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

UNITED STATES OF AMERICA

V. **CRIMINAL NO. 3:08CR014-M-A**

ROBERT L. MOULTRIE,
NIXON E. CAWOOD,
CHARLES K MOREHEAD,
FACILITY HOLDING CORP d/b/a FACILITY MANAGEMENT GROUP, INC., FACILITY CONSTRUCTION MANAGEMENT INC., and FACILITY DESIGN GROUP, INC.

DEFENDANTS' MOTION TO DISMISS COUNT 1 OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE UNDER 18 U.S.C. § 371

Defendants Robert L. Moultrie, Nixon E. Cawood, Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management, Inc. and Facility Design Group, Inc., through undersigned counsel, respectfully submit this as their Motion to Dismiss Count 1 of the indictment and as their Memorandum In Support on the grounds that the indictment fails to state an offense under 18 U.S.C. § 371.

I. Count One of the Indictment Attempts To Allege A Conspiracy to Commit §666 Bribery Without Alleging A Corrupt Exchange

This motion raises the failure of the Government to charge the element of an "exchange"—a *quid pro quo*—in its indictment. The Government in its response to Robert Moultrie's *Daubert*/polygraph motion asserted that it did not have to prove and had not charged a *quid pro quo*. *See* Government's Response in Opposition to Defendant Moultrie's

Motion for Daubert Hearing and Admission of Privately-Administered Polygraph Results at 13 (Document No. 42) (arguing that the relevance of questions about *quid pro quo* "evaporates when the two questions are compared to the offense charged"). This admission by the Government that the indictment had not charged a *quid pro quo* arose again at the hearing on the polygraph motion, where the Government argued that the legal issue relating to *quid pro quo* should more properly be the subject of a motion to dismiss. *See* Transcript, Daubert Hearing at 170 (May 2, 2008) (Mr. Lamar: "…We can address that on another day on another motion, but that's not—that's just not germane to this hearing and this argument."). The issue raised by the Government then and the motion invited in its objection are now before this Court.

Count 1 of the indictment alleges that the defendants violated the federal general conspiracy statute by engaging in a conspiracy to violate 18 U.S.C. § 666(a)(2), entitled "theft or bribery concerning programs receiving Federal funds." 18 U.S.C. § 666(a)(2) is referred to by some scholars as "the federal program bribery statute," *see* George D. Brown, Carte Blanche: Federal Prosecution of State and Local Officials After *Sabri*, Cath. 54 Cath. U. L. Rev. 403 (2005). The second paragraph of the Superseding Indictment summarizes the charge:

> From on or about February, 2003 to on or about March 12, 2004, in the Northern District of Mississippi and elsewhere, ROBERT L. MOULTRIE, NIXON E. CAWOOD, and THE FACILITY HOLDING CORP., d/b/a THE FACILITY GROUP, FACILITY MANAGEMENT GROUP, INC, FACILITY CONSTRUCTION MANAGEMENT, INC. and FACILITY DESIGN GROUP INC., hereinafter collectively referred to as "THE FACILITY GROUP", defendants, did knowingly and willfully conspire with others… to corruptly give, offer and agree to give things of value to another person with intent to reward an agent of the government of the State of Mississippi, which State government received federal assistance in excess of $10,000 in a one year period, in connection with business, transaction and series of transactions of such State government, things of value of $5,000 or

> more, to wit: ROBERT L. MOULTRIE, Chairman and Chief Executive Officer of THE FACILITY GROUP and NIXON E. CAWOOD, Chief Operating Officer of THE FACILITY GROUP, defendants, devised and executed a scheme and plan to corruptly give, offer and agree to give more than $5,000 in campaign contributions to the reelection campaign of an agent of the government of the State of Mississippi, hereinafter referred to as "the public official", who is not charged in this indictment, with intent to influence and reward the public official in connection with the State of Mississippi's selection of THE FACILITY GROUP to manage the completion of the design and construction of Mississippi Beef Processors, LLC processing plant located in Yalobusha County, Mississippi, in violation of Section 666(a)(2) of Title 8 of the United States Code.

