

5. Pursuant to 18 U.S.C. §666, Count 4 charges Sanchez with soliciting and accepting a thing of value in connection with a transaction of El Paso County involving a thing of value of \$5,000.00 or more. Count 5 charges Jones under the same statute with giving Sanchez a thing of value.
6. In response to a query from defense counsel concerning what the “thing of value” alleged in Counts 4 and 5 was, such query being made in connection with the possibility that the defense would file a motion for bill of particulars to request that the Court order the government to identify the “thing of value” referenced therein, AUSA Laura Franco Gregory replied in writing that the “thing of value” was a \$750.00 check written by Defendant Jones to Defendant Sanchez. A copy of Ms. Gregory’s letter is attached to this Motion as Exhibit A.
7. The \$750.00 check is referenced in the “Overt Acts” section on Page 7 of the indictment, which section is incorporated by reference into Counts 4 and 5. In Paragraph 6 of the “Overt Acts” section, the Indictment states that Jones wrote the check to Sanchez on January 28, 2004. In Paragraph 7 of the “Overt Acts” section, the indictment states that Sanchez cashed the check on January 29, 2004.
8. This indictment was found by the Grand Jury on May 28, 2009, more than five years after the check was issued by Jones and cashed by Sanchez. Therefore, the bribery charge based on this transaction is time-barred pursuant to 18 U.S.C. §3282.
9. Furthermore, even if the federal bribery charges had been filed within the limitations period, they fail to state an offense, because as a matter of law, the \$750.00 was not a bribe.

10. As the government knows, Jones intended that Sanchez use, and Sanchez did use the money to pay for a trip to an El Paso Bar Association Seminar in Las Vegas, Nevada, where he promoted the project to digitize the District Clerk's record-keeping system and attended a presentation by ALTEP, the bidder on the digitization project represented by Jones. The donation was intended by Jones for this lawful purpose and used by Sanchez for this lawful purpose. Donations of this type to elected officials are permitted by Texas law, and are not required to be reported.
11. A similar situation was described in Ethics Opinion No. 368, issued by the Texas Ethics Commission, the agency charged under Texas law with interpreting the rules pertaining to campaign and office-holder contributions and reports.¹ A judge inquired as to whether he could accept a waiver of the registration fees at a seminar during a period when the Judicial Campaign Fairness Act prohibited him from accepting contributions to his campaign or his office-holder account. The Ethics Commission responded that the judge could accept the donation because it was not an office-holder account contribution. An office-holder contribution is one "offered or given with the intent that it be used to defray expenses that are (1) incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and (2) not reimbursable with public money." The seminar fee waiver, however, was "reimbursable with public money," – though obviously it was not actually reimbursed -- so the judge could accept it, and was not required to report it. Texas Election Code § 251.001(4). Sanchez requested that County Commissioners Court reimburse the expenses of the trip, but the Commissioners, as was their prerogative, declined. However, they could have paid for

¹ A copy of this advisory opinion and of Ethics Advisory Opinion No. 106, discussed below, are attached hereto.

the trip, and thus it was “reimbursable with public money.” The contribution was neither unlawful nor reportable.

II. Count Three

12. Count 3 charges the defendants with the substantive crime of mail fraud. 18 U.S.C. 1341, 1346. The indictment states in Count 3 that the defendants “caused to be sent and delivered, by a private and commercial interstate carrier, that is, Federal Express, a proposal in response to the Request for Proposal to digitize court records ... on May 28, 2004...”
13. If this were correct, the indictment would have been rendered within the statute of limitations. However, contrary to the authorities cited above, the government construes the statute of limitations on mail fraud to run from the date a mailed item was delivered, rather than the date it was placed in the mail. The Federal Express package in question was allegedly received by El Paso County on May 28, 2009, the date the bids were to be opened. However, it was placed with Federal Express no later than the day before, May 27, 2009.
14. The statute of limitations for mail fraud begins to run on the day the mailed item is placed in the mail. *U.S. v. Dunn*, 961 F.2d 648, 650 (7th Cir. 1992); *U.S. v. Clevinger*, 458 F. Supp. 354, 358 (E.D. Tennessee, 1978); *U.S. v. Garland*, 337 F. Supp. 1, 4 (N.D. Ill. 1971); *U.S. v. Lee*, 667 F. Supp. 1404, 1416 (D. Colo. 1987). Therefore, the indictment was brought five years *and one day* after the date of completion of the alleged crime, and it is time-barred.
15. Even had the indictment been rendered within the limitations period, the Federal Express mailing upon which Count Three is based could not form the basis of the mail

