] possibly can reach misuse of virtually all funds of an agency that administers the

federal program in question. It is a different matter altogether, however, to suggest that the statute can reach *any government employee who misappropriates purely local funds, without regard to how organizationally removed the employee is from the particular agency that administers the federal program. United States v. Lipscomb*, 299 F.3d at 314. However, in our case, not only were no federal funds misappropriated, no "purely local funds" were misappropriated, because no funds at all were misappropriated.

To some extent, in *Sabri*, the Supreme Court addressed the question left open by *Salinas, i.e.*, whether the *constitution* limits the reach of § 666 even though the statutory text does not. Sabri made a facial attack on § 666, arguing that the statute could never be applied constitutionally because of its failure to require a connection between federal dollars and a bribe or kickback. Sabri argued that that omission rendered the statute unconstitutional because the statute did not "require proof that [each] particular application [of the statute fell] within Congress's jurisdiction to legislate," and thus, the statute "[could not] be properly applied in any case." *Sabri*, 541 U.S. at 604-05 (internal quotations omitted).

Sabri was a real estate developer who had offered bribes to a city councilman member of the Board of Commissioners of the Minneapolis Community Development agency (MCDA), a public body created by the city council to fund housing and economic development within the city. In 2001, the MCDA had received $23,000,000 in federal money. *Sabri*, 541 U.S. at 603.

The Supreme Court criticized Sabri's use of a facial challenge because it was "obvious that the acts charged against Sabri himself were well within the limits of legitimate congressional concern." Thus, the only "substantive constitutional claim" Sabri could make was an "overbreadth challenge; the most he could say was that the statute could not be enforced against

him, because it could not be enforced against someone else whose behavior would be outside the scope of congress's Article I authority to legislate." *Sabri*, 541 U.S. at 609.

The Court rejected Sabri's facial challenge and held that §666 is a valid exercise of Congress's authority under the Spending and the Necessary and Proper Clauses of the Constitution because these clauses authorize Congress to ensure that "taxpayer dollars appropriated under [Congress' power to spend federal dollars for the general welfare] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Sabri*, 541 U.S. at 605.

In essence, the reasoning of the court in rejecting Sabri's facial challenge was that the federal interest in protecting federal dollars extends to ensuring that those administering federal funds will be good stewards of those funds: "Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. It is enough that the statute condition the offense on a threshold amount of federal dollars defining the federal interest such as that provided here." *Sabri*, 541 U.S. at 601.

But the facts of this case are outside even such a broad view of the federal interest. In this case, there is no financial transaction at issue. Instead the transaction is a vote on a bill to give the people of Alabama the opportunity to vote on amending the Alabama constitution. Doc. 3, Indictment # 21. Also, the indictment does not allege that any particular federal funds are administered by any of the defendants, and therefore certainly does not allege that any federal program had anything whatsoever to do with any conduct alleged in the indictment. In addition, the vast majority of the counts in the indictment have to do with campaign contributions and in-kind campaign contributions. Thus, for all of these counts, there was not even any personal

enrichment. No federal funds were being "siphoned off" because there were no federal funds at issue and no funds of any kind were being siphoned off.

Thus, unlike either *Salinas* or *Sabri*, this case presents the issue of the outer reaches of § 666. Gilley does not argue that § 666 is unconstitutional on its face, but he does argue that if this indictment is sufficient to allege a violation of § 666, then this indictment goes beyond the scope of § 666 approved of in *Salinas* or *Sabri.*

In fact, the indictment in this case is at odds with the view of the proper scope of prosecution under §666 expressed in the Criminal Resource Manual of the Department of Justice ("the DOJ manual") itself. The DOJ manual states as follows:

> [T]he very broad language of the statute . . . *seemingly permits the prosecution of any state agent, regardless of whether his or her specific agency received the necessary Federal assistance, as long as the state received the required Federal assistance.* This broad reading, while statutorily permissible, would Federalize many state offenses in which the Federal interest is slight or nonexistent.
>
> A narrower reading, consistent with the stated congressional intent, requires that *the agent must have illegally obtained cash or property from the agency that received the necessary Federal assistance.* This narrower reading is strongly suggested in order to ensure that significant Federal interests are protected and the clear intent of Congress is followed.

Criminal Resource Manual 1001: The Scope of 18 U.S.C. § 666 (emphasis added). Thus, the DOJ manual would seem to counsel the following:

- first, that the DOJ should avoid prosecuting § 666 cases where "the Federal interest is slight or nonexistent";
- second, that to ensure that the federal interest is not "slight or nonexistent," the DOJ should restrict itself to cases in which 1) the target is an agent of the agency that received the federal assistance; and 2) the target has "illegally obtained cash or property from the agency that received the necessary Federal assistance."

However, in addition to failing to identify the "federal assistance," the indictment in this case does not even allege that anyone received cash or property from the state of Alabama.

Also, in the typical Federal Programs Bribery case, the government "agent" is a person actually administering federal funds in some way and the alleged bribe is at least indirectly related to the federal funds. But the indictment in this case merely alleges that *the entire state of Alabama* received over $10,000 in federal funds. The indictment does not identify any specific federal program under which Alabama allegedly received these funds. The indictment also fails to identify any federal money that any of the state legislator defendants were able to spend and fails to show any connection whatsoever between any federal program and the voting at issue. Thus, it is not even clear from the indictment that the legislators were in fact "agents" of the State of Alabama for purposes of § 666.

