

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES OF AMERICA

v.

No. 4:13 CR 00158-01 JLH

MARTHA ANN SHOFFNER

DEFENDANT’S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

COMES NOW the Defendant, Martha Ann Shoffner, by and through the undersigned Counsel, and for her Motion requesting a Judgment of Acquittal, brought pursuant to Rule 29 of the Federal Rules of Civil Procedure, does state as follows:

1. The Defendant respectfully moves for a judgment of acquittal, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, on the grounds that the evidence presented by the United States at trial of this case is insufficient to sustain the conviction of the Defendant on Counts 1-14 of the United States’ Second Superseding Indictment. The evidence presented at trial did not satisfy the elements and basic legal requirements for a conviction of the Defendant under either the Hobbs Act, at 18 U.S.C. § 1951, or the Federal Programs Bribery Statute, found at 18 U.S.C. § 666.

2. The government failed to present sufficient proof on each and every element of Counts 1-14, from which a rational juror could conclude beyond a reasonable doubt that the Defendant is guilty of these named offenses. The prosecution witnesses failed to provide evidence sufficient to meet all of the elements of the crimes charged.

3. No government witness established that interstate commerce was affected “by robbery or extortion,” as is required by the plain language of the Hobbs Act and not a single witness testified that there was an agreement that money was exchanged for official acts by the

Defendant as is also required for a conviction of Hobbs Act Extortion. As such, the Defendant asks that the Court enter a Judgment acquitting the Defendant of Counts 1-7 of the Second Superseding Indictment.

4. No government witness provided sufficient evidence to establish that the Arkansas State Treasury received “benefits,” as identified under the relevant Federal Programs Bribery statute at 18 U.S.C. § 666 and discussed by the United States Supreme Court in *United States v. Fischer*,¹ leaving this Court with insufficient evidence to sustain the Defendant’s conviction under Counts 8-14 of the Second Superseding Indictment. Judgment of acquittal is therefore appropriate as to Counts 8-14.

5. The application of the Federal Programs Bribery statute (Counts 8-14) is unconstitutional *as applied* to this Defendant because there was no evidence presented which might suggest that the United States Federal Government has any federal interest in the alleged criminal conduct of this Defendant or the activities of the Arkansas State Treasury. As federal jurisdiction for enforcement of the Federal Programs Bribery statute is derived from the Spending Clause of the United States Constitution, there must be a federal interest before criminal conduct comes within the scope of this statute. The government failed to produce any such evidence making a Judgment of Acquittal necessary.

6. Rule 29(a) of the Federal Rules of Civil Procedure states that “after the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”

7. The Defendant, Martha Shoffner, respectfully argues to the Court that the United States has failed to present sufficient evidence to prove the elements of Counts 1-14 of the

¹ *U.S. v. Fischer*, 529 U.S. 667 (2000).

United States' Second Superseding Indictment, and, as a result, the Court should enter a Judgment of Acquittal as to these counts.

8. This Motion is accompanied by a Brief in Support which is incorporated herein, word-for-word.

WHEREFORE, the Defendant, Martha Ann Shoffner, respectfully requests that the Court grant her Motion for Judgment of Acquittal on Counts 1-14 and provide any and all other relief to which the Defendant may be entitled.

Respectfully Submitted,

MARTHA ANN SHOFFNER

By: /s/ Grant Ballard
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I electronically filed the foregoing with the Clerk of the Court, via CM/ECF, which shall send electronic notification of such filing to the following:

Jana Harris
Jana.Harris@usdoj.gov

/s/ Grant Ballard

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES OF AMERICA

v.

No. 4:13 CR 00158-01 JLH

MARTHA ANN SHOFFNER

**BRIEF IN SUPPORT OF DEFENDANT’S RULE 29 MOTION
FOR JUDGMENT OF ACQUITTAL**

COMES NOW the Defendant, Martha Ann Shoffner, by and through the undersigned Counsel, and for this Brief in Support of her Motion for Judgment of Acquittal, brought pursuant to Rule 29 of the Federal Rules of Civil Procedure, does state as follows:

I. INTRODUCTION

The Defendant respectfully moves for a judgment of acquittal, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure on the grounds that the evidence presented by the United States at trial during the prosecution’s direct case is insufficient to sustain the conviction of the Defendant under both the Hobbs Act found at 18 U.S.C. § 1951, and the Federal Programs Bribery Statute, at 18 U.S.C. § 666. The government has failed to present sufficient proof on each and every element of Counts 1-14, from which a rational juror could conclude beyond a reasonable doubt that the Defendant is guilty of these named offenses.