Superseding Indictment, ¶2. This language merely tracks the language of § 666(a)(2), without providing any additional facts that provide notice of the nature of the charge:

Language of 18 USC § 666(a)(2)	**Superseding Indictment, ¶2**
• corruptly gives, offers, or agrees	• corruptly give, offer and agree
• to give anything of value to any person,	• to give things of value to another person
• with intent to influence or reward	• with intent to reward
• an agent of an organization or of a State, local or Indian tribal government, or any agency thereof,	• an agent of the government of the State of Mississippi,
• 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;	• in connection with business, transaction and series of transactions of such State government, things of value of $5,000 or more
• 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.	• which State government received federal assistance in excess of $10,000 in a one year period

This paragraph obviously provides no real notice of what the defendants did, or under what circumstances, that purportedly violated the statute. From there, the indictment has allegations about the Mississippi Beef Plant project and problems with the construction of that project. Superseding Indictment, ¶¶3-9. As will be shown by the quotations that follow this paragraph, the Superseding Indictment then goes on to allege that the Facility Group was seeking and signed a letter of intent to complete the Beef Plant project, and that thereafter, Robert Moultrie made political contributions to an unnamed public official. Nowhere do these allegations suggest that the public official had anything to do with the award of the contract, or that anything about the political contributions was corrupt or connected in any way to the beef plant project. Nor do these paragraphs suggest that an agreement ot make such an exchange ever existed. The only "connection" between the campaign contributions and the award of the beef plant project contract are connections of timing, and, in fact, the timing alleged in the indictment is backwards: The indictment alleges that contributions to the public official were after the decision had been made to award the beef plant project to Facility Group.[1] Further, there is no factual allegation of a "corrupt" effort to "influence or reward" the public official. It is that language in the statute—the words "corrupt" and "influence or reward"—that expresses § 666(a)(2)'s *quid pro quo* requirement and that is missing from the factual allegations of the Superseding Indictment. Here are the actual allegations about the contributions:

> 10. Desiring that the FACILITY GROUP also be selected Project Manager of the beef processing facility, ROBERT L. MOULTRIE…

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[1] As will be shown, the timeline above cannot establish bribery. *See infra* at 14 (discussing *United States v. Thompson,* 484 F.3d 877, 879 (7th Cir. 2007) and the fallacy of a contention that a mere timeline establishes a crime under 18 U.S.C. §666).

> contacted Robin Williams, a consultant employed by the FACILITY GROUP… and asked Williams to set up a meeting with the public official. On or about April 2, 2003, MOULTRIE and Williams met with the public official and an employee of the public official's campaign staff at a Jackson, Mississippi restaurant to discuss the Mississippi Beef Processors project.
>
> …[2]
>
> 13. On or about April 15, 2003, THE FACILITY GROUP was selected by the State of Mississippi to manage the Mississippi Beef Processors project and on April 23, 2003, the FACILITY GROUP entered into a "Letter of Intent" with the State of Mississippi to sign a Project Management Agreement.
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> 14. On or about July 7, 2003, however, before a Project Management Agreement had been executed, MOULTRIE caused invitations to be mailed to individuals living in Georgia, Mississippi, and elsewhere to attend a fundraiser for the public official, to be held at MOULTRIE'S residence in Smyrna, Georgia.
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> 15. Less than a week later, on or about July 11, 2003, THE FACILITY GROUP … entered into a Project Management Agreement with the State of Mississippi and the Bank to manage the completion and design of the Mississippi Beef Processors plant….
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> 16. On or about mid July, 2003, ROBERT L. MOULTRIE and NIXON E. CAWOOD did instruct employees of THE FACILITY GROUP, who were invited to the fundraiser, to issue $1,0000.00 personal checks payable to the public official. …
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> 17. On or about July 23, 2003, a fund raiser for the public official was held at MOULTRIE'S Smyrna, Georgia residence, during which MOULTRIE, CAWOOD and other individual employees of THE FACILITY GROUP contributed campaign checks to the public official, payable to the public official.

These allegations are repeated without elaboration in the "OVERT ACTS" section of the indictment. *See* Superseding Indictment, ¶¶30, 31 (the meeting in the Jackson restaurant); ¶35, 37, 38 (the fund raiser). The Superseding Indictment also alleges creation of the Facility

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[2] The omitted paragraphs describe efforts by Sean Carothers to keep the beef plant job for Carothers Construction. Superseding Indictment, ¶11-12.

Group PAC and contributions on July 29th, August 13th, and September 30 by a Facility Group PAC to "the public official's campaign." Superseding Indictment, ¶¶19-21, 41-43. There is an allegation about the PAC contribution:

> 25. To further accomplish the objects of the conspiracy, ROBERT L. MOULTRIE did then … cause to be issued two additional checks to the public official's campaign in the amounts of $20,000.00 and $25,000.00, which were intended to influence and reward the public official in connection with the State of Mississippi's selection of THE FACILITY GROUP to manage and complete… the Mississippi Beef Processors plant….

