IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 02-10013
	)	
Plaintiff-Appellee,	)	D.C. NO. 00-00442 HG
	)	(District of Hawai'i)
	)	
vs.	)	
	)	
ANDREW K. MIRIKITANI,	)	
	)	
Defendant-Appellant.	)	
	)	

DEFENDANT-APPELLANT ANDREW K. MIRIKITANI'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable Helen Gillmor
United States District Judge

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Hawai'i (the "District Court") had jurisdiction of this matter under 18 U.S.C. § 3231. This Court has jurisdiction on appeal pursuant to 28 U.S.C. § 1291.

This matter is an appeal from a final judgment entered in the District Court on December 10, 2001 [Excerpts of Record (hereafter, "E.R."), 125-132] against the defendant-appellant Andrew K. Mirikitani ("Mr. Mirikitani") on all counts in a six-count Superseding Indictment [E.R., 12-22].

This appeal is timely: Mr. Mirikitani filed the Notice of Appeal on December 14, 2001, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. [E.R., 133-134].

STATEMENT OF ISSUES PRESENTED

I. Whether the District Court's interpretation of 18 U.S.C. § 666, the federal bribery statute, violated Mr. Mirikitani's fifth and sixth amendment due process rights for concluding that the nexus element of the offense -- between the alleged criminal activity and the federal interest -- was "a jurisdictional element for the court to decide" rather a factual element of the offense to be proven beyond a reasonable doubt by the Government?

II. Whether 18 U.S.C. § 666 is unconstitutional on its face for exceeding the scope of Congress' power under the Spending Clause of article I the U.S. Constitution?

STATEMENT OF THE CASE

On February 14, 2001, the plaintiff-appellee, the United States of America (the "Government") filed a Superseding Indictment against Mr. Mirikitani:

- Count 1, wire fraud, in violation of 18 U.S.C. § 1343;
- Counts 2 and 3, theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666(a)(1)(A) and § 666(a)(1)(B), respectively;
- Count 4, extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951; and
- Counts 5 and 6, witness tampering, in violation of 18 U.S.C. § 1512. [E.R., 12-22].

The Superseding Indictment following the original Indictment, filed on November 8, 2000. [E.R., 1-11].

After a 10-day trial, on July 3, 2001, a jury convicted Mr. Mirikitani on all six counts of the Superseding Indictment. [E.R., 117-118]. On December 6, 2001, the District Court sentenced Mr. Mirikitani to, among other penalties, 51 months'

imprisonment as to each count of the Superseding Indictment, all terms to run concurrently. [E.R., 125-132]. On December 14, 2001, Mr. Mirikitani filed a Notice Appeal against the judgment and sentence. [E.R., 133-134].

In this Opening Brief, Mr. Mirikitani challenges his convictions under Counts 2 and 3 of the Superseding Indictment, which counts are based upon 18 U.S.C. § 666. Mr. Mirikitani argues in this Opening Brief that:

> (1) in violation of his fifth and sixth amendment due process rights, the District Court erred in concluding that the nexus element of offenses under 18 U.S.C. § 666 - between the alleged criminal activity and the federal interest - was "a jurisdictional element for the court to decide" [E.R., 80], rather than a factual element of the offense to be submitted to a jury and proven by the Government beyond a reasonable doubt;
>
> (2) in the alternative, 18 U.S.C. § 666 is facially unconstitutional for exceeding the scope of Congress's authority to enact laws under the Spending Clause of article I of the U.S. Constitution.

For these reasons, Mr. Mirikitani respectfully requests that this Court vacate his convictions on Counts 2 and 3, and remand this matter to the District Court with an order to dismiss the same.

BAIL STATUS

Mr. Mirikitani is currently serving the custodial part of his sentence at the Nellis Federal Prison Camp, located in North Las Vegas, Nevada. His projected

date of release is September 28, 2005.

STATEMENT OF THE FACTS

A. Background.

The following Background facts are taken from the "STIPULATION RE: ISSUE OF FEDERAL FUNDING", signed by the parties and filed in District Court on May 15, 2001 (hereafter, "Stipulations"). [E.R., 82-101].

The City and County of Honolulu (the "City" or the "City and County") operates on a fiscal year beginning July 1 and ending June 30. [E.R., 83]. The City's General Fund ("General Fund") is its general operating fund. [E.R., 86]. Most of the City's tax revenues go to the General Fund. [E.R. 86]. The City's employees' salaries are paid out of the General Fund. [E.R. 86]. Other examples of City funds are the Highway Fund, which derives its revenues primarily from fuel taxes, and the Sewer Fund, which derives its revenues from sewer taxes. [E.R. 86]. During the fiscal year 1999, the time material to the Superseding Indictment, the City received into its General Fund $898,224.34 in federal funds. [E.R. 86].

The City is, and was at the time material to the Superseding Indictment, governed by a nine-member body known as the City Council. [E.R., 83]. City

Council members are elected to four-year terms from each City district, and constitute the City's legislative body. [E.R., 83]. Among other duties, the City Council reviews and approves the annual budget of the City, submitted to the Council by the mayor. [E.R., 83]. The City Council also provides the authority for the City to participate in programs funded by various federal grants. [E.R., 83].

In 1990, voters in the City's 5th District elected Mr. Mirikitani to the City Council, where he served continuously until December 2001. [E.R., 83]. Each Council member was allocated money from the General Fund to pay his/her staff. In 1999 Mr. Mirikitani's annual staff salary budget was $165,000.00. [E.R., 86]. He was authorized to spend any or all of this amount on staff compensation, which could be paid in the form of regular salaries or bonuses. [E.R., 86]. Mr. Mirikitani's longstanding practice was to pay substantial performance-based bonuses to his staff members annually, typically near the end of the fiscal year, since any funds in his personnel budget not expended would revert back to the City's General Fund. [E.R., 86].

B. Superseding Indictment and the Motion to Dismiss Counts 2 and 3.

On November 8, 2000, the Government filed a six-count Indictment against Mr. Mirikitani [E.R., 1-11], which Indictment was superseded on February 14,

2001 when the Government filed a six-count Superseding Indictment against Mr. Mirikitani and co-defendant Sharron Bynum. [E.R., 22]. The Superseding Indictment alleged, in relevant part:

- that in 1999 Mr. Mirikitani authorized the payment of bonuses to two staff members in amounts of approximately $16,900 and $9,600, from which bonuses he demanded a kickback [E.R., 16, 18];

- that staff member Cindy McMillan made payments of $4,250 to Mr. Mirikitani's campaign fund, a portion of which Mr. Mirikitani later converted for his own use [E.R., 17];

- that staff member Jonn Serikawa made cash payments directly to Mr. Mirikitani, and to a third party on Mr. Mirikitani's behalf, totaling $2,634. [E.R., 18].