II. PROCEDURAL BACKGROUND

On March 5, 2011, the Defendant went to trial on Counts 1-14 of the Second Superseding Indictment. At the close of the government’s case in chief, the Defendant moved for a Rule 29 judgment of acquittal as to these Counts. At that time, the Court elected to reserve its ruling on the Rule 29 Motion until after a jury verdict and indicated that the issues presented were

sufficiently complex to require briefing. On May 11, 2013, the Jury found the Defendant guilty of Counts 1-14. The Defendant hereby renews her Rule 29 Motion.

III. RULE 29 STANDARD

A motion for judgment of acquittal, as allowed by Rule 29 of the Federal Rules of Civil Procedure, is a challenge to the sufficiency of the evidence presented against a Defendant. Rule 29(a) states that “after the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”

IV. ARGUMENT

The Defendant, Martha Shoffner, argues to the Court that the United States has failed to present sufficient evidence to prove the elements of Counts 1-14 of the United States’ Second Superseding Indictment. The prosecution witnesses failed to provide evidence sufficient to meet all of the elements of the federal criminal offenses charged. No government witness established that interstate commerce was affected “by robbery or extortion,” as is required by the plain text of the Hobbs Act (Charged in Counts 1-7) and not a single witness testified that there was an agreement that money was exchanged for official acts by the Defendant as is required for a conviction of Hobbs Act extortion.

Similarly, no government witness provided sufficient evidence to establish that the Arkansas State Treasury received “benefits,” as identified under the relevant statute at 18 U.S.C. § 666 and as discussed by the United States Supreme Court in *United States v. Fischer*,¹ leaving this Court with insufficient evidence to sustain the Defendant’s conviction under Counts 8-14 of

¹ U.S. v. Fischer, 529 U.S. 667 (2000).

the Second Superseding Indictment. Moreover, the application of the Federal Programs Bribery Counts 8-14 is unconstitutional *as applied* to this Defendant because there was no evidence presented which could serve to prove a Federal interest in the Defendant's indicted conduct, as required by the Spending Clause of the United States Constitution, prior to the prosecution of a Defendant under the Federal Programs Bribery statute. For these reasons and as more specifically addressed below, the Defendant contends that the United States has failed to present sufficient evidence and, as a result, a Judgment of Acquittal by the Court is proper.

A. Hobbs Act Convictions- Counts 1-7.

After the presentation of the evidence in this case, the jury found that the Defendant was guilty of Extortion and Attempted Extortion in violation of the Hobbs Act. Hobbs Act extortion has three elements: 1) that a Defendant induce another to part with property; 2) that the Defendant voluntarily and intentionally did so by extortion; and 3) that the Defendant's Action affected interstate commerce. The Defendant asks that the Court enter a Judgment of Acquittal on Counts 1-7 of the Second Superseding Indictment as: 1) no evidence was presented at trial that interstate commerce was affected by extortion or *would have been affected if an attempted extortion had been completed* and 2) that there was no evidence introduced at trial which suggests the Defendant entered into an agreement with Steele Stephens to exchange official acts for improper payments of cash.

1. Acquittal is Appropriate as No Evidence was Introduced to Establish that the Defendant's Conduct "Affected Commerce."

A plain reading of the Hobbs Act demonstrates that the government must offer evidence that a crime of extortion has an affect on interstate commerce before extortion may be prosecuted under the Act. However, the government has not offered any evidence to suggest that the

conduct of the Defendant in receiving personal funds from Steele Stephens had any actual or potential affect on interstate commerce, and, as such, a Judgment of Acquittal is necessary.

A stated element of a Hobbs Act prosecution is that commerce be affected “by robbery or extortion,”² The text of the Hobbs Act further defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”³ As a result, the language of the statute itself requires that “the obtaining of property from another” must affect commerce before extortion may be prosecuted under the Hobbs Act. Consequently, the government’s failure to offer evidence of such an affect at trial is fatal to the convictions on these Counts. The evidence presented to the jury at trial only served to demonstrate that the Defendant accepted \$36,000.00 of Steele Stephens’ personal funds and demonstrates no actual or potential affect on interstate commerce. As a result, a Judgment of Acquittal is requested on Counts 1-7, by the Defendant.

