

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:07CR192

RICHARD F. SCRUGGS,  
DAVID ZACHARY SCRUGGS, and  
SIDNEY A. BACKSTROM  
TIMOTHY R. BALDUCCI  
STEVEN A. PATTERSON

**GOVERNMENT'S RESPONSE TO THE DEFENDANTS' MOTION TO DISMISS  
COUNTS 2, 3, & 4 OF THE INDICTMENT**

Comes now the United States and files this its response to the defendants' motion to dismiss counts 2, 3, and 4 of the indictment. In support of its response, the government would state as follows:

With the present motion, the defendants have moved to dismiss counts 2, 3, and 4 of the indictment, making essentially three arguments: First, the defendants argue that Judge Lackey was not an agent subject to the reach of 18 U.S.C. § 666; second, the defendants argue that the bribe paid to Judge Lackey was not made "in connection with any business, transactions, or series of transactions of either Lafayette County or the Administrative Office of Courts; and third, the defendants argue that 18 U.S.C. § 666 is unconstitutional as applied to them in this case. The government will respond to each of these arguments in turn:

**I. AGENCY**

In the present case, the defendants are charged with bribing Judge Henry Lackey in violation of 18 U.S.C. § 666(a)(2). That section provides in pertinent part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(2) corruptly gives, offers or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, 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.<sup>1</sup>

18 U.S.C. § 666(a)(2), (b).

Consequently, for jurisdiction to rest with this Court, the government must show that when he received the bribe, Judge Lackey was an agent of “an organization of a State, local or Indian tribal government, or any agency thereof.” In fact, Judge Lackey was an agent of at least two such organizations, the Administrative Office of Courts and Lafayette County, Mississippi.

#### **A. Administrative Office of Courts**

Judge Lackey is an agent of the Administrative Office of the Courts. To determine what it means to be an agent for purposes of section 666, we look first to the statute itself. Subsection (d)(1) provides: “the term “agent” means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or an employee, and a partner, director, officer, manger, and representative.” 18 U.S.C. § 666(d)(1). Clearly, Judge Lackey is authorized to act on behalf of the Administrative Office of Courts. The Administrative Office of Courts is the state agency that provides office operating allowances to the circuit courts of the state. Those operating expenses include, for example, \$40,000 per year

---

<sup>1</sup>The government notes that for purposes of this motion, the defendants assume that both organizations at issue receive the requisite \$10,000 in federal assistance mandated by the statute.

for each circuit judge to hire support staff. The Office also provides \$4,000 per judge for office operating expenses and \$4,000 per year for rent should the judge's base of operations not provide office space. Judge Lackey is one of the judges in the state who utilize at least a portion of this additional money. How those funds are spent is left to the discretion of the circuit judge and will be fully developed at trial.

The defendants in the present case also refer to the Fifth Circuit's decision in *United States v. Phillips* in support of their argument. See *United States v. Phillips* 219 F.3d 404 (5<sup>th</sup> Cir. 2000). While the *Phillips* decision has been largely abrogated by the Supreme Court's decision in *Sabri v. United States*, 541 U.S. 600 (2004), the government will address those issues to the extent necessary at this stage of the litigation.

In *Phillips*, the court was asked to decide whether a tax assessor was an agent of St. Helena Parish, Louisiana. Holding that the assessor was not an agent of the parish, the court went into detail as to what criteria an individual must meet to be seen as an agent of an organization for purposes of section 666. *Phillips* 219 F.3d at 410-15. Applying that analysis to the facts in the present case, it is a simple matter to differentiate a tax assessor's role as it applies to a parish in Louisiana to a circuit judge's role as it applies to his Administrative Office of Courts in Mississippi. Specifically, the court asked whether the organization – the AOC – had any power, authority, or control over the would-be agent – Judge Lackey. In the present action, the answer is decidedly – yes. Just as an example, section 9-1-36(3) provides:

(3) each judge who desires to employ support staff . . . shall make application to the Administrative Office of Courts by submitting to the Administrative Office of Courts a proposed personnel plan setting forth what support staff is deemed necessary. The plan may be submitted by a single judge or by any combination of judges desiring to share support staff. In the process of the preparation of the plan,

the judges, at their request, may receive advice, suggestions, recommendations and other assistance from the Administrative Office of Courts. The Administrative Office of Courts must approve the positions, job descriptions and salaries before the positions may be filled. The Administrative Office of Courts shall not approve any plan which does not first require the expenditure of the funds in the support staff fund for compensation of any of the support staff before expenditure is authorized of county funds for that purpose. Upon approval by the Administrative Office of Courts, the judge or judges may appoint the employees to the position or positions, and each employee so appointed will work at the will and pleasure of the judge or judges who appointed him but will be employees of the Administrative Office of Courts. Upon approval by the Administrative Office of Courts, the appointment of any support staff shall be evidenced by the entry of an order on the minutes of the court. When support staff is appointed jointly by two (2) or more judges, the order setting forth any appointment shall be entered on the minutes of each participating court.

Miss. Code Ann. § 9-1-36 (3) (West 2008). In other words, because the AOC may approve or refuse to approve a personnel plan submitted by a circuit judge, certainly it has power, authority, or control over the judge with regard to the plan.

The *Phillips* court also looked to determine whether the tax assessor's salary was set by the parish in question. In the present case, while circuit judges' salaries are set by statute, the AOC, unlike the parish in *Phillips*, administers the judges' salaries. That is, despite the fact that the amount is set by statute and paid by the state, the checks are written out of the AOC's office.

Another issue used to determine agency pursuant to section 666 is whether Judge Lackey controls or administers employees or funds of the AOC. *See Phillips*, 219 F.3d at 413. Again, the tax assessor in the *Phillips* case did not control any of the parish employees, but Judge Lackey certainly controls employees of the AOC. As can be seen in the statute quoted above, once the AOC approves the judge's plan concerning support staff, the judge chooses who will receive those jobs, and they will "work at the will and pleasure of the judge . . . ." Miss. Code

Ann. § 9-1-36 (3). “But,” also according to the statute, these staffers “will be employees of the Administrative Office of Courts.” *Id.*

In the end, Judge Lackey is clearly an agent of the AOC for purposes of 18 U.S.C. § 666. Judge Lackey is authorized to act on behalf of the AOC with respect to selecting employees; he chooses how to utilize the operating expenses provided to him by the AOC; he decides how best to utilize the \$40,000 provided by the AOC for support staff; and he selects who that support staff will be; he even chooses where he will operate and to an extent how much of the money provided by the AOC will go towards rent for that space. These examples alone and more to be covered at trial are more than enough to meet the standard set out at 18 U.S.C. § 666 (d)(1) and subsequent Fifth Circuit precedent.

#### **B. Lafayette County**

Judge Lackey is also an agent of Lafayette County. As discussed *supra*, to be an agent of Lafayette County, Judge Lackey must be authorized to act on behalf of the county. Certainly, Judge Lackey acts of behalf of Lafayette County on a routine basis. For example, as Senior Circuit Judge for the Third Judicial District, Judge Lackey presides over hundreds of cases filed in Lafayette County such as *Jones, et al. v. Scruggs et al.* When, for instance, he chooses to fine a party or their counsel, he will do so, and the money paid goes directly to the county’s general fund. Lafayette County also pays for Judge Lackey’s law clerk and his court reporter. As another example, Lafayette County has a specific fund, the circuit court administrator fund. That fund is supplied by \$2.00 from every civil and criminal court case from every county in the district, and the money is utilized to defray costs of the Judge Lackey’s administrator’s health

insurance.<sup>2</sup> The Victim's Assistance Coordinator is another position used by the circuit courts to help victims and their families with a variety of needs. Judge Lackey enters an order naming who will fill that position, and her salary is also paid by the county.<sup>3</sup>