The Superseding Indictment charged Mr. Mirikitani -- in addition to Count 1, Fraud by Wire (18 U.S.C. § 1343), Count 4, Interference with Commerce by Extortion (18 U.S.C. § 1951), and Counts 5 and 6, Tampering with a Witness (18 U.S.C. § 1512) -- with two separate offenses under 18 U.S.C. § 666:

> COUNT 2
> * * *
> 1. At all times material to this Indictment:
>
> a. The City and County of Honolulu was a local that received federal assistance in excess of $10,000 during the one-year period beginning July 1, 1998.
>
> b. Defendant ANDREW K. MIRIKITANI (hereinafter "MIRIKITANI") was an agent of the City and County of Honolulu as a member of the City and County of Honolulu City Council.

2. From on or about July 15, 1999, up until a date in September, 1999, in the District of Hawaii, defendant MIRIKITANI, and defendant SHARRON BYNUM as an aider and abettor, did intentionally misapply and knowingly obtain by fraud, and otherwise without authority convert to the use of the Friends of Andy Mirikitani and to MIRIKITANI's use, where neither Mirikitani nor the Friends of Andy Mirikitani was the rightful owner, property of the City and County of Honolulu of a value of $5,000 or more, that is, MIRIKITANI caused the City and County of Honolulu to pay bonuses to two employees of MIRIKITANI, so that the employees in turn would give to MIRIKITANI, for his own benefit and the benefit of the Friends of Andy Mirikitani, approximately $6,884 of the bonus money that the employees received from the City and County of Honolulu.

All in violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2. [E.R., 19-20].

COUNT 3

* * *

2. From on or about late May, 1999 until a date in September, 1999, defendant ANDREW K. MIRIKITANI, and defendant SHARRON BYNUM as an aider and abettor, did knowingly and corruptly solicit, demand, accept, and agree to accept something of value from two employees of MIRIKITANI, intending to be influenced or rewarded in connection with a transaction or series of transactions of the City and County of Honolulu involving something of value of over $5,000.

All in violation of Title 18, United States Code, Sections 666(a) (1) (B) and 2. [E.R., 20].

As seen in Counts 2 and 3, the Government simultaneously charged co-defendant Sharron Bynum as aider and abettor for the alleged offenses under 18 U.S.C. § 666. As well, the Government charged Ms. Bynum as aider and abettor under Count 4, Interference with Commerce by Extortion. [E.R., 20-21].

Throughout the trial proceedings, and these appellate proceedings, Ms. Bynum, was and is represented by separate counsel.

On February 20, 2001, Mr. Mirikitani pled not guilty to all charges in the Superseding Indictment. [U.S. District Court Docket (hereafter, "Docket"), No. 23]. On April 10, 2001, Mr. Mirikitani filed a motion to dismiss Counts 2 and 3 on the ground that the Superseding Indictment was constitutionally defective: Counts 2 and 3 alleging offenses in violation of 18 U.S.C. § 666 failed to include an allegation of a nexus between the alleged misconduct and federal funds. [Docket No. 27]. The Government opposed the motion. [Docket No. 31].

After a hearing on the motion on May 3, 2001 [E.R., 23-78], the District Court issued a Minute Order, finding, in the first instance, that a nexus between the alleged misconduct and the federal funds is required for prosecution under 18 U.S.C. § 666. [E.R., 79-80]. The District Court relied on, and quoted from, Salinas v. United States, wherein the U.S. Supreme Court left open the issue of the extent to which 18 U.S.C.§ 666, "requires some other kind of connection between the bribe and the expenditure of federal funds." Salinas v. United States, 522 U.S. 52, 59 (1997). [See, E.R., 79]. The District Court found, "that a nexus between the alleged misconduct and federal funds must exist for a prosecution under 18 U.S.C. § 666 to be consitutional." [E.R., 79-80].

Second, the District Court found that, "[t]he nexus requirement is not an element of the charged offenses under 18 U.S.C. § 666, but rather, a jurisdictional requirement for the Court to decide. United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998)." [E.R., 80]. As a "jurisdictional requirement for the Court to decide", the District Court concluded that the Superseding Indictment was not defective for failing to include an allegation of nexus as an element of the offense. [E.R., 80]. The Court ordered the parties to file stipulations setting forth the relevant nexus facts. [E.R., 80].

On May 15, 2001, the parties filed the Stipulations which set forth in relevant part:

> "1. . . . Defendant Mirikitani has been a member of the City Council since first elected in 1990.
>
> 2. As part of its duties, the City Council reviews and approves the annual budget of the City which is submitted to the City Council by the Mayor of Honolulu (Mayor). ... In addition, as part of its duties the City Council provides the authority for the City to participate in various federal grants. The receipt of these federal grants is considered a revenue item in the City's annual budget." [E.R., 83].
>
> * * *
>
> "8. During fiscal year 1999, the City's general fund received $898,224.34 in federal funds." [E.R., 86].

The parties attached as exhibits to the Stipulations hundreds of pages of documents relating to the City's budgets for fiscal 1999, to the City's receipt and spending of federal funds, and to the regulations applicable to spending the federal

funds - among other documents. [*See*, Docket No. 35].

On June 7, 2001, the parties filed, TRIAL STIPULATION RE FEDERAL FUNDS, which stated, in relevant part:

> "The parties stipulate that in fact the City and County of Honolulu received federal assistance in excess of $10,000 in the one-year period beginning July 1, 1998, and that the this [sic] element of Counts 2 and 3 of the Indictment are to be considered by you as proven beyond a reasonable doubt." [E.R., 111-112].

On June 8, 2001, the District Court issued a second Minute Order addressing whether the required nexus had been shown. [E.R. 113]. The Minute Order stated, in relevant part:

> "In the instant case, the City received approximately $898,224.34 of federal funds into its general fund in 1999. As a city council member, Defendant Mirikitani had power to influence the application for, expenditure, and allocation of federal funds. Whether or not Defendant Mirikitani cast the deciding vote relating to federal funds, his ability to vote on the spending of federal funds relating to federal programs remained constant.
>
> As recognized in Simas, Reyes, and Zwick, the federal government has an interest in assuring that high-ranking local officials who have the power to direct federal funds are acting honestly and responsibly. A requirement that local officials with power to affect significant amounts of federal funds refrain from accepting bribes or stealing funds is a reasonable method of ensuring the integrity of the entity that administers the federal funds.
>
> The Court finds, based on the facts contained in the Stipulation Re: Issue of Federal Funding, that Defendant Mirikitani's position as a city council member provides a sufficient nexus between the alleged misconduct and a federal interest. Defendant's Motion to Dismiss Counts 2 and 3 of the Indictment is hereby DENIED." [E.R., 115-116].

C. Trial and Post-Trial Proceedings.

A 10-day jury trial commenced on June 5 2001, and ended on June 28, 2001. [Docket Nos. 80, 82, 94, 96, 105, 108, 112, 114, 127, 128]. On July 3, 2001, the jury returned a verdict against Mr. Mirikitani, finding him guilty on all counts of the Superseding Indictment, including Counts 2 and 3 which alleged offenses under 18 U.S.C. § 666. [E.R., 117-118]. The jury acquitted co-defendant Bynum on Count 3, but convicted her under Counts 2 and 4. [Docket No. 137].