The Hobbs Act can be distinguished from many other federal criminal statutes as the text of the Hobbs Act itself contains a jurisdictional element which restricts the scope of federal prosecutions under the Hobbs Act and limits the application of the Hobbs Act to offenses of extortion and robbery which actually affect interstate commerce. The Eighth Circuit has recognized this jurisdictional limitation on the application of the Hobbs Act and made clear that a prosecution under the Hobbs Act requires “an actual effect on interstate commerce, not just a probable or potential impact.”⁴ A Judgment of Acquittal is appropriate as to the Defendant’s Hobbs Act convictions because there was no evidence introduced at trial indicating that interstate commerce was impacted by the extortionate acts of the Defendant.

² 18 U.S.C. § 1951.

³ 18 U.S.C. § 1951 (b)(2).

⁴ United States v. Williams, 308 F.3d 833, 836-38 (8th Cir. 2002).

The issue before this Court is whether a Hobbs Act conviction may be sustained where evidence was not presented by the government that suggests the extortionate receipt of \$36,000.00 had any impact on interstate commerce. A key point of law is that extortion and robbery, as referenced specifically in the Hobbs Act, both involve the taking of property, and *the plain language of the statutory text along with guidance from relevant case law suggests that the taking of property must be the act which “affects” commerce.* The government’s trial arguments that Steele Stephens traded bonds in interstate commerce, that he used email, and that the State was engaged in interstate bond transactions are simply irrelevant to the question of whether the government has produced sufficient evidence as to the jurisdictional element of the Hobbs act, which explicitly mandates that the act of extortion affect commerce.

The limitation of Hobbs Act prosecutions to situations where property is taken out of interstate commerce makes good sense and is perfectly aligned with the original intent of Congress in enacting the Hobbs Act. It has long been recognized by United States’ Courts that the purpose of the Hobbs Act is “to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion.”⁵ The government has, in this case, attempted to expand the application of the Hobbs Act to a situation where the evidence at trial indicates that the Defendant did not obstruct, delay, or affect commerce by her alleged acts of extortion.

A review of applicable case law further reveals that the government normally demonstrates the “affecting commerce” element of Hobbs Act extortion by introducing evidence that a robbery or extortion has depleted the assets of a business engaged in interstate commerce. In other words, the evidence which most often satisfies the jurisdictional hook for a Hobbs Act

⁵ See United States v. Culbert, 435 U.S. 371 (1978).

prosecution is that property is taken out of interstate commerce. However, in this case the proof introduced at trial has revealed that the assets of a business engaged in interstate commerce were not depleted. Instead, the personal funds of the government's witness Steele Stephens were the only funds directly impacted by the conduct for which the jury found the Defendant guilty of extortion. Such evidence is insufficient to sustain a conviction of Hobbs Act extortion.

The government insists that the State of Arkansas' is customary engaged in bond transactions, transactions stated by the Court to be transactions "in interstate commerce," and that this activity satisfies the jurisdictional hook of the Hobbs Act. This position is contrary to the law and the original intent of the Hobbs Act. The offense of Hobbs Act extortion requires that a Defendant obtain the property of another and that this conduct *by the Defendant* affect commerce. The government's argument that the state's business in bond transactions satisfies the jurisdictional element of a Hobbs Act prosecution of the Defendant misses its mark, as relevant Hobbs Act Case Law indicates that the illegal act – here the extortion – must affect interstate commerce.⁶

Put simply, cash was received by the Defendant from an individual and these funds were not in or affecting interstate commerce. The Eighth Circuit case law provides support for the Defendant's position. Our Circuit has previously suggested that Hobbs Act prosecutions of Defendant's who have robbed *individuals* are questionable as such "actions normally have a lesser effect on interstate commerce when directed at individuals rather than businesses."⁷ To sustain a Hobbs Act conviction, the government must have offered evidence that a robbery or extortion affected interstate commerce. That type of evidence was just not presented in this case. The case of *United States v. Martha Shoffner* is one where a jury found that the jurisdictional

⁶ See *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir 1978).

⁷ *United States v. Quigley*, 53 F.3d 909, 910 (8th Cir. 1995).

element of the Hobbs Act offenses were satisfied by the government's introduction of testimony that bond transactions occur in interstate commerce. While this may be factually true, such evidence does not serve to allow a finding that the extortionate acts of the Defendant, as defined by the relevant statute (the receipt of cash), affected interstate commerce. At trial there was no evidence or testimony presented from which a rational juror could conclude that any "instrumentality of commerce," any "persons ... in interstate commerce," or any "things in interstate commerce" were "obstructed, delayed, or affected" by the extortionate actions of the Defendant, Martha Shoffner.