fraud charge, because it did not further the alleged scheme. The mailing was not sent by or on behalf of ALTEP, but by and on behalf of a competitor. 18 U.S.C. §1341, the mail fraud statute under which the defendants are charged, prohibits the use of the mails (or commercial interstate carriers such as Federal Express) “for the purposes of executing” a scheme or artifice to defraud. As the Supreme Court held in *U.S. v. Maze*, 414 U.S. 395, 400, 94 S.Ct. 645, 648 (1974), this phrase means what it says. The competitor’s use of the mails to submit its proposal not only was not for the purpose of executing the alleged scheme to obtain the County’s business for ALTEP, but for the opposite purpose, to obtain the contract for the competitor.

16. In *U.S. v. Castile*, 795 F.2d 1273, 1278 (6th Cir. 1986), the defendant was convicted of mail fraud in connection with a scheme involving arson and an insurance claim. The mailings in question were correspondence by the insurance company pertaining to its arson investigation. Reversing, the court stated that, while the insurance company mailings were foreseeable, they were not in furtherance of the scheme. “[W]here the purpose of a mailing conflicts with, rather than promotes, the scheme to defraud, the mailing will not support a conviction under the mail fraud statute.” *Id.*

17. The use of the competitor’s Federal Express mailing to support the present mail fraud claim is precisely analogous to the use of the insurance company’s mailings in *Castile*. Because the Federal Express mailing was not for the purpose of executing the alleged scheme, Count Three should be dismissed.

18. The Fifth Circuit addressed an analogous circumstance in 2006 when it partially overturned the mail fraud conviction of a defendant who had plotted to burn down a house for insurance proceeds. In *United States vs. Ingles*, 445 F.3d 830 (5th Cir. 2006),

the mailing used to establish this element was correspondence between the owners of the burned property and their insurance company. Because the property owners were not in on the scheme, and there was no evidence the defendant would have shared in any proceeds derived from the mailing, the mailing was not “in furtherance of” the scheme. 445 F.3d at 836.

19. In *United States v. LaFerrriere*, 546 F.2d 182, 185-87 (5th Cir. 1977), a mail fraud conviction was reversed because the mailing – a demand letter by an attorney threatening legal action against the victim of the fraud – was not a mailing in furtherance of the scheme. See also, *U.S. v. Georgalis* 631 F.2d 1199,1204 (5th Cir. 1980), (defendant’s mail fraud convictions on counts involving letters of complaint written to him by victims of the scheme were reversed, as these letters did not further the scheme). To support a mail fraud conviction, a use of the mails must be “a step toward receipt of the fruits of the scheme.” *U.S. v. Staszczuk*, 502 F.2d 875, 880 (7th Cir. 1974)
20. In the case at bar, the “mailing” relied upon by the United States in its indictment of defendants was the deposit of a competitor’s response to the County’s Request for Proposal with Federal Express. This was one of seven bidders whose submissions were in competition with ALTEP for the bid. As was the case in *Castile* and *Ingles*, the mailing charged in the indictment “served to defeat, rather than further, the defendant’s scheme.” *Ingles*, 445 F.3d at 837, fn 27, quoting from *LaFerrieriere*. Competitive proposals could have had no affect on the alleged scheme but to make it less likely, rather than more likely, that “the fruits of the scheme” would be received by the alleged schemers – that ALTEP would receive financial remuneration from El Paso County in connection with the digitization contract. The use of the competitor’s Federal Express

mailing to support the present mail fraud claim is precisely analogous to the use of the insurance company's mailings in *Castile*. Because the Federal Express mailing was not for the purpose of executing the alleged scheme, Count Three must be dismissed

Counts One and Two

21. Counts One and Two are also barred by limitations. Count One charges the defendants conspired to commit wire fraud. Count Two charges that the defendants conspired to commit mail fraud. The "wire event" charged in that count, on Page 4 of the indictment, is that Jones "caused to be sent a transmission by wire...request[ing] that Defendant, Gilbert Sanchez, place on Commissioners Court agenda items, including selection of a vendor for the District Clerk's document imaging project..." Elsewhere in the indictment – Paragraph 16 on Page 8, under "Overt Acts" -- the government states that this email was sent on May 23, 2004. Thus, any conspiracy to commit wire fraud ended upon the accomplishment of the conspiracy – the transmission of the wire communication on May 23, 2004. The indictment would have had to be brought by May 23, 2009, to be timely. It was not, so this count must be dismissed.

