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

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

RONALD E. GILLEY'S OBJECTIONS
TO RECOMMENDATION OF THE MAGISTRATE JUDGE, DOC. 862

Comes now Defendant Ronald E. Gilley and submits this brief in support of his objections to Recommendation of the Magistrate Judge, Doc. 862 (hereinafter, "the Recommendation"). Gilley filed a motion to dismiss counts under 18 U.S.C. § 666 ("Federal Programs Bribery") for failure to state an offense pursuant to Rule 12(b)(3)(B). Doc. 490.

Gilley objects to the Recommendation's conclusion that his motion to dismiss, Doc. 490, be denied.

Summary of the Basis for Gilley's Motion to Dismiss

Gilley will not repeat his arguments in their entirety here, but in summary, Gilley's motion to dismiss was based on the fact that 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 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.

Objections to the Recommendation

1. The Recommendation assumes that the indictment is sufficient without any analysis of Gilley's argument. For example, the court's statement about the requirements for a sufficient affidavit are not incorrect, but the analysis is incomplete. The court acknowledges that an indictment must protect a defendant from double jeopardy, Doc. 862, p. 7 n. 1, but does not address the fact that the failure to name the federal program at issue could in fact subject the defendant to double jeopardy. The Government could indict a defendant under one program, fail to obtain a conviction, and then re-indict the defendant for the same conduct under a different federal program.[2]

2. The Recommendation fails to address Gilley's argument that, 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

[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.
[2] Obviously, the fact that a prosecutor would be *unlikely* to do this is insufficient protection from double jeopardy.

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. *Fischer*, 529 U.S. at 681-82. Obviously, the analysis required by *Fischer* is impossible where no specific federal program is identified in the indictment. The Recommendation fails to address this issue at all.

3. The Recommendation also fails to address the fact that 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).

3. The Recommendation fails to recognize the extremely different facts present in this case and in *Salinas v. United States*, 522 U.S. 52 (1997). 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. Thus, the facts of Salinas are nothing like our facts. In *Salinas*, the defendants acted almost as federal employees, which is nothing like the defendants in this case. Thus, the facts of this case are outside even the broad view of the federal interest in *Salinas*.

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.

As the Fifth Circuit noted in *United States v. Lipscomb*, 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.

4. The Recommendation fails to address the fact that, unlike either *Salinas* or *Sabri v. U.S.*, 541 U.S. 600 (2004), 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.*

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).

Conclusion

In light of the preceding objections, under Federal Rule of Criminal Procedure 59(b)(3), Gilley requests that the Court reject the Recommendation. In addition, Gilley urges the Court to grant Gilley's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 20th 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:

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