There is no question that "commerce is sufficiently affected under the Hobbs Act where a robbery depletes the assets of a business that is engaged in interstate commerce."⁸ Similarly, an extortion which depletes the assets of a business engaged in interstate commerce would satisfy the requisite Hobbs Act jurisdictional element. However, those facts were not before the Court at trial. In Martha Shoffner's case, St. Bernard Financial Services was not extorted or disgorged of any property. Instead, Steele Stephens testified that he decided to provide financial assistance to the Defendant, out of his own pocket. A judgment of acquittal is appropriate in the present case as there was no evidence presented, at trial, of the requisite affect on interstate commerce resulting from the Defendant's improper *obtaining of property*. The government's presentation of evidence that the State of Arkansas engages in bond transaction and that Steele Stephens' employer is engaged in interstate commerce simply fails to satisfy the jurisdictional element of a Hobbs Act extortion offense. The Defendant now asks the Court to enter a Judgment of Acquittal on the Hobbs Act Counts.

⁸ U.S. v. Williams, 308 F.3d 833 (8th Cir. 2002).

2. *The Government Has also Failed to Present Evidence of an Agreement by the Defendant to undertake an exercise of official power in exchange for monetary payment.*

In addition, the Defendant argues herein that the Court should enter a Judgment of Acquittal as to Counts 1-7 of the Second Superseding indictment as the government presented no evidence of a Quid Pro Quo Agreement between the Defendant and Steele Stephens whereby money was paid to the Defendant in exchange for the exercise of official powers by the Defendant, Martha Shoffner. When “extortion under color of official right” is charged against a public official, the act of extortion need not involve force or threats but, the Defendant’s conduct must constitute an acceptance of money by a public official in exchange for a specific exercise of his or her official power.⁹

It is true that the Supreme Court, in *McCormick v. United States*, limited the application of the *quid pro quo* requirement to cases where the payments to a public official constituted campaign contributions.¹⁰ However, in a more recent ruling, the United States Supreme Court in *Evans v. United States* reasoned that Congress intended the common-law rules regarding extortion by public officials to be incorporated into the Hobbs Act. As a result, *Evans* stands for the proposition that the government must show a *quid pro quo* arrangement not only in campaign contribution cases but in all cases involving public officials.

While the government contends that a conviction of extortion under “color of official right” only requires an agreement or quid pro quo in cases where the payments were made as campaign contributions, this position is contrary to both the common law governing extortion and the reasoning of the United States Supreme Court, in *Evans v. United States*,¹¹ where the

⁹ *Evans v. United States*, 504 U.S. 255 (1992).

¹⁰ *McCormick v. United States*, 500 U.S. 257 (1991).

¹¹ See *Evans v. United States*, 504 U.S. 255 (1992).

Court held that, in a Hobbs Act extortion prosecution, the government must show that a public official has obtained a payment to which she is not entitled, knowing that the payment was made in return for official acts. The *Evans* decision is simply not limited to campaign contribution cases as was argued by the Government at the trial of this case.

In *Evans*, the Court's reasoning was based on the common law definition of extortion, and the Court wrote that although the text of the Hobbs Act is broader than the common-law definition of extortion "because it encompasses conduct by a private individual as well as conduct by a public official, the portion of the statute that refers to official misconduct continues to mirror the common-law definition."¹²

This is a significant addition to the Court's holding in *McCormick*, made by a majority of the Court, for the reason that "at common law, extortion was an offense committed by a public official who took by colour of his office money that was not due to him for the performance of his official duties."¹³ At Note 5 of the *Evans* opinion, the Court stated that "there is no difference of substance between the classic common-law phrase "by colour of his office" and the Hobbs Act's formulation "under color of official right."¹⁴ As a result, the law requires that the government present evidence from which a rational juror could conclude that there was a quid pro quo agreement by a public official to exchange an exercise of official acts for improper monetary payment. The government has failed to present this evidence and, as a result, the Hobbs Act Convictions cannot stand.

It must also be pointed out that the dissent in *Evans v. United States* did not miss this aforementioned development of the law and the application of a *quid pro quo* requirement to

¹² *Evans v. United States*, 504 U.S. 255 (1992).