22. Count Two charges the defendants conspired to commit mail fraud, using the same "mail event" referenced in Count Three, the sending by Federal Express of a bid by an ALTEP competitor which was received by the County on May 28, 2004. Because this was actually deposited with Federal Express no later than May 27, 2004, the conspiracy to cause this item to be sent by private interstate carrier ended no later than that date, and thus this count is barred by limitations. Furthermore, for the reasons set out in the portion of this motion addressing Count Three, the competitor's Federal Express mailing

did not further the scheme and thus cannot establish an element of a mail fraud conspiracy. Therefore, this count must be dismissed.

23. The Fifth Circuit has held that in a mail fraud case, “[i]t is not the scheme to defraud, but the use of the mails or wire to execute the scheme which constitutes mail or wire fraud.” *U.S. v. St. Gelais*, 952 F.2d 90, 97 (5th Cir. 1990). Furthermore, each wire or mail transmission in support of the scheme constitutes a separate crime. *Id.* at 96-97; *U.S. v. Blankenship*, 746 F.2d 233, 236 (5th Cir.1984); *U.S. v. Caldwell*, 302 F.3d 399 408 (5th Cir. 2002). “Notwithstanding the continuing nature of the scheme itself, each mailing constitutes a completed offense.” *U.S. v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994). The indictment here describes (at pages 3 and 4) the conspiracy alleged in Count One as relating to the May 23, 2004 wire transmission, and the conspiracy alleged in Count Two is described (at pages 9-11) as pertaining to the May 28 (actually May 27), 2004 Federal Express transaction. Although the “Overt Acts” section of the indictment alleges other acts upon which the government could have based a mail or wire fraud charge, such as Paragraph 20 on Page 9, it did not do so. Instead, the indictment specifically connects the alleged conspiracies to the specified “separate crimes” (in the government’s opinion) set forth therein. Once these mailings or wire communications had been sent, defendants could no longer conspire to send them. Thus, because these events occurred outside the limitations period, the conspiracy counts are time-barred.
24. Although under the government’s theory (which, for the record, defendants absolutely deny) a conspiracy to defraud El Paso County continued after the date of the wire and mail events referenced in Counts One and Two, this is not the conspiracy for which the defendants are indicted. As the Fifth Circuit observed in *Ingles*, the mail fraud statute

"does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate [other] law." Id. at 837, quoting from *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148 (1944) Defendants are aware of no federal statute which makes it a crime to "conspire to defraud," and if one exists, defendants are not charged under it. Defendants are charged with conspiracy to commit mail and wire fraud. The scheme or artifice to defraud in the mail and wire fraud statutes is merely a predicate; the offense is committed when, if the predicate scheme exists, the defendant causes to be mailed or sent by wire a communication in furtherance of the scheme. Thus, to be charged with conspiracy to commit mail and wire fraud, the defendants must be charged with conspiring to cause the mail or wire communication, rather than conspiracy to commit the fraud.

25. **Counts One, Two and Three**

26. Counts One, Two, and Three should also be dismissed because the predicate scheme to defraud as alleged in the indictment fails to adhere to the "state law limiting principle" mandated by the Fifth Circuit in cases, such as this one, where the government contends that the scheme involved the deprivation of honest services by a public official. This principle was elucidated in *U.S. v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997), where the court held that "'honest services' contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer – or that he consciously contemplated or intended such actions. For example, something close to bribery."

27. As the *Brumley* court explained, for a public official to be convicted of honest services fraud, “the official must act or fail to act contrary to the requirements of his job under state law. This means that if the official does all that is required under state law, alleging that the services were not otherwise done ‘honestly’ does not charge a violation of the mail fraud statute.” *Id.*

28. It can be shown from the face of the indictment that all of the financial transactions upon which the scheme is alleged to have been based, were lawful transactions, contrary to the government’s position. As was discussed above, the \$750.00 check which the government contends was a bribe was in fact a lawful donation of a type contemplated by Texas law. It was not required to be reported as a campaign donation, and it did not constitute a pecuniary benefit to Sanchez, who merely used it to facilitate the performance of his duties in taking a business-purpose trip which El Paso County could have, but chose not to, pay for. Similarly, although the government has argued otherwise in response to the defendants’ Motion to Strike, Texas law permits a person to pay for entertainment, meals, and travel for a District Clerk, and there is no requirement that the District Clerk report these donations on his campaign finance reports filed pursuant to Chapter 15 of the Texas Election Code.² Thus, neither the \$750.00 check, nor the meals, entertainment and travel referenced in the indictment can be used to prove