Superseding Indictment, ¶25. Most of the remainder of Count One of the Superseding Indictment consists of allegations that Facility Group arranged to repay the employees for their contributions, and allegations that Facility Group "billed back" these and related costs through billing on the project. Superseding Indictment, ¶¶16, 18, 22, 23, 24, 26, 27, 33, 39, 40, 44.

II. An Indictment Must Charge All Essential Elements of the Crime

To be consistent with the Fifth Amendment to the United States Constitution, an indictment must charge all the essential elements of the crime. The United States Supreme Court has long held that this requires that an indictment go beyond the general language of the statute, particularly so where "guilt depends… crucially on a specific identification of fact…" *Hamling v. United States*, 418 U.S. 87, 118 (1974). In *Hamling,* the Court described what an indictment must do:

> Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description with which he is charged.

The court went on to discuss *Russell v. United States,* 369 U.S. 749 (1962), a prosecution for refusal to answer a question pertinent to a Congressional inquiry. In *Russell,* the indictment

had been held insufficient where it did not identify the question the defendant refused to answer. The Court in *Hamling* quoted *Russell,* which had held that "the very core of criminality under [the statute]… is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute." *Hamling*, 418 U.S. at 119 (quoting *Russell*, 369 U.S. at 764). This language provides the key to evaluating a challenge to an indictment: Are the key elements—"the very core of criminality"—under the statute charged by the indictment? Put plainly, can a defendant reading this indictment tell what the prosecution alleges he did that was criminal? *See Wilkins v. United States,* 376 F.2d 552, 562 (5th Cir. 1967) (a valid indictment "must charge positively and not inferentially everything essential"). *Russell* holds that when the defect in an indictment is a failure to state an offense by failure to allege the essential elements of the crime charged, the appropriate remedy is dismissal of the indictment or dismissal of the count in which the defect exists. *Russell*, 369 U.S. at 770-72. *United States v. Kay*, 359 F.3d 738, 757 (5th Cir. 2004) (citing *Russell*);Fed. R. Crim. P. 7(c) & 12(b).

It is this key that distinguishes defects in an indictment that are "minor deficiencies" and therefore harmless error from defects that mean there is a lack of adequate notice of the charges. The cases holding an indictment that tracks the statute is insufficient are cases where "the factual information that is *not* alleged in the indictment goes to the very *core of criminality* under the statute." *Kay,* 359 F.3d at 757 (emphasis original); *see United States v. Dentler*, 492 F.3d 306, 309 (5th Cir. 2007) (court will not reverse for "minor deficiencies" where "the language of the indictment demonstrates adequately" that the element [of the crime] is required). In *Dentler*, the defendant was charged with bank robbery in an

indictment that charged him with attempting to enter a bank while intending to rob someone of the bank's money. The court understandably rejected his contention that the indictment was insufficient for failing to allege that his conduct affected the bank. *Id.* at 310.

What constitutes a fatal deficiency is shown by *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007), in which the Fifth Circuit affirmed the dismissal of a mail fraud indictment. Ratcliff had borrowed money to finance his election campaign, a loan that had been co-signed by a supporter. When he was told this would violate state election laws, he refinanced the loan and secretly used cash from supporters to secure the refinancing. The government alleged that this was all mail fraud, in that he was using fraudulent devices to deprive the state of money (his salary in the elected office). The Fifth Circuit held that the indictment did not—and could not—allege that Ratcliff had "denied the parish of benefits" because the salary would have been paid regardless of the purported fraud relating to the loans.[3] Thus the indictment failed to adequately plead mail fraud. *Ratcliff* shows how the issues raised in this motion must be resolved, looking to a close reading of the indictment in the context of what the Government must prove to establish guilt.

The right to a sufficient indictment, then, is two-fold: First, there is a right that the indictment charges each of the elements of the particular crime. In this case, as noted above, the indictment does not allege a connection between the campaign contributions and the award of the beef plant contract. The indictment does not allege facts that establish any

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[3] It is worth remarking that there is a very similar issue in the mail fraud counts in this case. The Government is going to have difficulty showing that the purported fraudulent invoices, sent to Richard Hall, who was not even a party to the Facility Group contract, had any impact or was even material (a required element for mail or other fraud) on what the Facility Group was paid.

"corrupt" effort to "influence or reward" the public official in the form of an agreement or otherwise, and therefore alleges no *quid pro quo*. It thus fails to charge the elements of the offense.