Among other post-trial motions, on July 13, 2001 Mr. Mirikitani filed a motion for judgment of acquittal on Counts 2 and 3. [Docket No. 139]. On July 30, 2001, Ms. Bynum attempted to join Mr. Mirikitani in the motion for judgment of acquittal on Counts 2 and 3. [Docket No. 146].

In the motion for judgment of acquittal, which the Government opposed [Docket No. 142], Mr. Mirikitani argued that:

- "the absence of any impact on federal funding, and the lack of any threat to the integrity of any federal program from the alleged offense conduct here makes it impermissible to apply § 666 to Defendant Mirikitani here; were the Court to do so, it would be exceeding the jurisdiction conferred under the Commerce Clause[]" [Docket No. 139, emphasis in original];

- assuming there was a factual issue regarding nexus, the District Court erred when it took that issue away from the jury [Docket No. 139];

- Sufficiency of the evidence: "Absent evidence of federal nexus, there was necessarily insufficient evidence to sustain a conviction on Counts 2 and 3, and this Court should grant Defendant's motion for judgment of acquittal on those counts." [Docket No. 139].

On October 31, 2001, the District Court denied the motion for a judgment of acquittal on the motion's merits. [E.R., 119-124]. As well, the District Court denied as untimely co-defendant Bynum's motion to join Mr. Mirikitani in his motion for a judgment of acquittal. [E.R., 124].

On December 6, 2001, the District Court denied the parties' sentencing motions, as well as Mr. Mirikitani's motion for release pending appeal. [Docket No. 171]. On the same date, the District Court imposed punishment against Mr. Mirikitani, which punishment included 51 months' imprisonment as to each count of the Superseding Indictment, all terms to run concurrently, and three years supervised release as to each count, to run concurrently. [E.R., 127]. The judgment was entered on December 10, 2001. [E.R., 125].

On December 14, 2001, Mr. Mirikitani filed a notice of appeal. [E.R., 133-134]. After withdrawal of Mr. Mirikitani's trial counsel [Docket, Court of Appeals, Ninth Circuit (hereafter, "9th Circuit Docket"), 3/18/02], and appointment of the undersigned counsel on appeal [9th Circuit Docket, 3/22/02], this Court order Mr. Mirikitani's Opening Brief and Excerpts of Record filed on or before

August 8, 2002. [9th Circuit Docket, 4/4/02].

On June 3, 2002, the Government filed a motion to consolidate both Mr. Mirikitani and Ms. Bynum's appeals, which motion this Court denied. [9th Circuit Docket, 6/11/02]. On or about May 30, 2002, Ms. Bynum filed with this Court her Opening Brief and Excerpts of Record (hereafter, "Bynum OB"). Similar to the arguments made in this Opening Brief, Ms. Bynum argues in her Opening Brief (among other arguments) that 18 U.S.C. § 666 is unconstitutional 'on its face,' and, in the alternative, that, "it was unconstitutional for the district court to decide the issue of federal jurisdiction as to 18 U.S.C. § 666." [Bynum OB, pp. 18-19].

On August 5, 2002, the undersigned counsel for Mr. Mirikitani filed a motion to withdraw as counsel, appoint substitute counsel and vacate the scheduling order. [9th Circuit Docket, 8/5/02]. On August 16, 2002, this Court denied the motion, but set new due dates for the briefs. [9th Circuit Docket, 8/16/02]. Mr. Mirikitani's Opening Brief and Excerpts of Record are now due on or before September 3, 2002. [Id.]. The Government's Answering Brief is due on or before October 3, 2002, with Mr. Mirikitani's Reply Brief, if any, due 14 days after service of the Government's Answering Brief. [Id.].

SUMMARY OF THE ARGUMENT

Under the fifth and sixth amendments of the U.S. Constitution the Government must prove every element of an offense charged to the satisfaction of the jury, beyond a reasonable doubt. The nexus requirement is an element of the offense charged under 18 U.S.C. § 666, the federal statute prohibiting acts of bribery, theft, and fraud against state and local governments (and certain other organizations) receiving funds under federal assistance programs.

In violation of Mr. Mirikitani's fifth and sixth amendment due process rights, the District Court erred as a matter of law in concluding that the nexus requirement under 18 U.S.C. § 666 was jurisdictional and in the court's province to decide, rather than an element of the offense to be proven to the satisfaction of the jury beyond a reasonable doubt.

Under de novo review, the Government cannot overcome the burden of demonstrating that the error was not harmless beyond a reasonable doubt. The record is void of evidence demonstrating that there was a connection between the federal funds received by the City and County during fiscal 1999 and the City's personnel budget from which the alleged bribes and kickbacks originated. For these reasons, the District Court erred in denying the motion to dismiss Counts 2 and 3 of the indictment, and, as well, the motion for a judgment of acquittal.

Should this Court reverse the convictions on Counts 2 and 3, as Mr. Mirikitani urges it to do in the argument below, the rule against double jeopardy precludes the Government from retrying Mr. Mirikitani on these counts.

In the alternative, and assuming for the sake of argument that this Court finds unpersuasive the first issue presented, Mr. Mirikitani argues that 18 U.S.C. § 666 is facially unconstitutional. The statute lies outside the scope of Congress' power under the Spending Clause of article I of the Constitution, and, moreover, does not require a nexus between the alleged criminal activity and a federal interest.

THE ARGUMENT

I. In Violation of Due Process, the District Court Erred in Finding That the Nexus Requirement under 18 U.S.C. § 666 Was a Jurisdictional Element for the Court to Decide, Rather than a Factual Element of the Offense Which Should Have Been Submitted to the Jury and Proven Beyond a Reasonable Doubt by the Government.

A. Standard of Review & Issue Preservation.

The District Court's interpretation of a statute is reviewed de novo. United States v. Frega, 179 F.3d 793, 802 n.6 (9th Cir. 1999). Since this issue concerns Mr. Mirikitani's challenge to the District Court's interpretation of 18 U.S.C. § 666, the standard of review governing this issue is de novo. Assuming error, the

burden shifts to the Government to prove that the error was harmless beyond a reasonable doubt. O'Neal v. McAninch, 513 U.S. 432, 444-45 (1995).

This issue was raised below in Mr. Mirikitani's motion to dismiss Counts 2 and 3, and motion for a judgment of acquittal. [Docket Nos. 27, 139]. The Government responded to these motions. [Docket Nos., 31, 142]. The District Court ruled upon them. [Docket Nos. 33, 91, 154].

B. Discussion

The fifth amendment guarantees that no one will be deprived of liberty without "due process of law". The sixth amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Together these provisions, "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 509-10 (1995). "The jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." Gaudin, 515 U.S. at 514. But if the trial judge, rather than the jury, makes a finding as to one of the elements of the charged crime, then the defendant's constitutional rights have been violated. Gaudin, 515 U.S. at 510.