² Defendants explained the legal reasoning for this assertion in their reply to the government’s response to the motion to strike. Texas Ethics Commission Advisory Opinion No. 106 establishes that, unless these are actually campaign contributions, they are not required to be reported under the Election Code. Some County officials – specifically a County Judge, County Commissioner, or County Attorney – are required to report the receipt of such gifts, but this requirement does not apply to a District Clerk. See §159.002, Texas Local Government Code, defining for purposes of that chapter “County Officer” to include County Judge, County Commissioner and County Attorney only, and sequential provisions of that chapter requiring “County Officers” to file reports detailing the receipt of entertainment and travel donations. See also §36.10(b), Texas Penal Code, stating that the laws prohibiting gifts to public servants do not apply to “food, lodging, or transportation accepted as a guest and, if the donee is required to report those items, reported by the donee in accordance with that law.” Based on the language in the indictment, it appears that the government erroneously believed that Sanchez was required to report these gifts.

a deprivation of honest services. Paragraphs 1 and 2 of the government's description of the "scheme or artifice to defraud" on Page 5 of the indictment are insufficient to support the government's allegation that a "scheme or artifice to defraud" existed.

29. Even if, *arguendo*, the government could show that the \$750.00 and/or the entertainment and travel expenditures were required to be reported by Sanchez, it strains credulity to maintain that Sanchez' failure to do so proves any criminal purpose by him or Jones. Had Sanchez reported these items as contributions from Jones and expenditures by Sanchez, it is improbable that they would have attracted any attention, given their unremarkable size in relationship to other contributions and expenditures reported by Sanchez during the relevant period. Sanchez' failure to report these items could simply have had no effect on whether the "scheme to defraud" as the government imagines it advanced or regressed. And absent any evidence – of which there is none – that Jones participated in any determination as to whether these matters would be reported or not, Sanchez' decision not to report them cannot establish Jones' culpability in the alleged scheme.

30. Paragraph 4 of the government's description of the "scheme or artifice to defraud" alleges that the defendants provided "cash bribes in the form of a campaign contribution to CW2" in return for her agreement to vote for the ALTEP bid. On Page 8, in Paragraph 13 of the "Overt Acts" section of the indictment, this transaction is alleged to have occurred on "March 4 or 5, 2004." Defendants believe that the government will not dispute that the transaction referenced herein was a campaign contribution from ALTEP President Roger Miller to CW2, which was given at a lunch meeting attended by Miller, Jones, and CW2.

31. Texas Penal Code §36.02(a)(4) specifies that for a campaign contribution to constitute a bribe, there must be an “express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for the benefit.” This provision further requires that, “notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision.” Defendants deny that the government has evidence, especially direct evidence, that any express agreement to give or withhold CW2’s vote on the ALTEP proposal was made in connection with this campaign contribution, or that CW2 would not have voted for the digitization project absent the contribution. Unless the government can present evidence of both of these conditions, this allegation fails the “state law limiting principle” as well.

32. If Paragraphs 1, 2 and 4 in the government’s description of the “scheme or artifice to defraud” are disregarded, what is left of the scheme is this: Paragraph 3: Jones and Sanchez instructed CW1 to structure the RFPs in a way that would benefit ALTEP; Paragraph 5: Sanchez caused an RFP to be issued and a vendor bid on it. The surviving allegations do not constitute a “scheme or artifice to defraud” El Paso County of any person’s honest services. Therefore, the indictment fails to describe an offense as to Counts 1, 2, and 3.

33. Even if the government were to persuade the Court that the \$750.00 check and the meals, entertainment, and travel, were required to be reported under Texas law, this duty fell entirely upon Sanchez, not Jones. Unless the government can show – and defendants are certain it can’t – that Jones and Sanchez made some type of agreement

that Sanchez would fail to report these transactions as required by law, then Jones' conduct is not only lawful, it is protected by the First Amendment.

34. The First Amendment guarantees the right of an American citizen to petition his government for redress of grievances. It also protects both political expression and political association. *Buckley v. Valleo*, 424 U.S. 1, 14, 96 S. Ct. 612, 633 (1976). Limitations on an individuals' right to contribute money to political candidates "impinge on protected associational freedoms." *Id.* at 22, 636. The right of political association is "a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. ... [G]overnmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 24, 638, internal quotations and citations omitted.