Second, an indictment must provide enough notice for the defendant to be able to defend against the charges. Here, the indictment provides no notice of how or whether the government intends to show any kind of agreement to corrupt or influence the unnamed public official. Given the legality and even the constitutionally protected status of campaign contributions,[4] a reader of the indictment is left at a loss to know what exactly Robert Moultrie is charged to have done to corrupt the public official.

These principles for evaluating an indictment have been applied to prosecutions under 18 U.S.C. § 666. In *United States v. Abu-Shawish*, 507 F.3d 550, 557 (7th Cir. 2007), the court held an indictment insufficient because it failed to allege the defendant defrauded the organization he served as an agent. "There was nothing in the indictment to suggest that Abu-Shawish hid facts from or lied to any stakeholders when he paid himself or transferred funds." *Id.* at 558. Further, the Third Circuit has held that an indictment under § 666 fails to state an offense if the specific facts alleged in it "fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella*, 277 F.3d 678, 685 (3rd Cir. 2002); *see United States v. Vitillo*, 490 F.3d 314, 321 (3rd Cir. 2007) (citing *Panarella* on this issue).

[4] The constitutionally protected status of campaign contributions is discussed beginning, *infra,* at 10.

III. The Essential Element of § 666 Bribery—An Exchange—Is Even More Essential Where, As Here, First Amendment Protections Are Involved

The central element in this or any bribery prosecution is an exchange. "The essential element of a section 666 violation is a 'quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." *United States v. Medley,* 913 F.2d 1248, 1260 (7th Cir 1990); *see United States v. Paradies,* 98 F.3d 1266 (11th Cir. 1996) (stating in a § 666 prosecution that, "A quid pro quo is a specific act in exchange for a corrupt payment"). It is the *quid pro quo* exchange, the Fifth Circuit has recognized, that constitutes the "universally recognized" definition of bribery: "Not every gift, favor or contribution to government or political official constitutes bribery. It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent... 'Bribery' imports the notion of some more or less specific quid pro quo for which the gift of contribution is offered or accepted." *United States v. Washington* 688 F.2d 953, 958 n. 4 (5th Cir. 1982) (quoting Webster's seventh New Collegiate Dictionary, omissions original).[5] The exchange *is* the crime: "[I]t is the recipient's intent to make good on the bargain, not simply her awareness of the donor's intent that is essential to establishing guilt under Section 666." *United States v. Ford,* 435 F.3d 204, 213 (2nd Cir. 2006). The Fifth Circuit has recognized that this concept of an exchange is what proves bribery:

> Under the bribery statutes, the government must prove a quid pro quo, that is, that the official took money in return for an exercise of his official power. *McCormick v. United States,* 500 U.S. 257, 269-73, 111 S.Ct. 1807, 1815-16, 114 L.Ed.2d 307 (1991). In order to convict a briber, the government must prove that the accused intended to bribe the official. Intending to make a campaign contribution does not constitute bribery, even

[5] In *Washington,* the Fifth Circuit reversed a conviction of a Mississippi County Supervisor for kickbacks where the trial court refused to instruct the jury on the defense theory that he had only received unsolicited gifts from an unknown source.

> though many contributors hope that the official will act favorably because of their contributions. *See United States v. Allen,* 10 F.3d 405, 411 (7th Cir.1993) ("[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe."); *United States v. Biaggi,* 909 F.2d 662, 695 (2d Cir.1990) ("There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear."), *cert. denied,* 499 U.S. 904, 111 S.Ct. 1102, 113 L.Ed.2d 213 (1991). Accordingly, a jury instruction must adequately distinguish between the lawful intent associated with making a campaign contribution and the unlawful intent associated with bribery. *See United States v. Taylor,* 993 F.2d 382, 385 (4th Cir.) ("Any payment to a public official, whether it be a legitimate campaign contribution or a bribe, is made because of the public office he holds. *Evans* makes clear that the public official must obtain 'a payment to which he was not entitled, knowing that the payment was made in return for *official acts*.' " (quoting *Evans v. United States,* 504 U.S. 255, 268, 112 S.Ct. 1881, 1889, 119 L.Ed.2d 57 (1992)) (emphasis added)), *cert. denied,* --- U.S. ----, 114 S.Ct. 249, 126 L.Ed.2d 202 (1993).