¹³ *Evans v. United States*, 504 U.S. 255 (1992).

¹⁴ *Evans v. United States*, 504 U.S. 255, n.5 (1992).

cases where public officials do not allege to have only received improper campaign contributions. The dissent went so far as to state that “today’s extension of McCormick’s reasonable (but textually and historically artificial) quid pro quo limitation to all cases of official extortion is both unexplained and inexplicable,”¹⁵ and . . . “reader’s of today’s opinion should have little difficulty in understanding that the rationale underlying the Court’s holding applies not only in campaign contribution cases, but all § 1951 prosecutions.”¹⁶ In his Opinion concurring with the majority, Justice Kennedy went so far as to write “the dissent is correct to conclude that this language requires a quid pro quo as an element of the Government’s case in a prosecution under 18 U.S.C. § 1951.”¹⁷

Justice Kennedy, in his concurring Opinion in *United States v. Evans*, specifically noted that “we hold today that the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”¹⁸ Justice Kennedy went on to write that “in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question.”¹⁹ These are strong words from a Justice of the Supreme Court. The Second Circuit Court of Appeals heard these words and has also suggested that evidence of a quid pro quo agreement is required to sustain a conviction of Extortion under the Hobbs Act in the non-campaign context.²⁰ The Defendant now asks that the Court enter a Judgment of Acquittal as to her Hobbs Act

¹⁵ *Evans v. United States*, 504 U.S. 255, (1992) (dissenting opinion).

¹⁶ *Evans v. United States*, 504 U.S. 255, (1992) (dissenting opinion).

¹⁷ *Evans v. United States*, 504 U.S. 255, (1992) (concurring opinion, Justice Kennedy).

¹⁸ *Evans v. United States*, 504 U.S. 255, n.5 (1992) (See concurring opinion by Justice Kennedy).

¹⁹ *Evans v. United States*, 504 U.S. 255, (1992) (concurring opinion, Justice Kennedy).

²⁰ *U.S. v. Ganim*, 510 F.3d 134 (2nd Cir. 2007).

Convictions as there was not sufficient evidence of a quid pro quo agreement presented at trial, as required by the Supreme Court's analysis in *Evans*.

In the case of *United States v. Martha Ann Shoffner*, the government failed to offer any evidence of a quid pro quo or testimony indicating that there was an agreement between the Defendant and Steele Stephens whereby the Defendant would perform certain official acts in exchange for the payment of money. In fact, the government's star witness, Steele Stephens, testified that he began making payments to the Defendant because he "felt sorry for" the Defendant's situation after she had lost her place of residence, her mother had passed away, and the Defendant began experiencing financial difficulty. Testimony revealed that the Defendant and Steele Stephens were trusting friends who talked about many things, aside from the business of the Arkansas State Treasury. Only after significant prodding by the government, did Mr. Stephens indicate that he had hoped this financial relationship would benefit his business in the long term. This is not satisfactory evidence of an agreement by which a public official commits to exchange official acts for money.

It was clear from the testimony at trial that there was no quid pro quo or "agreement" that money be exchanged for specific official acts by the Defendant. Therefore, the common law definition of extortion, which the Supreme Court of the United States has held applicable to prosecutions of extortion under the Hobbs Act, has not been satisfied. The government has failed to offer sufficient evidence that the Defendant, Martha Ann Shoffner, took by color of her office money that was not due her, for the performance of her official duties. Consequently, the jury's verdict cannot be sustained and acquittal is necessary in accordance with Rule 29 of the Federal Rules of Civil Procedure.

B. Federal Program Bribery- Counts 8-14

The Defendant also respectfully requests that this Court enter a Judgment of Acquittal as to the jury's finding that the Defendant is guilty of violating the Federal Program Bribery Statute, specifically the offense of Bribery by an Agent of a Program receiving Federal Funds. The offense of Bribery by an Agent of a Program receiving Federal Funds has four elements: 1) the defendant was an agent of an agency or governmental unit; 2) During a one year period, the Defendant corruptly solicited for her benefit, something of value in connection with certain business; 3) the business involved something of value of \$5,000.00 or more; and 4) the governmental unit received "benefits" in excess of \$10,000.00 in the one-year period pursuant to a federal program. For this Court to deny the Defendant's Rule 29 Motion as to Counts 8-14, the Court will have to rule that any acceptance of an impermissible gratuity or bribe by any and every state employee in this nation constitutes a violation of the Federal Programs Bribery Statute.