Yet another position paid by the county is that of the public defender. Who will fill that position is also determined by the circuit judge. Indeed, only recently a number of the Lafayette County Board of Supervisors attempted to terminate the present public defenders, and Judge Lackey would not allow it. To illustrate this example, section 25-32-3 of the Mississippi Code provides in part:

(1) When the office of public defender is established, the circuit judge or the senior circuit judge, shall appoint a practicing attorney to serve the county or counties as public defender until the end of the term of the office of the district attorney and thereafter for a term of four (4) years and said term shall coincide with the term of the district attorney. Such an appointee shall be selected from a list of two (2) or more attorneys recommended by the county or regional bar association. In the event a vacancy shall occur in the office of the public defender, the circuit judge or the senior circuit judge, if there be more than one (1) circuit judge, shall appoint another person to serve as public defender until the end of the regular term of office.

Miss. Code Ann. § 25-32-3 (1) (West 2008). In other words, Judge Lackey appoints the public defenders who are paid by the county. Moreover, if, for example, the public defender has a

---

<sup>2</sup>Anyone or any entity that files a case in the Lafayette County Circuit Court pays a filing fee; for civil cases that fee is \$107.50 and for criminal cases \$397.00. Those fees are divided with portions going to a number of different projects with \$10.00 going to pay for Judge Lackey's court reporter. The money actually goes to Lafayette County's general fund, and his court reporter is paid from the county's general fund. Who Judge Lackey hires is left wholly to his discretion.

<sup>3</sup>Lafayette County is one of seven counties that make up the Third Judicial District. As to salaries paid, each county pays a pro rata share.

conflict of interest and cannot represent a particular party, Judge Lackey would then appoint a private attorney. Section 25-32-13 provides in part:

(1) If the court finds that indigent defendants have such conflicts of interest that they all cannot be properly represented by the public defender, or when other good cause is shown in the trial court or on appeal, the court shall appoint separate counsel as provided in section 99-15-15, Mississippi Code of 1972. In such cases, the fees allowed appointed counsel in 99-15-17, Mississippi Code of 1972, shall apply.

Miss. Code Ann. § 25-32-13 (1) (West 2008).

Should Judge Lackey appoint separate counsel, section 99-15-17 provides:

The compensation for counsel for indigents appointed as provided in section 99-15-15 shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars (\$1,000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars (\$200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the chancery court, county court or circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars (\$2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars (\$1,000.00) per case. In addition, the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

Miss. Code Ann. § 99-15-17 (West 2008). Consequently, when a separately appointed counsel submits his expenses to the court, Judge Lackey decides whether the county will pay all the submitted expenses or a portion thereof. Once he decides how much the county will pay, Judge

Lackey enters an order, and the county treasurer pays the expenses and compensation from the general county fund.

Looking again to the factors set out in *Phillips*, there, as discussed *supra*, the court looked to determine whether the tax assessor had control or administered any of the parish employees. *Phillips*, 219 F.3d at 413. While the tax assessor in Louisiana did not, Judge Lackey certainly does. For example, the public defenders are county employees, and as has been discussed, Judge Lackey appoints the defenders once he has determined a particular defendant qualifies as indigent. As another example, Judge Lackey clearly has control over the county treasurer when he orders her to pay separate counsel the amount he has decided the attorney will receive.

While these are only a few examples of Judge Lackey's role as agent of Lafayette County, they clearly show his agency, and any additional factual matters will be further adduced at trial.

## **II. IN CONNECTION WITH ANY BUSINESS TRANSACTIONS OR SERIES OF TRANSACTIONS**

Citing no authority, the defendants next argue that the Court should dismiss the indictment because “[t]he conduct alleged in the indictment was not ‘in connection with any business transaction or series of transactions’ of Lafayette County or the AOC.” This matter can be addressed summarily because it is plainly apparent that the bribe paid to Judge Lackey was in connection with the business of both Lafayette County and the AOC.