U.S. v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995). This requirement of a corrupting exchange is critical because a political contribution (in and of itself) is not merely innocent. It is constitutionally protected. Campaign contributions involve both free speech and free association rights. *Buckley v. Valeo*, 424 U.S. 1, 14, 23 (1976) (Political campaign contributions involves the "area of the most fundamental First Amendment activities, and political contributions involve "protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate."); *see Federal Election Com'n v. Colorado Republican Federal Election Campaign Committee*, 533 U.S. 431, 466 (2001) (affirming continued validity of *Buckley*'s holding); *Chamber of Commerce of U.S. v. Moore*, 288 F.3d 187, 192 (5th Cir. 2002) (citing *Buckley* for the principle that the First Amendment protects campaign contributions and expenditures); *FEC v. Wisconsin Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2676 (2007) (Scalia, J. concurring) ("contributing money to, and

spending money on behalf of, political candidates implicates core First Amendment Protections"). The government's interest in regulating political contributions and the constitutional limits imposed by the First Amendment have been explained in terms of *quid pro quo* exchanges: "The 'corruption' to which the Court repeatedly referred [to in *Buckley*] was of the '*quid pro quo*' variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official." *Wisconsin Right to Life,* ___ U.S. at ___, 127 S.Ct. at 2676 (Scalia, J., concurring). Obviously, a payment to a public official's campaign is not in itself illegal. "Any payment to a public official, whether it be a legitimate campaign contribution or a bribe, is made because of the public office he holds." *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993)(citing *Evans v. United States*, 504 U.S. 255, 268 (1992)). For that reason, proof that money was paid to a public official "because of" or "motivated by" his office "creates no standard and involves no evidence of wrongdoing..." *Id.* It is not a crime; something more must be shown.

The constitutionally protected status of campaign contributions is critical in understanding what is required of the indictment in this case. In contexts where money changes hands in far-from-innocent ways—e.g. envelopes of cash among state employees, or off-the-books kickbacks to a judge—a simple allegation of the exchange tells the whole story and that it was corrupt. With an allegation of an open, acknowledged campaign contribution, something more is required to give notice what the crime might have been.

A Seventh Circuit case under § 666 shows how the elements of the crime and the particular facts interact and establish what is required for an adequate indictment. It is a "bag of money" case. The case holds that, even though a *quid pro quo* is the "essence" of § 666, the indictment was not insufficient as a matter of law for failure to explicitly allege a

quid pro quo. *United States v. Agostino,* 132 F.3d 1183 (7th Cir. 1997). *Agostino* shows the importance of a close reading of the indictment in relation to the facts alleged is important. It is a case far more like *Dentler,* where allegations of bank robbery obviously also alleged the required element that the conduct affected the bank, than it is like *Ratcliff,* where the conduct alleged did not constitute or describe the missing element for mail fraud.

The factual description in the indictment in *Agostino* established what was plainly an improper payment and thus told the defendant what he had done that was allegedly a crime. The defendant in Agostino was the supervisor in the Toll Roads Division of Indiana state government. Agostino had a subordinate who was involved in approving fuel-price calculations for a business called "Gas City" that had stations on the toll road. Agostino gave $4000 in cash to the subordinate, stating that the payment was for the "good job" the subordinate was doing, and because he "did not make enough money," then added that it came from a man the subordinate knew to be the manager of Gas City. Agostino was indicted for this under § 666, with an indictment that the Seventh Circuit acknowledged did little more than track the statutory language. What the indictment did accomplish was that it told Agostino what he had done that was alleged to be a crime: He handed cash to a subordinate to influence him in connection with the toll road. Obviously, the indictment in Agostino did not involve something innocent on its face, such as a campaign contribution. Agostino's complaint about the spelling-out of a *quid pro quo* is exactly like Dentler's complaint about an indictment that had not spelled out that Dentler intended to affect the bank by robbing it. *See Dentler,* 492 F.3d at 310. From the standpoint of telling Agostino

what he did that was alleged to be a crime, there was nothing missing from his indictment. This stands in stark contrast the indictment here.[6]

Given the legality and constitutionally protected status of campaign contributions, an exchange (the *quid pro quo*), or an allegation of how the defendant intended to corrupt the public official, are the sorts of specific facts that must be identified for Robert Moultrie to mount a defense. To repeat the Supreme Court's test: "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Hamling,* 418 U.S. at 199, citing *Russell v. U.S.*, 369 U.S. at 764.