The Circuit Courts in this Country are split on whether the government must show a tracing of federal funds in bribery cases charged under Section 666(a)(1)(B).²¹ Regardless of where the Eighth Circuit falls on this issue, there should be no doubt that the government did not "trace" any specific federal funds to the control of the Defendant, Martha Shoffner, or the Arkansas State Treasury. The only evidence presented at trial regarding whether a governmental unit received "benefits" was the testimony by Arkansas Division of Legislative Audit employee, Joseph C. Buddenburg, who suggested that the Arkansas State Treasury received funds from the Federal government which were "commingled" with Arkansas' own state funds. Mr.

²¹ U.S. v. Simas, 937 F.2d 459, 463 (9th Cir. 1991); (in cases charged under Section 666, federal funds need not be traced to the project affected by the bribe); United States v. Foley, 73 F.3d 484, 492 (2d Cir. 1996)(no violation of section 666(a)(1)(B) where the conduct at issue affects neither the federal program funds received nor the receiving organization's financial interest).

Buddenburg offered no testimony as to the origin of the federal funds nor did he offer testimony indicating that the federal funds constituted “benefits” as described under the relevant statutory text and case law. As such, Mr. Buddenburg’s testimony is insufficient upon which to sustain a conviction of Federal Program Bribery.

There is also an additional constitutional difficulty in convicting the Defendant of violating the Federal Program Bribery Statute, as the evidence presented at trial and the testimony of Richard Weiss, Director of the Arkansas Department of Finance and Administration, revealed no clear distribution of federal program funds to the Arkansas State Treasury. In short, there appears to be no direct Federal interest in the operations of the Arkansas State Treasury or the alleged conduct of the Defendant in this case. Mr. Weiss indicated on cross-examination that the Defendant did not administer any federal funds, the State Treasury did not have to comply with any specific federal program restriction as to the handling of Federal Funds, the state treasury does not undergo Federal Audits, and that he had no knowledge that the Arkansas State Treasury had ever invested any federal money. The fact that the conduct of the Defendant is so-attenuated and distanced from the administration or receipt of federal funds makes this case unique in the context of prosecutions under the Federal Program Bribery statute and an unconstitutional application of the statute.

Put simply, the evidence offered by the government only serves to suggest that some federal funds may make their way to the Arkansas State treasury. The government failed to present evidence that the conduct for which the Defendant was indicted posed any threat to the integrity and proper operation of a federal program. The application of the Federal Program Bribery statute to the Defendant is unconstitutional, as the Supreme Court of the United States

has indicated that for the Federal Program Bribery statute to be constitutionally applied, there must be a threat to a federal program's integrity and proper operation.²²

In the case of *United States v. Martha Ann Shoffner*, the government failed to even identify a single program under which the Arkansas State Treasury received federal program benefits, but, more importantly, the government failed to introduce evidence that a federal program's integrity and proper operation were threatened by the Defendant's conduct. A judgment of acquittal is therefore appropriate in accordance with Rule 29 of the Arkansas Rules of Civil Procedure.

In an effort to fully inform the Court, Defendant's Counsel admits that the Supreme Court has suggested that the text of 18 U.S.C. § 666 does not require the government to prove that a bribe has any particular influence on federal funds. However, the Court has demonstrated concern that the application of § 666 could "extend federal power beyond its proper bounds."²³ This Court now finds itself in that exact situation where the government has asserted the Federal Program Bribery Statute over conduct which not only does not have any particular influence on federal funds, but also fails to involve a Federal Program or Federal interest in any conceivable way.

The broad nature of the Federal Program Bribery statute has resulted in attention from the United States Supreme Court. In certain cases, the Supreme Court has held application of the Federal Program Bribery Statute (18 U.S.C. § 666 (a)(1)(B)) constitutional "as applied to the

²² See *Salinas v. United States*, 522 U.S. 52, 60-61 (1997); *United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (Salinas may be read as requiring a threat to a federal program's integrity); *United States v. Zwick*, 199 F.3d 672, 687 (3rd Cir. 1999) (666 requires the government to prove federal interest is implicated by defendant's offense conduct); *United States v. Phillips*, 219 F.3d 404, 412-414 (5th Cir. July 13, 2000) (666 does not reach misconduct of local officials whose actions do not threaten the integrity of federal funds or programs).