The determination of what elements constitute a crime is often subject to dispute. *See, e.g.*, National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (holding that, "RICO contains no economic motive requirement'); United States v. Culbert, 435 U.S. 371, 380 (1978) (declining to limit the Hobbs Act's scope to an undefined category of conduct termed "racketeering"). "[I]n determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive." McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). The Supreme Court has noted that, "'[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" Staples v. United States, 511 U.S. 600, (1994) (*quoting* Liparota v. United States, 471 U.S. 419, 424 (1985)); *see also* McMillan, 477 U.S. at 85. Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. *See,* Patterson v. New York, 432 U. S. 197, 210 (1977).

1. Nexus is an Element of the Offense under Section 666.

The Government charged Mr. Mirikitani with two counts of corruption under 18 U.S.C. § 666(a)(1)(A) and § 666(a)(1)(B). The statute states in relevant part:

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

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof -

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that -

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(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;

shall be fined under this title, imprisoned not more than 10 years, or both.

(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."

In 1991 this Court determined that the bribery provision of § 666 required only two elements:

"First, the defendant must be an 'agent' of a 'government agency' that

> receives in excess of $10,000 from the federal government within a one-year period. 18 U.S.C.§ 666(b). Second, the defendant must accept a bribe relating to 'any... transaction... involving $5,000 or more.' § 666(a)(1)(B)."

United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991). The statute neither required a tracing of federal funds to the project affected by the bribe, nor a showing that the defendant had the authority to administer federal funds. Id.

In 1997 the Supreme Court reviewed § 666 in a case arising out of the Fifth Circuit. Salinas, 522 U.S. 52. In Salinas, a deputy sheriff accepted bribes from a federal prisoner housed at a Texas county jail pursuant to an arrangement negotiated between the U.S. Marshals' Service and the Texas county. In exchange for bribes, the deputy sheriff permitted the federal prisoner "contact visits" with his wife and with a girlfriend. Salinas argued that under the bribery provision set forth in § 666(a)(1)(B) the government had to prove that, "the bribe in some way affected federal funds, for instance by diverting or misappropriating them." Salinas, 522 U.S. at 55-56.

The Supreme Court's analysis focused on the clause, "[a]ny business, transaction, or series of transactions," found both in § 666(a)(1)(B) and in § 666(a)(2). Reasoning that the word "any" means "any," without qualification, and that, "[t]he statute applies to all cases in which an 'organization, government, or

agency' receives [$10,000 or more] of benefits under a federal program," the Court rejected Salinas' proposed statutory construction. Id. at 57. The statute's prohibition against accepting a bribe with the intent of being influenced or rewarded in connection with any business, transaction, or series of transactions, "is not confined to a business or transaction that affects federal funds." Id. Indeed, the Court observed that § 666(a)(1)(B)'s language was "expansive" and "unqualified ... both as to the bribes forbidden and the entities covered." Id. at 56.

The Court also rejected Salinas' contention that the Court could not construe § 666(a)(1)(B) to apply to bribes having no affect on federal funds without, "a plain statement of congressional intent," as required by Gregory v. Ashcroft, 501 U.S. 452 (1991), and McNally v. United States, 483 U.S. 350 (1987). The Court distinguished Gregory (29 U.S.C. §§ 621-634, the Age Discrimination and Employment Act) and McNally (18 U.S.C. § 1341, Mail Fraud statute) on the grounds that, "[i]n each of those cases, we confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state power." Salinas, 522 U.S. at 59. "The text of § 666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction." Id. at 60.

Accordingly, the Supreme Court held that, "as a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds." Id. at 61. However, in finding that the statute was constitutional as applied to the facts of that case, the Court observed that, "whatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds." Id. at 60. The Court further stated that:

> "We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves. And that relationship is close enough to satisfy whatever connection the statute might require."

Id. at 59.

Since Salinas, courts interpreting § 666 have consistently recognized that while the Supreme Court in Salinas held that § 666(a)(1)(B) did not, "require the Government to prove that the bribe in question had any particular influence on federal funds," it expressly left open the question of, "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Salinas, 522 at 59; *see* United States v. Santopietro, 166 F.3d 88, 93 (2nd Cir. 1999); United States v. Zwick, 199 F.3d 672, 681 (3d Cir. 1999). The U.S. Court of Appeals for the Second, Third, Fifth and Sixth Circuits have all issued

post-Salinas opinions recognizing that a constitutional application of the statute requires the showing of a nexus between the criminal activity and the federal interest. Santopietro, 166 F.3d at 93; Zwick, 199 F.3d at 681; United States v. Phillips, 219 F.3d 404, 413-14 (5th Cir. 2000); United States v. Suarez, 263 F.3d 468, 485 (6th Cir. 2001).

Moreover, the Supreme Court recently confirmed the need for a nexus requirement. Fischer v. United States, 529 U.S. 667, 677 (2000). In Fischer, the defendant had defrauded the West Virginia Health Authority, a participant in the Medicare program. The Supreme Court upheld his conviction under § 666(a)(1)(A), but, "without endorsing the Government's broader position", that the receipt of federal funds alone was enough to satisfy the definition of "benefits." Id., at 677. The, "[g]overnment has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetrated upon Medicare providers." Id. at 681. However, the Court stated that, "[o]ur discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b)." Id. This, "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance". Id.

The Supreme Court endorsed a fact-based inquiry into the, "program's

structure, operation, and purpose" to determine whether the criminal conduct posed a threat to the integrity of the federal program. Id. at 681-82. If the misconduct poses a threat (as it did with defendant Fischer's misconduct), then the statute may be applied constitutionally, regardless of whether the federal funds are affected directly.

The question in Fischer turned on whether to characterize certain forms of federal aid as "benefits". However, the Fischer majority's language regarding the need to respect the proper balance between state and federal sovereigns makes clear the Supreme Court's constitutional concerns over a broad reading of § 666. Justice Thomas (who argued with Justice Scalia for an even narrower definition of "benefits") pointed out that jurisdictional restrictions are required to, "ensure that in each case the exercise of federal power is related to the federal interest in a federal program, [otherwise] § 666 would criminalize routine acts of fraud or bribery". Id. at 689 n.3 (Thomas, J., dissenting). Justice Thomas believed that the majority would find such a result unconstitutional. Id.

Under Salinas and Fischer, then, and the recent opinions out of the Second, Third, Fifth and Sixth Circuits, in order to constitutionally apply § 666 a connection between the misconduct and the federal interest in the programs supported by the funds must be made. Moreover, as directed by the Supreme

Court in Fischer, courts should engage in a fact-based inquiry into the, "program's structure, operation, and purpose" to determine whether the criminal conduct posed a threat to the integrity of the federal program. Fischer, 529 U.S. at 681-82.