35. Criminal statutes may be unconstitutional if they are enforced in a manner that unlawfully impinges on the defendant's First Amendment rights. See *New York State Bar Association v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1985) (holding the New York State Bar Association could maintain a civil rights lawsuit against the Attorney General to prevent enforcement of a statute criminalizing attorneys instructing clients on how they could qualify for Medicaid, and that they were likely to prevail, as this impermissibly burdened the attorneys' rights under the First Amendment); *Alliance to End Repression v. City of Chicago*, 561 F.Supp.537 (D.C. Ill. 1982) (approving a class-action settlement enjoining Chicago police from targeting and prosecuting individuals because of their lawful political activity).

36. Jones does not contend that the First Amendment permits bribery or mail fraud, only that prosecution for acts which, when closely examined, amount to no more than

conduct protected by the First Amendment, not only deprives him of due process (in that he has been indicted without probable cause), but further victimizes his civil rights by burdening his right of political expression. Retaliation for the exercise of protected First Amendment rights offends the constitution because it threatens to inhibit the exercise of these rights. *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998). A civil plaintiff can make out a First Amendment retaliation claim under 42 U.S.C. §1983 by showing that (a) he engaged in protected conduct; (b) the defendant's actions caused him to suffer an injury which would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the actions of which he complains were substantially motivated by his protected conduct. *Keenan v. Tejada*, 290 F.3d 252 (5th Cir. 2002). To the extent that the allegations of wrongdoing against Jones are founded upon no more than evidence of his lawful exercise of First Amendment rights, they are repugnant to the Constitution, and Defendants respectfully submit that this factor should require a strict showing by the government that its allegation of unlawful conduct is comprised of something other than its dark view of Jones' lawful political activities, if this indictment is to be permitted to survive.

37. For these reasons, Defendants respectfully request that the Court dismiss the indictment in its entirety.

_____/s
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CERTIFICATE OF SERVICE

I certify by my signature below that on the 10th day of September, 2009, I electronically filed the forgoing Motion to Dismiss with the Clerk of the Court using the CM/ECF System which will transmit notification of such filing to the following CM/ECF participants:

_____/s
Stephen G. Peters

Ms. Laura Gregory
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June 16, 2009

Steven G. Peters
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John G. Jones
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Re: *United States of America v. Luther Jones*
09-CR-1567-PRM

Dear Sirs:

Pursuant to the United States District Court Judge Phillip R. Martinez' Discovery order and Rule 16 of the Federal Rules of Criminal Procedure, the government is providing to local counsel, Mr. Peters the following:

1. Documents bate stamped 1 - 1364 and 1520 - 1572 contained in a compact disc marked United States v. Jones, Government's First Set of Discovery.
2. Four (4) Compact Discs dated June 7, 2004.
3. One (1) Compact Disc dated December 10, 2003.
4. One (1) Compact Disc labeled 1800 Stanton.

5. The computer media seized in the instant case is available for your review at the Federal Bureau of Investigation (FBI), El Paso Division. In the alternative, you may furnish the government a one terabyte hard drive and the FBI will provide copies of the seized computer media. Please contact me to either arrange a mutually convenient date and time to review the computer media or to provide a hard drive for copying.
6. Please be advised that the Search Warrant affidavit is sealed and therefore, I am not attaching a copy.
7. Pursuant to Rule 12.1 of the Rules of Criminal Procedure, the government is demanding notice of any alibi for offenses charged in the indictment.
8. Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, please provide the government with any documents or tangible objects, reports of any examinations or tests and any expert witness information.
9. Please be advised that pursuant to Federal Rules of Evidence 702, the government will call a witness who examined the defendant's computer media. The government believes that the testimony will involve his technical and specialized knowledge regarding the examination of computers under Federal Rule of Evidence 702. The witness will be asked to explain his training and background, the nature of the examination that he undertook of the computers and related media, and the methods and/or software used to assist him in the examination. Thus, the witnesses will be more in the nature of a fact witness explaining how certain evidence was located. The government is prepared to present the evidence pursuant to Federal Rule of Evidence 702 and the requirements of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Company, Ltd. V. Carmichael*, 526 U.S. 137 (1999). The government, however, emphasizes that the witness will be offered only for his technical and specialized knowledge in the area of computer examination. Nevertheless, there is no dispute that this witness has specialized knowledge which will assist the trier of fact to understand the evidence and/or to determine a fact in issue.
 - a. Included in the compact disc marked *United States of America v. Jones*, Government's First Set of Discovery, are the related files and data recovered from the defendant's computer. The forensic tool kit prepared in analyzing the computer media is available for your review at the FBI, El Paso Division Office. Please contact me to coordinate a mutually convenient time and date.
 - b. The qualifications of this witness, as required by Federal Rules of Criminal Procedure 16(a)(1)(G) is attached.