As has been discussed extensively *supra*, Judge Lackey is an agent of both the AOC and Lafayette County. He is an agent in his role as Senior Circuit Judge of the Third Judicial District. The defendants paid the bribe charged in this case precisely because he was a circuit

judge. The statute provides that the offer made to the Judge must be “in connection with any business transaction or series of transactions of such organization, government, or agency . . . .” 18 U.S.C. § 666 (a)(2). In their motion the defendants contend: “Even assuming that deciding private civil cases can be categorized as a ‘business’ or ‘transaction,’ it is certainly not the ‘business’ or ‘transaction’ of either the Administrative Office of Courts or of Lafayette County.” With this argument the defendants misconstrue the statute, however, because the statute does not mandate that deciding civil cases *be* the business of the AOC or Lafayette County. The statute provides that the bribe was made *in connection* with a business transaction or series of transactions of the AOC or Lafayette County. As an agent of both the AOC and Lafayette County, Judge Lackey hears cases filed in the circuit court. Any party filing a case in circuit court must then, for example, pay a filing fee, \$107.50 for civil cases and \$397 for criminal cases. Portions of these fees go both to Lafayette County and the AOC (e.g., the court administrator fund). These fees are paid in part for the circuit courts and all its staff, including the circuit judges, of course, to provide a service to the litigants. And, chief among the reasons for Congress’s enactment of section 666 was to make certain those running these organizations were not corrupt. *See United States v. Westmoreland*, 841 F.2d 572, 577-78 (5<sup>th</sup> Cir. 1988) (“It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.”). Nobody can dispute that the bribe offered in the present case was not “in connection” with the business transaction conducted when the plaintiffs in this case paid their filing fee to the Circuit Court of Lafayette County.

### **III. SPENDING CLAUSE AND THE TENTH AMENDMENT**

Finally, the defendants argue that should the court find jurisdiction, the indictment should

nevertheless be dismissed because it is unconstitutional as applied to them. This argument is without merit simply because it was made in *Sabri v. United States*, 541 U.S. 600 (2004), and the Supreme Court rejected it.

Making their argument, the defendants contend that the statute is unconstitutional as applied to them for two reasons: (1) that public monies are not implicated at all; and (2) the conduct at issue is too attenuated from any federal interest in the alleged crimes. As to the contention that public monies are not implicated at all, the court need only look to the previous argument addressing the business transaction language in the statute. Clearly, public monies are implicated when a litigant pays a filing fee or a citizen of Lafayette County pays taxes that go to support their county courthouse. Moreover, the courts have made it clear that “[a]ny reference to federal funds is conspicuously absent from the operative provisions, allowing Congress to ensure the integrity of federal funds by protecting the integrity of the organizations that receive them.” *United States v. Marmalejo*, 89 F.3d 1185, 1193 (5<sup>th</sup> Cir. 1996).

To take the defendants argument a step further – the defendants must concede that the Supreme Court made it abundantly clear in *Sabri* that there is no need to provide *any connection at all* between the “forbidden conduct and the federal funds.” *Sabri*, 541 U.S. at 604-07. Understanding that no connection need be made between the bribe offer and the federal funds, the defendants argument that there must be a connection to “any funds” must logically refer either to state or local funds. Such an argument is unavailing, however, because clearly a connection between the bribe offered and state or local funds would have no relevance whatever to an argument that *federal* jurisdiction is lacking.

Next the defendants argue that the conduct was too attenuated from any federal interest in

the alleged crimes. With this argument, the defendants have simply restated the precise argument made by Sabri, and as mentioned, the court found such an argument without merit. In *Sabri*, the defendant argued that section 666 was unconstitutional because it failed to require proof of any connection between a bribe and some federal money. *Id.* at 604. Rejecting this argument, the Court wrote:

We can readily dispose of this position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense. We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I, § 8.