The District Court responded to Mr. Mirikitani's motion to dismiss Counts 2 and 3 of the Superseding Indictment with a two-part ruling rendered in the Minute Orders of May 3, 2001 [E.R., 79-81], and June 8, 2001. [E.R., 113-116]. In the May 3, 2001 Minute Order, District Court decided that:

> "A nexus between the alleged misconduct and federal funds must exist for a prosecution under 18 U.S.C. 666 to be constitutional. * * * The nexus requirement is not an element of the charged offense under 18 U.S.C. § 666, but rather, a jurisdictional requirement for the Court to decide. United States v. Klimavicius-Viloria, . . . [Citation omitted.] Because the nexus requirement is not an element of the charges, the Superseding Indictment is not defective for not including an allegation of nexus." [E.R., 79-80].

This ruling flies in the face of the Supreme Court's fact-based inquiry endorsed in Fischer. Fischer, 529 U.S. at 681-82. The Supreme Court's endorsement of a fact-based inquiry supports the conclusion that the nexus requirement is an element of the offense to be proven by the Government beyond a reasonable doubt, and not a "jurisdiction requirement" to be decided by the court.

Further, the District Court's ruling is not supported by the law. Its reliance on the case United States v. Klimavicius-Viloria is unavailing. In that case, the

Ninth Circuit determined that the Maritime Drug Enforcement Act ("MDLEA") contained no element of 'nexus' between the criminal conduct and the United States:

> "The MDLEA contains no nexus requirement. The nexus requirement is a judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial. . . . The nexus requirement serves the same purpose as the "minimum contacts" test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who "should reasonably anticipate being haled into court" in this country. [Citation omitted.] Just as the question of personal jurisdiction should be decided by the court prior to trial, so should the question of nexus, even though it is part of the jurisdictional requirement." Klimavicius, 144 F.3d at 1257.

The District Court attempted to find authority for its ruling -- that § 666's nexus requirement must be decided by the court and not the jury -- based on the Ninth Circuit's use of the term "nexus" in Klimavicius, without considering the context in which the term was being used. The District Court must be corrected. To begin with, the Ninth Circuit found in Klimavicius that with respect to the MDLEA the nexus requirement was a "judicial gloss" relating to personal jurisdiction concerns. Id. A court's personal jurisdiction over a defendant speaks to traditional notions of fair play and substantial justice. Personal jurisdiction, along with subject matter jurisdiction is always determined by the court.

In contrast, § 666's nexus requirement concerns maintaining the proper

balance between state and federal powers. To ensure the proper balance the Supreme Court in Fischer endorsed a fact-based inquiry into the program's structure, operation, and purpose to determine whether the criminal conduct posed a threat to the integrity of the federal program. Fischer, 529 U.S. at 681-82. Thus, the District Court's reliance on Klimavicius is misguided and otherwise unavailing. Following the Supreme Court's decision in Fischer, the nexus requirement under § 666 must be deemed a factual element of the offense.

Moreover, assuming for the sake of argument that the nexus requirement is jurisdictional and to be decided by the court, Mr. Mirikitani notes that Gaudin's mandate applies even to 'jurisdictional' elements. United States v. Pappadopoulos, 64 F.3d 522, 524 (9th Cir. 1995) (under the federal arson statute, the "jurisdictional element" - that the property was used in or used in any activity affecting interstate or foreign commerce - must be proved to the jury beyond a reasonable doubt.); United States v. Ripinsky, 109 F.3d 1436, 1443-44 (9th Cir. 1997)(under the federal money laundering statute the jurisdictional requirement - that the monetary transaction be, "in or affecting interstate commerce" - was an essential element of the offense to be determined by the jury beyond a reasonable doubt.)

Since the nexus requirement is an element of the offence, the District

Court's ruling on the motion to dismiss Counts 2 and 3, and its ruling on Mr. Mirikitani's motion for a judgment of acquittal runs afoul of both the fifth and sixth amendments, and fundamental due process articulated by the Supreme Court in Gaudin. Criminal convictions must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. Gaudin, 515 U.S. at 509-10. Where the trial judge, rather than the jury, makes the finding as to one of the elements of the charged crime, the defendant's constitutional rights have been violated. Gaudin, 515 U.S. at 510.

2. Harmless error analysis.

Harmless error analysis is required even when an element of an offense has been entirely removed from the jury's consideration. Neder v. United States, 527 U.S. 1 (1999). The burden of demonstrating that the error was harmless belongs to the Government. O'Neal, 513 U.S. at 444-45. The Government will not be able to shoulder this burden.

After ruling that a nexus was required under § 666 prosecution, but that the nexus was a jurisdictional element for the court to decide, in a separate ruling entered on June 8, 2001 the District Court denied Mr. Mirikitani's motion to dismiss Counts 2 and 3:

> "In the instant case, the City received approximately $898,224.34 of federal funds into its general fund in 1999. As a city council member, Defendant Mirikitani had power to influence the application for, expenditure, and allocation of federal funds. Whether or not Defendant Mirikitani cast the deciding vote relating to federal funds, his ability to vote on the spending of federal funds relating to federal programs remained constant." [E.R., 115].
>
> "The Court finds, based on the facts contained in the Stipulation Re: Issue of Federal Funding, that Defendant Mirikitani's position as a city council member provides a sufficient nexus between the alleged misconduct and a federal interest." [E.R., 116].

Analysis of the Stipulations, however, show no evidence of the required nexus between the alleged misconduct and how it threatened the integrity of the City's federally funded programs. Moreover, the record and the law do not support the District Court's determination that Mr. Mirikitani's position as a council member necessarily demonstrated nexus.

The Fischer fact-based inquiry -- into a federal program's structure, operation, and purpose to determine whether the misconduct posed a threat to the integrity of the federal program -- governs this analysis. The focus is on the time material to the Superseding Indictment, the city's fiscal year 1999, and the Stipulations upon which the District Court relied in denying the motion to dismiss. [E.R., 57, 82-101].

Analysis begins by reviewing the relationship between the City's General

Fund and Mr. Mirikitani's staff salary budget, from which the Government alleged he misapplied more than $5,000 in fiscal 1999. The Stipulations told the District Court that the City's General Fund was its "operating fund" [E.R., 86], and that City employees' salaries were paid out of the General Fund, including the salaries and bonuses for Mr. Mirikitani's staff. [E.R., 86]. Like the other City Council members, in fiscal 1999 Mr. Mirikitani's staff salary budget was $165,000.00. [E.R., 86]. He was authorized to use any or all this amount on staff compensation in the form of regular periodic salaries or bonuses. [E.R., 86]. His longstanding practice was to pay substantial performance-based bonuses to staff members annually, typically near the end of the fiscal or budget year; any funds remaining in his personnel budget would have reverted to the General Fund. [E.R., 86]. The Government accused Mr. Mirikitani of misapplying more than $5,000.00 from his fiscal 1999 staff salary budget - which money was derived from the General Fund. [E.R., 1-11; 12-22].

a. Federal Monies received into the General Fund in 1999.