²³ *Salinas v. United States*, 522 U.S. 52, 60-61 (1997).

facts,”²⁴ but the Supreme Court has never addressed a case where a Defendant had absolutely no connection to Federal Program Funds. The government has now charged this Defendant in just that kind of a case. Importantly, the Supreme Court has *not* held that there is no constitutional requirement that the government present evidence of a federal interest in the alleged criminal acts of a Defendant charged under this statute. This Court is now faced with a set of facts which truly test the limits and outer-boundary of the application of the Federal Program Bribery statute and prosecutions thereunder.

By way of background, Federal Jurisdiction under 18 U.S.C. § 666, has been recognized to arise from the spending clause of the United States Constitution, and, in fact, Congress’ power under the spending clause is limited and “subject to several general restrictions.”²⁵ “The spending power requires, at least, that the exercise of federal power be related to the federal interest in particular national projects or programs.”²⁶ The government has failed to introduce any evidence, at the trial of this case, regarding a federal interest in the alleged extortionate conduct of the Defendant or relating to the Defendant’s former role as Arkansas’ State Treasurer. As a result, the Defendant suggests that a Judgment of Acquittal pursuant to Rule 29 is proper.

The Fifth Circuit has also recognized that the Supreme Court in *Salinas* “suggests there might be obstacles to applying § 666 to different facts,”²⁷ and the Court went on to discuss the fact that the text of § 666 may be properly applied to the misuse of possibly any funds administered by an agency that administers a federal program. However, this Court is faced with a situation where the statute is applied to a set of facts and evidence which demonstrate no

²⁴ *Salinas v. United States*, 522 U.S. 52, 60-61 (1997).

²⁵ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); see *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 and n. 13 (1981).

²⁶ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

²⁷ *United States v. Lipscomb*, 299 F.3d 303, 311-12 (5th Cir. 2002).

misuse of federal funds or any specific administration of federal funds by the Defendant or the State Treasury. This was made clear by the testimony of Richard Weiss.

This case is far different from the case of *United States v. Sabri*,²⁸ where the Supreme Court stated that the § 666 Federal Program Bribery statute had been, and could be, applied constitutionally. The *Sabri* Court took pains to highlight that their decision was limited because it was “obvious that the acts charged against Sabri himself were well within the limits of legitimate congressional concern.”²⁹ Unlike the present case, *Sabri* involved the bribery of a member of the Minneapolis Community Development Agency, an agency which directly received Federal Benefits. The evidence presented at the trial of *United States v. Martha Ann Shoffner*, was simply not sufficient for a juror to conclude that the Arkansas State Treasury directly receives Federal Benefits. As such the application of the Federal Programs bribery statute to the Defendant’s conduct was improper and in excess of Federal Power arising from the Spending Clause of the United States Constitution.

In *Sabri*, the Court found the application of § 666 a valid exercise of Congress’ authority under the Spending and the Necessary and Proper Clauses because these clauses authorize Congress to ensure that taxpayer dollars appropriated by Congress 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.”³⁰

This Court is now faced with a case where no evidence was presented to the jury which would suggest that the Defendant’s alleged extortionate conduct involved federal program funds or jeopardized federal taxpayer dollars. Yet, a jury convicted the Defendant of Bribery

²⁸ *United States v. Sabri*, 541 U.S. 600 (2004).

²⁹ *United States v. Sabri*, 541 U.S. 600, 609 (2004).

³⁰ *Sabri*, 541 U.S. at 605.

concerning Federal Program Funds. It is clear that the federal interest in protecting federal dollars involves insuring that those administering federal funds will be good stewards of those funds, but there is also no basis for a finding that the alleged wrongful conduct of the Defendant involved an official administering federal funds or any federal interest in protecting federal funds. Certainly there has not been presented sufficient evidence to show a constitutional application of the Federal Program Bribery Statute to the Defendant.

Returning to the Defendant's argument that the government failed to present sufficient evidence that the Arkansas State Treasury or the State of Arkansas received over \$10,000.00 in federal "benefits," which would thereby satisfy the plain text of the statute, the Defendant points to the case of *United States v. Fischer*,³¹ where the Supreme Court of the United States made clear that "not all federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b)."³² This case is applicable to the Defendant's Rule 29 Motion as the government, at trial, simply assumed that the flow of federal funds to the State of Arkansas would satisfy the "benefits" requirement found in the text of § 666(b). The Defendant suggests to the Court that this is not a correct application of law and the government failed in its burden to put on evidence that the State received federal funds which qualify as "benefits" under the statute.