10. Please also contact me to arrange a mutually convenient time and date to review the co-defendant, Gilbert Sanchez', financial documents. Since these documents contain Mr. Sanchez' personal financial information, the government will not furnish copies of these documents.

The above items are provided to Mr. Peters pursuant to Rule 16 of the Federal Rules of Criminal Procedure and Judge Martinez' Standing Discovery Order. Your letter dated June 10, 2009 requests the government produce multiple items that are not governed by Rule 16 of the Federal Rules of Criminal Procedure or Judge Martinez' Standing Discovery Order. The government filed a motion for clarification requesting guidance on a discovery item requested in your letter. The remaining items that are not covered by Rule 16 or the Standing Discovery Order, are not included in the government's discovery.

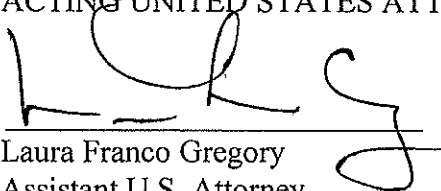
Finally, Mr. Peters requested in our telephone conversation on June 15, 2009, that the government remove from the indictment language outlining Texas statutory language and advise the defendant of the thing of value that is charged in Count five (5) of the instant indictment. As to Mr. Peter's first request, the government submits the Fifth Circuit mandated that when charging the Deprivation of Honest Services, the government must show that there is a violation of services owed under state law. *United States v. Brumley*, 116 F.3d 728, 733-35 (5th Cir. 1997). The government submits that the Texas statutory language is necessary to meet the government's burden under *Brumley*. In regards to Mr. Peters second request, the government will provide notice to the defense that the "thing of value" outlined in counts five relates to a \$750.00 check made payable to Gilbert Sanchez by the payor, your client, Luther Jones.

Should you have any questions concerning this letter feel free to contact me at the above listed number.

Respectfully yours,

JOHN E. MURPHY
ACTING UNITED STATES ATTORNEY

By:



Laura Franco Gregory
Assistant U.S. Attorney

ETHICS ADVISORY OPINION NO. 368

May 9, 1997

Whether a judge may accept an offer from the sponsor of a legal seminar to allow the judge to attend the seminar at no cost. (AOR-405)

A judge has asked whether he may accept an offer from the sponsor of a legal seminar to allow the judge to attend the seminar at no cost. The questions raised are whether acceptance of such an offer is permissible under the Judicial Campaign Fairness Act and also under section 36.08 of the Penal Code.

In 1995 the Texas Legislature adopted the Judicial Campaign Fairness Act as part of the Texas campaign finance law. S.B. 94, Acts 1995, 74th Leg., ch. 763. The Judicial Campaign Fairness Act limits the time period during which a judge may accept campaign or officeholder contributions.¹ Elec. Code § 253.153. The question here is whether providing a judge the opportunity to attend a legal seminar at no cost would be an officeholder contribution and therefore impermissible outside of the period during which a judge may accept officeholder contributions.

An "officeholder contribution" is a contribution to an officeholder that is offered or given with the intent that it be used to defray expenses that are (1) incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and (2) not reimbursable with public money. *Id.* § 251.001(4). We assume that in many cases a judge attends a legal seminar because the seminar is related to the performance of his or her judicial duties. *See generally* [Ethics Advisory Opinion Nos. 279, 247](#) (1995). In such a case, attendance at the legal seminar is an activity in connection with the judge's office. Providing a judge the opportunity to attend a legal seminar at no cost is not an officeholder contribution to the judge, however, if the expenses defrayed would otherwise be "reimbursable with public money."

The judge requesting this opinion states that if he paid a fee to attend the seminar in question, the fee would be reimbursable with county funds. Because the cost of attending the seminar would be reimbursable with public funds, the seminar sponsor's waiver of the fee is not an officeholder contribution to the judge.