In denying the motion to dismiss, the District Court focused on the amount of federal funds the City received into its General Fund in fiscal 1999, $898,224.34. [E.R., 44, 86, 115]. This amount included four wire transfers from the United States Department of Justice ("DOJ"), totaling $796,813.00. [E.R.,

886-87]. The DOJ funds were designated for the COPS program, a federal program to assist local police forces in hiring more police and paying their salaries. [E.R., 87-88]. As such, the COPS funds were exempt from coverage under 18 U.S.C. § 666(c): "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c).

It bears noting, nonetheless, that the City was not required to segregate the COPS funds into a separate account from its own funds. [E.R., 87]. But, like other federal funds, it was required by law to account for the COPS funds to ensure that their use was in compliance with the restrictions and prohibitions of the applicable statutes and grants. Further, the City had to maintain records which adequately identified the source and application of the funds and any income derived from the funds, and to submit annual financial and compliance audit reports. [E.R., 87].

The other federal money identified in the Stipulations that the City received into its General Fund in fiscal 1999 came from the Byrne Grant Program (the "Byrne Program"). The Byrne Program provided the City with $46,241.00, which funds concerned an intergovernmental agreement to, "develop the NCIC 2000 computer interface" and to improve the Honolulu Police Department's DNA data

base. [E.R., 89]. The City received this money on condition that it be used for specific law enforcement purposes. [E.R., 89].

As to the nexus requirement under § 666, the record shows no connection between the Byrne Program, a law enforcement endeavor and Mr. Mirikitani's alleged misapplication of monies from his staff salary budget, as required by the Supreme Court in Fischer. Fischer, 529 U.S. at 681-82. There is no evidence that the alleged misconduct – a bonus-kickback scheme – impacted or threatened the integrity of the Byrne Program. As well, the Stipulations do not show how Mr. Mirikitani could have influenced the use of this predesignated money.

The parties did not identify the remaining balance of $55,170.34 in federal funds the City received into its General Fund in fiscal 1999. [E.R., 82-89]. Under the Fischer inquiry, failure to identify the federally funded program is tantamount to failure to identify the federal interest threatened by the alleged misconduct, and, therefore, failure to identify the required nexus.

b. Other Federal Monies in the City's Budget.

The Stipulations also described the City's fiscal 1999 budget and budgeted federal funds, in addition to those funds received into the 1999 General Fund and discussed above, i.e., the $898,224.34. The City's budget consisted of two

budgets, one for the capital budget and one for the operating budget. As to the operating budget, the record shows a total budget of $1,050,217,700.00, with federal funds of $61,334,805.00 budgeted. [E.R., 94]. As to the capital budget of $352,887,000.00, the City budgeted federal funds in the amount of $79,095,000.00. [E.R., 90].

Some of the federal funds were multipurpose funds, "which are allocated by formula entitlements and may be expended for multiple purposes. Such monies include Community Development Block Grant monies [hereafter, the "CDBG"] under HUD [U.S. Department of Housing and Urban Development, hereafter, "HUD"], Federal Transit Administration monies, HOME Investment Partnerships Program monies". [E.R., 90]. The City Council had the authority to reapportion the multipurpose funds, but, for example with the CDBG and HUD funds, only among the projects that fell within HUD guidelines. [E.R., 91-92].

As to HUD money, the Stipulations showed that in fiscal 1999 the City received a total of $9,632,205.00. [E.R., 96]. As to money from the Federal Transportation Administration (hereafter, "FTA"), the Stipulations showed that during fiscal 1999 the federal government paid to the City various funds, including several amounts which totaled $7,920,267.00. [E.R., 87-88].

As to both the HUD and FTA funds, "[t]he City is not required to segregate federal funds it receives from HUD [and from the FTA] in an account separate from its own funds, and the deposit of these funds in the General Fund was proper. The City is, however, required by law to account for these funds ..." [E.R., 96, 98]. And, otherwise, the City was required to ensure that the funds were only used for the designated program. [E.R., 96, 98].

In compliance with the requirement that the City account for its administration of federal funds, an annual audit of all federally-funded programs which the City operated was required. [E.R., 98]. The Stipulations note an audit for fiscal 1999 showing federal expenditures of $113,506,276.00. [E.R., 94]. The Stipulations also note that the audit for fiscal 1999 found that the City complied in all material respects with the stated requirements applicable to each of the City's major programs that received federal funds. [E.R., 99].

The Stipulations -- and all the hundreds of pages of exhibits attached thereto and submitted to the District Court [See, Docket No. 35] detailing the City's receipt and/or expenditure of federal funds in fiscal 1999 -- do not show a relationship between the alleged bribe-kickback scheme and the federally funded City programs. Further, there is no showing that the alleged kickback scheme threatened a federal interest. Moreover, as discussed below, there is no showing

that Mr. Mirikitani's position as a council member jeopardized or breached the integrity of any of the federal funds either received into the City's fiscal 1999 General Fund, or received or existing in the capital or operating budgets in 1999.

c. Mr. Mirikitani's Position on the City Council.

The District Court found a nexus under § 666 based on two unrelated facts:

- that the City's General Fund received more than $10,000 in federal funds in fiscal 1999 [E.R., 115]; and

- that Mr. Mirikitani's position on the City Council provided him with the power to control the use of federal funds. [E.R., 115].

The District Court's ruling is based upon the assumption that corruption by any member of a local government's legislative body is transformed under § 666 into a federal offense, whether or not that program is connected with the misconduct or imperiled by it. No caselaw, however, supports the contention that holding a legislative position within a governing body which receives federal funding creates, without more, the required nexus under 18 U.S.C. § 666. No caselaw proposes that § 666's nexus requirement should vary if the defendant is a member of a legislative body. Indeed, even where the defendant was a legislative official, courts have refused to apply 18 U.S.C. § 666 in the absence of a sufficient federal nexus. *See, e.g.*, United States v. Foley, (state legislator); Zwick, supra

(member of township board of commissioners); Philips, supra (parish tax assessor; not "agent" of parish within meaning of § 666).

In conclusion, there is no factual basis - not even, "a highly attenuated implication of a federal interest" (Zwick, 199 F.3d at 687) - upon which the District Court's finding of the required nexus can rest. The fact that Mr. Mirikitani was a City Council member who could vote in connection with federally-funded City projects, does not change the rule required for constitutional application of 18 U.S.C.§ 666 under Fischer: that there must be a demonstration that the offense conduct – an alleged bribery/kickback scheme relating exclusively to City personnel funds from the General Fund – posed a threat to the integrity of the federal program. The record is void of any such evidence. The Government will not be able to shoulder its burden of demonstrating that the District Court's error was harmless beyond a reasonable doubt. Therefore, Mr. Mirikitani respectfully requests that this Court vacate his conviction under Counts 2 and 3.

C. Double Jeopardy Precludes Further Prosecution.

Assuming this Court vacates the convictions under 18 U.S.C. § 666, Mr. Mirikitani respectfully requests that the Court remand this matter to the District Court with an order to dismiss these charges against him. Mr. Mirikitani submits

that the Government is precluded from re-trying him under the rule against double jeopardy.