The *Fischer* Court expressed concern that certain interpretations of § 666 could lead to unconstitutional results and explained "***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***

³¹ *U.S. v. Fischer*, 529 U.S. 667 (2000).

³² *U.S. v. Fishcer*, 529 U.S. 667 (2000).

*federal offense, upsetting the proper federal balance.*³³ The *Fischer* Court reasoned that to determine whether an organization receives benefits for the purposes of Federal Programs Bribery, an examination must be undertaken of the program's structure operation, and purpose, and that Courts "should examine the conditions under which the organization receives the federal payments,"³⁴ before applying the Federal Programs Bribery Statute to specific facts. The government failed to present such evidence at trial, rendering the the jury unable to determine whether "benefits" were received and leaving the jury without sufficient evidence to convict on Counts 8-14. The Court also did not take Judicial Notice of the fact that sufficient "benefits" were received by the State, and the Record is insufficient to sustain these convictions.

Fischer strongly favors the Defendant's case, as the only evidence presented by the government regarding the disbursement of federal funds to the Arkansas State Treasury and the State of Arkansas was the testimony of Joseph Buddenburg and Richard Weiss. Mr. Buddenburg did not provide any description of the alleged funds, nor did he testify that the State of Arkansas or the Arkansas State Treasury receives funds under any specific conditions or program. As a result, the government failed to offer satisfactory evidence that the Arkansas State Treasury received "benefits" as described in the Federal Program Bribery statute being applied to the Defendant, Martha Shoffner. Furthermore, Mr. Richard Weiss who was called to testify that the State of Arkansas receives over \$10,000.00 of federal funds in a given year also did not provide testimony as to whether the federal funds should be considered "benefits" which would result in coverage under the Federal Programs Bribery Statute.

³³ U.S. v. Fishcer, 529 U.S. 667 (2000).

³⁴ U.S. v. Fishcer, 529 U.S. 667, 681-682 (2000).

The government has failed to present sufficient evidence that the Arkansas State Treasury received federal “benefits” which would bring the Defendant’s conduct within the purview of the Federal Program Bribery Statute. In addition, the government has failed to provide evidence which would make its prosecution of the Defendant, under this statute, constitutional, as applied to the facts of this case. The Defendant respectfully requests a Judgment of Acquittal as to Counts 8-14 of the Second Superseding Indictment.

V. CONCLUSION

The Defendant asks that this Court enter a Judgment of Acquittal as to the Defendant’s conviction of Counts 1-14 of the Second Superseding Indictment in accordance with Rule 29 of the Federal Rules of Criminal Procedure. The evidence propounded by the government has failed to satisfy all of the elements of the crimes charged. No government witness established that interstate commerce was affected “by robbery or extortion,” as is required for Federal Jurisdiction under the Hobbs Act Counts (1-7) and not a single witness testified that there was a *quid pro quo* agreement that money was exchanged for specific official acts by the Defendant as is required for a conviction of Hobbs Act Extortion. Similarly, no government witness provided sufficient evidence to establish that the Arkansas State Treasury received “benefits,” as discussed in the relevant Federal Programs Bribery statute under which Counts 8-14 were charged and as described by the United States Supreme Court in *United States v. Fischer*,³⁵ This Court is left with insufficient evidence to sustain the Defendant’s conviction under Counts 8-14 of the Second Superseding Indictment. In addition, the application of the Federal Programs Bribery Counts 8-14 is unconstitutional *as applied* to this Defendant because there exists no nexus between a Federal Interest or Federal program funds and the conduct for which the Defendant, Martha Ann

³⁵ U.S. v. Fischer, 529 U.S. 667 (2000).

Shoffner, was convicted. For these reasons, the Defendant requests an Order of Acquittal regarding Counts 1-14 of the Second Superseding Indictment.

WHEREFORE, the Defendant, Martha Ann Shoffner, respectfully requests that the Court grant her Motion for Judgment of Acquittal on Counts 1-14 and provide any and all other relief to which the Defendant may be entitled.

Respectfully Submitted,

MARTHA ANN SHOFFNER

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I electronically filed the foregoing with the Clerk of the Court, via CM/ECF, which shall send electronic notification of such filing to the following:

Jana Harris
Jana.Harris@usdoj.gov

/s/ Grant Ballard