In its response to the polygraph motion, the Government cited *Agostino, United States v. Gee* 432 F.3d 713 (7th Cir. 2005), and *United States v. Castro,* 89 F.3d 1443 (11th Cir. 1996) for its contention that there is no *quid quo pro* requirement for § 666 bribery. Government's Response in Opposition to Defendant Moultrie's Motion for Daubert Hearing and Admission of Privately-Administered Polygraph Results at 12-13 (Document No. 42). The corrupt exchange in transparently clear in *Agostino* (the envelope of cash) and *Gee* (the

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[6]Other circuits—and even subsequent Seventh Circuit cases—have clearly established the limited application of *Agostino.* In *United States v. Jennings,* 160 F.3d 1006, 1015 (4th Cir. 1998), the court rejected the conclusion in *Agostino* that a *quid pro quo* need not be charged, beginning by noting that *Agostino* "blur[red] the distinction between bribes and illegal gratuities…" The *Jennings* court discussed the history of §666, including an October 1986 amendment of the statute that focused the requirement of a *quid pro quo.* The court then noted the closely comparable language of §666 ("corruptly.. with intent to influence or reward") and the bribery provision of §201, section (b) ("corruptly…with intent to influence…"). The Second Circuit has explicitly followed *Jennings* in *United States v. Ganim,* 510 F.3d 134, 148 (2nd Cir. 2007), and in doing so affirmed a jury instruction that required the government to prove bribery by proving "some specific *quid pro quo.*" *See U.S. v. Griffin,* 154 F.3d 762, 764 (8th Cir. 1998) (the corrupt intent element is met by the requirement that "the person giving the bribe receive a *quid pro quo*...").

kickback to obtain a contract). There was no "notice" question arising from an indictment on those facts. It was just as evident in *Castro,* where there were kickbacks to a judge in return for public defender work. *Castro,* 89 F.3d at 1455.[7] Unlike a case involving a political contribution, the facts alleged (kickbacks, envelopes of cash outside any legal explanation) demonstrate a corrupt exchange. These cases say nothing about the sufficiency of the indictment in this case.

On the other hand, anyone who read the indictment in this case is left at a loss—there is an allegation that the project was discussed with "the public official," and that thereafter, a letter of intent was interred into, from which the Facility Group got the work on the beef plant project. There is an allegation that thereafter, the Facility Group's CEO agreed to do a fund raiser for the public official, and that political contributions were made at the fund raiser. Those allegations do not even suggest that the "public official" had anything to do with the decision to hire the Facility Group, much less that there was some sort of "exchange" or corrupt payment relating to the campaign contributions.

A close reading of the indictment suggests why the government is making this argument that it need not prove a *quid pro quo.* Stripped of pejorative adjectives, the indictment on bribery in Count One essentially charges a time line, and nothing more—that, at the time Facility Group was contracting to perform work in Mississippi, its CEO held a

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[7] Citation to *Castro* for the lack of a *quid pro quo* requirement is even more strained than is suggested in the text, above. The defendants in *Castro* argued that there paid to be a direct *quid pro quo* relationship between the defendants and the statutory "agent" who was receiving federal funds (in this case, a county official who cut checks for public defenders, as distinct from the judge who hired them and who had received kickbacks). The defendants argued that because they had the judge and not the "agent" (the official who cut the checks) there was no *quid pro quo.* This was of course rejected.

fund raiser for a political figure in Mississippi. The indictment does not even allege that the political figure had any role in the decision to hire the Facility Group. Attempts to establish bribery-by-timeline have been harshly criticized in exactly the context of a § 666 prosecution: "*Post hoc ergo propter hoc* is the name of a logical error, not a reason to infer causation." *United States v. Thompson,* 484 F.3d 877, 879 (7th Cir. 2007).[8]

There are two related reasons a "*quid pro quo*" is the sort of fact that must be "specifically identified" here. It is the exchange—the thing for a thing—that makes the campaign contribution "corrupt," as required by the statute. It is the agreement to make such a corrupt echange that violates the conspiracy statute, Indeed, the cases are consistent that the "essence" or "defining element" of bribery is the conscious exchange of influence for reward. That is what makes the conduct "corrupt" (as explicitly required by the statutory language). In *U.S. v. Allen*, 10 F.3d 405 (7th Cir. 1993), the court delineated the line distinguishing ordinary campaign contributions and bribes, starting its reasoning from the holding in *McCormick v. United States,* 500 U.S. 257 (1991) that, for violation of the Hobbs Act, which criminalizes extortion "under color of official right,' there must be a showing of an explicit exchange. The *Allen* court explained why:

> *McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. … It would be naïve to suppose that contributors do not expect some benefit—support for favorable legislation, for example—for their contributions.