The double jeopardy clause of the fifth amendment to the U.S. Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Supreme Court has acknowledged that the underlying purpose of the double jeopardy clause is that:

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. United States, 355 U.S. 184, 187-88 (1957). Where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. United States v. Wilson, 420 U.S. 332, 344 (1975).

The guarantee against double jeopardy provides three forms of protection: it prohibits, "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." Dep't. of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994).

In the present case, the protection at issue is Mr. Mirikitani's right to be free from a second prosecution for the same offenses on the same facts because the former prosecution resulted in a judgment of conviction. Inasmuch as the District Court rendered a judgment of conviction against Mr. Mirikitani for violating 18 U.S.C. § 666, the Government is bound by the preclusive effect of the former conviction as to any future proceedings on the same offenses with the same facts.

II Section 666, Title 18, United States Code, Is Unconstitutional on its Face Because it Was Enacted Outside the Scope of Congress' Authority under the Spending Clause of Article I of the Constitution.

A. Standard of Review and Issue Preservation.

The constitutionality of a statute is a question of law reviewed de novo. Frega, 179 F.3d at 802 n. 6; United States v. Mack, 164 F.3d 467, 471(9th Cir. 1999); United States v. Hicks, 103 F.3d 837, 847(9th Cir. 1996).

This issue was not specifically raised below, nor ruled upon by the District Court. When no objection is made below, plain error review applies. United States v. Buckland, 277 F.3d 1173, 1178 (9th Cir. 2002).

B. Discussion.

Assuming for the sake of argument that this Court finds unpersuasive

Argument I, Mr. Mirikitani now argues in the alternative that 18 U.S.C. § 666 is facially unconstitutional under the Spending Clause of article I of the U.S. Constitution.

1. Under the Spending Clause, 18 U.S.C. § 666 Is Not a Condition Statute.

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. 137, 176 (1803). Every law enacted by Congress must be predicated upon the powers conferred upon it by article I of the U.S. Constitution. United States v. Morrison, 529 U.S. 598, 607 (2000). Congress adopted 18 U.S.C. § 666 pursuant to the Spending Clause in article I of the Constitution. Fischer, 529 U.S. at 689 n. 3 (Thomas, J., dissenting); United States v. Morgan, 230 F.3d 1067, 1073 (8th Cir. 2000)(Bye., J., concurring); Santopietro, 166 F.3d at 92-94; Zwick, 199 F.3d at 687; United States v. McCormack, 31 F.Supp. 2d 176, 186 n. 18 (D.Mass. 1998). The Spending Clause provides that: "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

Congressional power under the Spending Clause is akin to a contract

between the federal government and the states:

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

Congress' ability to regulate behavior under the Spending Clause is based upon attaching conditions to grants of money. *See,* South Dakota v. Dole, 483 U.S. 203, 206-207 (1987). The spending power requires, at least, that the exercise of federal power be related, "to the federal interest in particular national projects or programs." Id., at 207.

In Dole, the Supreme Court held that Congress could indirectly bring about the establishment of a uniform minimum drinking age among the States by enacting a statute that directed the Secretary of Transportation to withhold a small percentage of federal highway funds from those States that allowed the purchase and possession of alcohol by individuals under 21 years of age. Dole, 483 U.S. at 206. The Court found this 'condition statute' a valid exercise of legislative power under the Spending Clause, i.e., to attach a condition, incident to its spending power, on an entity's receipt of federal funds. Id.

But the Supreme Court recognized the following limits on Congress' power, and set out four factors to be examined when determining whether a statute has been appropriately enacted under the Spending Clause:

> (1) the power must be used to pursue the general welfare;
>
> (2) Congress must unambiguously state the condition it is placing on the federal funding;
>
> (3) the conditions must be related to the federal interest in particular national projects or programs; and
>
> (4) the conditions must not violate other independent constitutional restrictions. Id. at 207- 11.

Court's must do a case-by-case review to prevent having, "the spending power. . . render academic the Constitution's other grants and limits of federal authority." New York v. United States, 505 U.S. 144, 167 (1992).

Section 666 does not withstand scrutiny under the four prongs of the Dole-inquiry. Under the first prong, although § 666's goal of preventing corruption is arguably in pursuit of the general welfare, this goal infringes upon traditional state power. The tenth amendment reserves for the states, or the people, those powers not delegated to the United States by the Constitution. New York, 505 U.S. at 156. States possess primary authority for defining and enforcing the criminal law.

Engle v. Isaac, 456 U.S. 107, 128, (1982). "When Congress criminalizes conduct already denounced as criminal by the States, it effects a, "'change in the sensitive relation between federal and state criminal jurisdiction.'" Lopez, 514 U.S. at 561 n.3. (*quoting* United States v. Enmons, 410 U.S. 396, 411-412 (1973)). The Hawaii Legislature has regulated the very type of misconduct the Government prosecuted here under § 666. Hawai'i Revised Statutes ("HRS") § 710-1040, Offenses Against Public Administration(relating to bribery).[1] [And see, E.R., 28-29].

The remaining prongs all relate to funding conditions. The issue of whether

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[1] **§710-1040 Bribery.** (1) A person commits the offense of bribery if:

(a) The person confers, or offers or agrees to confer, directly or indirectly, any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in the public servant's official capacity; or

(b) While a public servant, the person solicits, accepts, or agrees to accept, directly or indirectly, any pecuniary benefit with the intent that the person's vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.

(2) It is a defense to a prosecution under subsection (1) that the accused conferred or agreed to confer the pecuniary benefit as a result of extortion or coercion.

(3) For purposes of this section, "public servant" includes in addition to persons who occupy the position of public servant as defined in section 710-1000(15), persons who have been elected, appointed, or designated to become a public servant although not yet occupying that position.

(4) Bribery is a class C felony. [L 1972, c 9, pt of §§1; gen ch 1993]

Congress placed unambiguous conditions upon the receipt of federal funds under the second prong is immaterial because § 666 does not provide federal funds. Under the third prong, the issue of whether the conditions relate to the purpose for the funds, is, for the same reason, irrelevant. In this respect, the situation in Dole is a study in contrast: there the Court found that the disbursement of highway funds was related to the goal of raising the drinking age to prevent drunk driving, and, thus, there was a connection between the statute and the federal funds. But here, while § 666 proscribes corrupt conduct, it neither relates the corruption to any specific federal funding program, nor even requires that a nexus exist between the funding and the corruption, as argued below.

Section 666 goes beyond the Spending Clause's contract principles because it attempts to, "proscribe the conduct of third persons who aren't parties to the funding contract", Morgan, 230 F.3d at 1074(Bye, J., concurring). Indeed, when § 666 was enacted, "Congress did not contract with states or local governments." Id. Thus, § 666 cannot be construed as an attempt by Congress to influence States' behavior through conditions attached to federal funds, but rather is an attempt to obtain jurisdiction over state and local corruption.

> "Section 666 cannot properly be linked to any grant of Congressional power in the Constitution. Hence, Congress exceeded its proper authority in enacting § 666; the law is unconstitutional, void ab initio."