Finally, if this indictment is sufficient, then the Supreme Court's conclusion in *Sabri* would be turned upside down. In *Sabri*, the Court reasoned that Sabri's facial challenge could be rejected in part because "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State's own choices of public policy." *Sabri*, 541 U.S. at 608. However, where the conduct at issue involves no federal money, no federal program and no detectable federal concern, then there is not much left but the State's own choice of public policy.

As Justice Thomas, joined by Chief Justice Roberts and Justice Scalia, explained in dissent in *Evans v. United States*, 504 U.S. 255 (1992), "Concerns of federalism require [courts] to give a narrow construction to federal legislation in [areas traditionally regulated by the States] unless Congress' contrary intent is unmistakably clear in the language of the statute [because] the

States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Evans v. United States*, 504 U.S. 255, 291-92 (1992) (THOMAS, J., joined by Roberts, C.J., and SCALIA, J., dissenting) (internal quotations and citations omitted).

III. BECAUSE THE INDICTMENT FAILS TO SPECIFY ANY FEDERAL PROGRAM ON WHICH IT RELIES TO MEET THE JURISDICTIONAL REQUIREMENT OF FEDERAL PROGRAMS BRIBERY, NEITHER GILLEY NOR THIS COURT CAN DETERMINE WHETHER THE STATE OF ALABAMA RECEIVED "BENEFITS" UNDER "A FEDERAL ASSISTANCE PROGRAM" UNDER THE ANALYSIS REQUIRED BY THE SUPREME COURT IN *FISCHER*.

In *Fischer*, the Supreme Court explained that "[not all] federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b)." *Fischer*, 529 U.S. at 676. The Court noted that such an interpretation would lead to an unconstitutional result: "Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. *Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance*." *Id*. (emphasis added).

Because the government fails to identify the specific federal program on which it relies, it is impossible to know whether the alleged funds would qualify as "benefits" for Federal Programs Bribery purposes. In *Fischer*, the Supreme Court explained, "To determine whether an organization participating in a federal assistance program receives 'benefits' [for purposes of Federal Programs Bribery], an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments." *Fischer*, 529 U.S. at 681-82. Obviously, this analysis is impossible where no specific federal program is identified in the indictment.

In *Fischer*, the defendants had challenged whether payments made by Medicare to hospitals qualified as "benefits" for purposes of Federal Programs Bribery. The Supreme Court explained, "The inquiry [into whether payments by a federal program constitute 'benefits' under Federal Programs Bribery] should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. Health care organizations participating in the Medicare program satisfy this standard." *Id*. at 681.

But the crucial difference between *Fischer* and this case is that, in *Fischer*, the Grand Jury, the Judge, and the Defendants knew which Federal program allegedly provided the jurisdictional basis for turning alleged bribery of a state representative into a federal crime. But here, neither Gilley nor this Court can address whether the state of Alabama received "benefits" under "a federal assistance program" under the analysis required by the Supreme Court in *Fischer*, when the Indictment fails to even identify the Federal program under which the requisite "benefits" were allegedly provided to the State.

IV. CONCLUSION

Finally, in addition to all of the above, the government's failure to identify the federal program at issue violates fundamental protections against double jeopardy and general principles of due process by prohibiting Gilley from being able to challenge whether any federal program meets the requirements of § 666. *See U.S. v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (there are "two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, that [it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.").

The § 666 charges against Gilley are due to be dismissed for failure to state an offense under that statute.

ORAL ARGUMENT REQUESTED

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-l65m)
Haskell Slaughter Young & Rediker, LLC
1400 Park Place Tower
2001 Park Place
Birmingham, AL 35203
Phone: (205) 251-1000
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

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 4th day of February, 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

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

Peter J. Ainsworth
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Peter.Ainsworth@usdoj.gov

Eric Olshan
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Eric.olshan@usdoj.gov

Barak Cohen
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Barak.cohen@usdoj.gov

Brenda Morris
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Brenda.Morris@usdoj.gov

Emily Rae Woods
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Rae.woods@usdoj.gov

Joe Espy, III
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
jespy@mewlegal.com

William M. Espy
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
wespy@mewlegal.com

Benjamin J. Espy
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
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
wem@glsmgn.com

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

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

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

Sam Heldman
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
sam@heldman.net

Stewart D. McKnight
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233
dmcknight@bddmc.com

Joel E. Dillard
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233
jdillard@bddmc.com

William J. Baxley
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 3523
bbaxley@bddmc.com

Brett M. Bloomston
Attorney at Law
1330 21st Way South, Ste 120
Birmingham, AL 35205
brettbloomston@hotmail.com

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

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwise@aol.com

H. Lewis Gillis
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
hlgillis@tmgslaw.com

Latasha M. Nickle
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
lameadows@tmgslaw.com

Tyrone C. Means
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
tcmeans@tmgslaw.com

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

Richard M. Adams
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
adams@parkmanlawfirm.com

William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Susan G. James & Associates
600 S. McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
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
jsharman@lightfootlaw.com

Joseph J. Basgier, III
Bloomston & Basgier
1330 21st Way South, Suite 120
Birmingham, AL 35235
joebasgier@gmail.com

John M. Englehart
Englehart Law Office
9457 Alysbury Place
Montgomery, AL 36117-6005
jmenglehart@gmail.com

Joshua L. McKeown
The Cochran Firm Criminal Defense-
Birmingham LLC
505 20th Street North
Suite 825
Birmingham, AL 35203
jmckeown@parkmanlawfirm.com

Jeffery Clyde Duffey
Law Office of Jeffery C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

/s/ G. Douglas Jones
OF COUNSEL