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[8] This logical fallacy would be to assume that because things are connected in time, they are logically connected; the Latin means "After this, therefore because of this," and the simplest example of the fallacy would be to assume that, because a rooster crows just before dawn, the rooster is causing the sun to rise.

10 F.3d at 410-11. The court went on to discuss *McCormick*, that a contrary view "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in is a very real sense is unavoidable so long as election campaigns are financed by private contributions…." *Id.* at 411, discussing *McCormick,* 500 U.S. at 272. In addition, "accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act." *Id.*[9] A *quid pro quo,* that is, a "conscious exchange of value for official favoritism," is a "necessary element of bribery-type crimes." *U.S. v. Vap*, 852 F.2d 1249, 1255 (10th Cir. 1988). Thus, in *McCormick,* the Hobbs Act cases noted above, the Supreme Court held that "it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and…the intention of the parties is a relevant consideration in pursuing this inquiry." *McCormick,* 500 U.S. at 270. Campaign contributions are not illegal. But nothing in the Superseding Indictment would provide a reader a clue what exchange occurred—that is, what made these other than usual campaign contributions. Just as in *McCormick* there was nothing of an exchange. There was no indication that "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* at 273.

In *Tomblin,* there was an agreement between the defendant and a senator's administrative assistant to exchange campaign contributions, travel expenses, and a stake in the defendant's business in exchange for assistance in obtaining a Federal Home Loan Bank

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[9]The court in *Allen* was faced with whether an Indiana bribery statute required a *quid pro quo.* The statutory question arose in a RICO gambling prosecution of a state official who had accepted bribes to protect a gambling hall from police raids. The court did not have to reach the *quid pro quo* issue because the RICO-related charge was aiding a gambling institution, which did not require establishing bribery.

Board regulatory approval. *Tomblin,* 46 F.3d at 1381. This agreement of course established the necessary exchange. The court noted that to prove a "meeting of the minds," the terms of the quid pro quo or agreement must be "clear and unambiguous." *Id.* The shortfall of the indictment here is not a shortfall in clarity or an isuse of ambiguity—there is nothing, a complete lack of any allegation of an exchange between the public official and Robert Moultrie.[10]

IV. Where An Indictment Fails To Adequately Allege The Substantive Crime, A Conspiracy Count Also Necessarily Fails

This motion establishes the Government's failure to allege any *quid pro quo* in Count 1 of its Superseding Indictment, which alleges that Defendants reputedly conspired to violate 18 U.S.C. § 666(a)(2), prohibiting theft or bribery concerning programs receiving federal funds, in violation of the federal conspiracy statute, 18 U.S.C. § 371.A *quid pro quo* is an essential element of any alleged § 666 violation. Count 1 is further subject to dismissal for the reason that a conspiracy charge will not lie *where there is no underlying, unlawful criminal object*. As the Fifth Circuit has recognized:

> [T]he premise that all conspiracy law is directed only at persons who have intentionally agreed to further an illegal object. [Fn.] *To convict, the government must prove that there was an agreement to accomplish an illegal act. It is not enough for it merely to establish a climate of activity that reeks of something foul.* The law requires proof that the members of the conspiracy knowingly and intentionally sought to advance an illegal objective. *Involvement by individuals in a clandestine agreement that appears suspicious may be ill advised or even morally reprehensible, but, without proof of an illegal aim, it is not criminal. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.***"**

[10] And the obvious reason the Government has not alleged an exchange is that it cannot prove one.

United States v. Wieschenberg, 604 F.2d 326, 331-32 (5th Cir. 1979) (emphasis added) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975); citing *Scales v. United States*, 367 U.S. 203 (1961); *United States v. Borelli*, 336 F.2d 376, 384 (2nd Cir. 1964); *United States v. Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940); *United States v. Peoni*, 100 F.2d 401, 403 (2nd Cir. 1938); *Developments in the Law Criminal Conspiracy*, 72 Harv.L.Rev. 920, 925-927 (1959)); *see also Wieschenberg*, at 334 ("*The gist of a conspiracy is an agreement to commit an offense*") (emphasis added) (citing *Falcone*, at 210); *accord United States v. Alvarez*, 610 F.2d 1250, 1255 (5th Cir. 1980) (emphasis added) (quoting *Iannelli*, at 777; citing *United States v. Conroy*, 589 F.2d 1258, 1269 (5th Cir. 1979)). "Lawfulness of purpose is not an affirmative defense to conspiracy; rather, unlawfulness of purpose is an element of the crime." *United States v. Fernandez*, 892 F.2d 976, 986 n.9 (11th Cir. 1989). Likewise, other jurisdictions have recognized that "*where the underlying offense agreed upon by the putative conspirators does not constitute a substantive violation of federal law no conspiracy can be effectuated under 18 U.S.C. § 371.*" *United States v. McNutt*, 908 F.2d 561, 565 (10th Cir. 1990) (emphasis added) (citing *Lubin v. United States*, 313 F.2d 419, 422 (9th Cir. 1963)). "[J]uries 'must not be permitted to convict on suspicion and innuendo.'" *Wieschenberg*, at 335 (quoting *United States v. Palacios*, 556 F.2d 1359, 1365 (5th Cir. 1977)).