Morgan, 230 F.2d at 1073 (Bye., J., concurring).

2. 18 U.S.C. § 666 Fails to Identify the Federal Interest.

The District Court convicted Mr. Mirikitani under 18 U.S.C. § 666 (a)(1)(A) for conversion. This provision required that the Government prove beyond a reasonable doubt the following elements:

> 1) the government or agency received benefits in excess of $10,000 under a federal program in a one year period, 18 U.S.C. § 666(b);
>
> 2) the defendant was an agent of an organization, or of a State or local government;
>
> 3) the agent knowingly converted to the use of any person not the right owner;
>
> 3) property valued at $5,000 or more;
>
> 4) which property is owned by or under the care, custody or control of the State or local government or agency.

The District Court also convicted Mr. Mirikitani under 18 U.S.C. § 666(a)(1)(B), the bribery provision. Here, in addition to elements 1, 2 and 4, listed immediately above, the Government had to prove beyond a reasonable doubt that the agent corruptly solicits or demands for the benefit of any person, or accepts anything of value, intending to be rewarded. 18 U.S.C. § 666(a)(1)(B).

Under either provision - for conversion or for bribery - there is no requirement in the statute that the Government prove a nexus between the criminal activity and the federal funds, but only that the state or local government or agency received $10,000.00 in federal funds. There is no requirement that the alleged corruption have anything to do with the federal funds. Thus, any agent of any state or local government that receives the prescribed federal funds is subject to federal prosecution under § 666 for corrupt acts, even if the corruption had nothing to do with federal funds. *See*, McCormack, 31 F.Supp. 2d 176; United States v. Sabri, 183 F.Supp. 1145 (D. Minn. 2002).

Courts have described § 666's reach as "expansive" and "unqualified" (Salinas, 522 U.S. at 56), and sweeping. Morgan, 230 F.3d at 1072(Bye., J., concurring). In Salinas, the Supreme Court observed that Congress had enacted in § 666 a, "breathtakingly broad criminal statute." Salinas, 522 U.S. at 56. But the Court in Salinas was not asked to probe the facial constitutionality of § 666. Rather, Salinas challenged only the meaning of the words in the statute, with the Court rejecting the argument that the government was required to prove under § 666 prosecution that the federal funds were directly affected by the misconduct.

Salinas, 522 U.S. at 56-57, 59-60.[2]

Other courts have grappled with the sweeping breadth § 666. Both the Second and the Third Circuits have determined that § 666 could be saved from constitutional infirmity under the Spending Clause only by reading into the text of the statute an additional nexus requirement. Santopietro, 166 F.3d at 92-94; Zwick, 199 F.3d at 687.

The Ninth Circuit should not follow this approach. First, federal courts are not free to rewrite the federal penal code. The Supreme Court has repeatedly admonished courts not to inject new elements into federal criminal statutes:

> "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature."

United States v. Albertini, 472 U.S. 675, 680 (1985) (internal citations omitted and punctuation altered).

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[2] The Court stated that it, "need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds" because there was a clear connection between Salinas' bribe and the federal funds. Id. at 59.

Second, even if a court-created nexus element could be added to § 666, the result would be wholly ineffectual. Congress lacks the power under the Spending Clause to enact criminal laws governing third-party conduct. "Judicial efforts to render § 666 palatable by adding an element to the crime cannot alter our Constitution's basic limitation on federal legislative power. No amount of creative drafting permits the judiciary to preserve a statute that Congress plainly lacked the power to create." Morgan, 230 F.3d at 1073 (Bye, J., concurring).

Elsewhere, the Supreme Court has refused to save statutes from such constitutional infirmity by pretending that the element of a nexus could be read into the statute's language, when it was not expressly required. United States v. Lopez, 514 U.S. 549, 552-57 (1995)(concerning the Gun Free School Zones Act under Commerce Clause analysis, no nexus requirement between the gun possessed on school grounds and interstate commerce); United States v. Morrison 529 U.S. 598, 607-08 (2000)(concerning the Violence Against Women Act under Commerce Clause analysis, no nexus required between the violence perpetrated and a legitimate federal interest).

"Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." Albertini, 472 U.S. at 680. "Any other conclusion, while

purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." Id. (*citing* United States v. Locke, 471 U.S. 84, 95-96 (1985).

C. The Conviction under Section 666 Is Plain Error.

Mr. Mirikitani did not specifically challenge the facial constitutionality of § 666 below. When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. *See* Fed. R. Crim. P. 52(b); Jones v. United States, 527 U.S. 373, 388 (1999). Under the plain error standard, relief is not warranted unless there has been (1) error; (2) that is plain, and (3) affects substantial rights. Jones, 527 U.S. at 389. Even then, a court will not reverse unless it exercises its discretion on the basis that the error, "seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993).

The plain error requirements are met here. First, the 'error' prong is fulfilled because the argument can be made that Congress erred in enacting § 666, which legislation lies outside the scope of Congress' powers under the Spending Clause. Second, this error is plain: the error is clear and obvious under the Spending Clause analysis using the four-prong Dole-inquiry, and when further

scrutinized for evidence of a federal nexus.

Third, and assuming § 666 is facially unconstitutionally, then the District Court had no authority to order Mr. Mirikitani to stand trial on Counts 2 and 3, and to submit these counts to the jury. The submission of Counts 2 and 3 to the jury clearly effected Mr. Mirikitani's substantive rights, and, as well, effected the "integrity, or public reputation of judicial proceedings." Mr. Mirikitani therefore respectfully requests that this Court vacate his convictions on Counts 2 and 3, and remand to the District Court to dismiss these charges.

CONCLUSION

For all the reasons set forth in the above arguments, Mr. Mirikitani respectfully requests that this Court vacate his convictions under Counts 2 and 3 of the Superseding Indictment and remand the matter to the District Court with an order to dismiss the charges.

DATED: Wailuku Maui, Hawai'i, September 3, 2002.

_____

Georgia K. McMillen
Attorney for the defendant-appellant,
Andrew K. Mirikitani

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is proportionately spaced in 14-point Times New Roman typeface. It contains 10,927 words, with an average of 227 words per page.

DATED: Wailuku Maui, Hawai'i, September 3, 2002.

_____

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant
Andrew K. Mirikitani

STATEMENT OF RELATED CASES

Mr. Mirikitani's co-defendant in the underlying case, Sharron Bynum, has appealed her conviction on Counts 2 and 4 of the Superseding Indictment to this Court, and has raised, among other arguments, issues similar to the two constitutional challenges set forth herein. That appeal - United States of America v. Sharron Bynum - carries the Circuit Court number, C.A. No. 02-10016. Otherwise, counsel is unaware of any other cases related to this matter presently pending before this Court.

DATED: Wailuku Maui, Hawai'i, September 3, 2002.

GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant
ANDREW K. MIRIKITANI

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was duly mailed to the following party on September 3, 2002.

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