*Id.* at 605. Article I, § 8 includes the Spending Clause and the Necessary and Proper Clause of the United States Constitution. The Court went on to explain the reasoning behind its decision, holding that Congress has authority “under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power 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. *Id.* In other words, Congress need not require a connection between the federal money and the bribe offered because it is the integrity of the organization with which they are concerned, not precisely the dollars sent. If agents of an organization are corrupt, then by definition they are a threat to the integrity of that organization regardless of whether their corrupt acts have any connection with any federal funds. Just as “corrupt contractors do not deliver dollar for dollar value,” a corrupt judge would be unlikely to fairly and honestly perform his duties, whatever they may be. *Id.* at 606. If, as in this case, a

judge is an agent of an organization receiving the threshold amount of federal dollars, then the federal government is perfectly within its rights to prosecute actors charged with offering the bribe to that particular judge. *Sabri*, 541 U.S. at 606 (“It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here.”).

#### **IV. CONCLUSION**

Because Judge Lackey is clearly an agent for both the Administrative Office of Courts and Lafayette County, Mississippi, the defendants’ motion to dismiss should be denied. Judge Lackey regularly performs acts as a representative of both organizations and has control and authority over their funds as well as their employees.

The bribe offered in the present case was also made in connection with a business transaction or series of transactions of both the Administrative Office of Courts and Lafayette County, Mississippi. When a citizen pays its taxes to Lafayette County, he expects a service rendered; the circuit court provides one of the many services expected. When a litigant pays a filing fee to have the circuit court hear its case, he also expects a service, and that service is provided by employees and agents of the Administrative Office of Courts and Lafayette County. Indeed, portions of the fee paid by the litigant go directly to the salaries and expenses of the employees and agents of both organizations. Accordingly, the defendants motion as to this issue should be denied.

Finally, the Supreme Court has made it abundantly clear that section 666 does not require that there be any connection between the forbidden conduct and the federal money provided to the organization at issue. Section 666 is the result of a proper exercise under the Spending

Clause and the Necessary and Proper Clause of the Constitution, and does not run afoul of Tenth Amendment. Accordingly, the defendants' motion to dismiss should be denied in its entirety.

Respectfully submitted,

JIM M. GREENLEE  
United States Attorney

*/s/ Thomas W. Dawson*

By:

THOMAS W. DAWSON  
First Assistant United States Attorney  
Mississippi Bar No. 6002

*/s/ Robert H. Norman*

By:

ROBERT H. NORMAN  
Assistant United States Attorney  
Mississippi Bar No. 3880

*/s/ David A. Sanders*

By:

DAVID A. SANDERS  
Assistant United States Attorney  
Mississippi Bar No. 10535

**CERTIFICATE OF SERVICE**

I, DAVID A. SANDERS, Assistant United States Attorney, hereby certify that I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO THE DEFENDANTS' MOTION TO DISMISS COUNTS 2, 3, & 4 OF THE INDICTMENT** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

[wbraunig@kvn.com](mailto:wbraunig@kvn.com)

[bdooley@kvn.com](mailto:bdooley@kvn.com)

[eastlandlaw@bellsouth.net](mailto:eastlandlaw@bellsouth.net)

[ngarrett@gbmkc.com](mailto:ngarrett@gbmkc.com)

[todd.graves@pobox.com](mailto:todd.graves@pobox.com)

[jkeker@kvn.com](mailto:jkeker@kvn.com)

[tleblanc@kvn.com](mailto:tleblanc@kvn.com)

[jlittle@kvn.com](mailto:jlittle@kvn.com)

[rmichael@rmichaellaw.com](mailto:rmichael@rmichaellaw.com)

[chrisrobertson@scruggsfirm.com](mailto:chrisrobertson@scruggsfirm.com)

[jrt@tannehillcarmean.com](mailto:jrt@tannehillcarmean.com)

[trappf@phelps.com](mailto:trappf@phelps.com)

This the 19th day of February, 2008.

/s/ David A. Sanders  
DAVID A. SANDERS  
Assistant United States Attorney