In *United States v. Wieschenberg*, the defendants entered discussions with an undercover informant for the Federal Bureau of Investigation and other parties regarding the possible purchase of "inertial navigation devices" in the United States for possible sale to the Soviet Union: however, no deal was ever consummated, no price was ever determined, no end user was ever obtained, and a required license or approval was never obtained from the U.S. State Department. 604 F.2d at 329-30. Nevertheless, the defendants were charged with conspiring to violate 22 U.S.C. §§ 1934(c) and 2778(c) and the regulations thereunder, by willfully,

knowingly and unlawfully conspiring to export the devices from the U.S. to a foreign country without first having obtained an export license or written approval from the State Department, as required by 22 C.F.R. § 123.01. *Id.* at 328. The Court of Appeals reversed the defendants' convictions, observing that:

> To embrace the government's contention we must hold that mere association of two or more persons to accomplish *legal and possibly illegal goals*, accompanied by discussions to promote those goals, but with no discernible direction toward either the legal or the illegal objectives, amounts to criminal conduct under 18 U.S.C. s 371. Our authorities cannot be correctly interpreted as supporting such a result. *Conviction of a criminal conspiracy must be supported by proof beyond a reasonable doubt of an agreement to accomplish an illegal act and an overt act in furtherance of that agreement's particular illegal purpose.*

Id. at 336 (emphasis added); *accord United States v. Moschetta*, 673 F.2d 96, 99 (5th Cir. 1982) ("[T]he 'mere association of two or more persons to accomplish legal and possibly illegal goals, accompanied by discussions to promote those goals, but with no discernible direction toward either the legal or illegal objectives,' does not amount to criminal conduct under the conspiracy statute, 18 U.S.C. § 371") (quoting *Wieschenberg*, at 336). Similarly, in *United States v. Fernandez*, the defendants, representatives of a hotel and restaurant employees union fund and the owner of a health maintenance organization ("HMO"), were charged with conspiracy to illegally influence the operations of an employee-benefit plan, in violation of § 371, for allegedly making payments to the union's president for his assistance in obtaining a contract between the union and the HMO to provide health services for the union's members. 18 U.S.C. § 371. 892 F.2d at 979. In reversing the defendants' convictions, the Eleventh Circuit Court of Appeals held that the government's alleged evidence that some of the defendants had attended a meeting at which the proposed contract was discussed "show[ed] a discussion susceptible of either an illegal or legal interpretation, and as such cannot be used to establish a conspiracy." *id.* at 986 (citing *Wieschenberg*, 604 F.2d at 335-36).

Furthermore, in *United States v. Templeton*, the Eighth Circuit Court of Appeals reversed the defendants' convictions for conspiring, pursuant to § 371, to violate the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*., where the government failed to prove that the alleged underlying conduct violated the CWA. 378 F.3d 845, 852 (8th Cir. 2004).

The Government's failure to allege any violation of § 666 is fatal to its charge of an alleged conspiracy in violation of § 371 in Count 1. The failure to allege any underlying unlawful act or unlawful object constitutes, by extension, a failure to allege an essential element of § 371. As demonstrated by *Wieschenberg*, mere allegations of lawful conduct, conduct which is not necessarily illegal, or conduct which merely appears improper or suspicious is insufficient to sustain a conspiracy charge pursuant to § 371.

CONCLUSION

For the foregoing reasons, this Court should dismiss Count 1 of the Superseding Indictment because of failure to allege an essential element of the crime, that there was a corrupt "exchange" or *quid pro quo* involved in the political contributions made to the unnamed public official..

This the 23rd day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a copy of the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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