The judge also asks whether acceptance of the seminar sponsor's offer is permissible under section 36.08 of the Penal Code, which prohibits public servants from accepting benefits in various circumstances. Because the judge would be entitled to reimbursement from the county for the cost of attending the seminar, we do not think the waiver of fee is a benefit to the judge.² Therefore, the waiver is not prohibited under section 36.08 of the Penal Code.

SUMMARY

A waiver of a seminar fee is not an officeholder contribution for purposes of title 15 of the Election Code nor is it a benefit for purposes of section 36.08 of the Penal Code if the fee would otherwise be reimbursable from county funds.

¹ The Judicial Campaign Fairness Act applies to justices of the supreme court, judges of the court of criminal appeals, justices of courts of appeals, district judges, statutory county court judges, and statutory probate court judges as well as to candidates for those positions. *See* Elec. Code § 253.151.

² The judge asks whether the "guest " exception in Penal Code section 36.10(b) would be applicable here. Section 36.10 sets out various exceptions to the prohibitions on benefits in section 36.08. Section 36.10(b) allows a public servant to accept food, lodging, transportation, or entertainment "as a guest " if the public servant complies with any applicable reporting requirement. That exception applies only to the acceptance of benefits in the form of food, lodging, transportation, or entertainment, however, and would not apply to the acceptance of a benefit in the form of a fee waiver.

ETHICS ADVISORY OPINION NO. 106

December 10, 1992

Whether communications to county officials are governed by chapter 305 of the Government Code. (AOR-117)

The Texas Ethics Commission has been asked to consider the following questions: (1) whether a donor must report expenditures for food, transportation, lodging, or entertainment provided to a county official, and (2) whether a county official is required to report food, lodging, transportation, or entertainment accepted as a "guest."

The lobby statute, chapter 305 of the Government Code, governs lobby expenditures made to communicate with members of the executive branch of government and members of the legislative branch. Gov't Code § 305.003. The definitions of "member of the legislative branch" and "member of the executive branch" make clear that those terms refer to the legislative and executive branches of "state" government. *Id.* § 305.002(4), (7). Counties are administrative arms of the state. *See Childress County v. State*, 92 S.W.2d 1011 (Tex. 1936) (state may use county as agent in discharging state's functions). They are generally described, however, as "political subdivisions," not as parts of one of the branches of "state" government. *Commissioners' Court of El Paso County v. El Paso County Sheriff's Deputies Ass'n*, 620 S.W.2d 900 (Tex. Civ. App.--El Paso 1981, writ ref'd n.r.e.). Indeed, the lobby statute uses the term "political subdivision" to describe governmental entities that are not part of one of the branches of state government. Gov't Code § 305.003(b).¹ Therefore, we conclude that communications to county officials are not governed by the lobby law.

The second question is whether a county official is required to report food, lodging, transportation, or entertainment accepted as a "guest." This question refers to chapter 36 of the Penal Code, which prohibits county officials from accepting benefits in certain circumstances. Penal Code § 36.08; *see also id.* § 36.09 (prohibiting offering, conferring, or agreeing to confer a gift the donor knows recipient is prohibited from accepting). There is an exception to this prohibition for food, lodging, transportation, or entertainment accepted as a guest and reported in accordance with any reporting requirement made applicable by law. *Id.* § 36.10(b); [Ethics Advisory Opinion No. 12](#) (1992) (interpretation of "guest" requirement).

In the statutes subject to interpretation by the Ethics Commission, only title 15 of the Election Code, which governs campaign finance, imposes reporting requirements on any county officials. The reporting requirements of title 15 would not be relevant to the question before us.² There are provisions, however, that impose reporting requirements on certain county officials in a county with a population of 500,000 or more. Local Gov't Code ch. 159. Under those provisions, certain county officials must file a financial statement with the county auditor. *Id.* § 159.004. Among the information to be reported on the financial statement is

identification of any person, business entity, or other organization from which the person or the person's spouse or dependent children received a gift of money or property in excess of \$250 in value or a series of gifts of money or property, the total of which exceeds \$250 in value received

from the same source, and a description of each gift, except gifts received from persons related to the person at any time within the second degree by consanguinity or affinity and campaign contributions that were reported as required by law.

Id. § 159.005(b)(7). Therefore, a county official in a county with a population of 500,000 or more may be required to report some food, lodging, transportation, or entertainment under that section in order to satisfy the requirements of Penal Code section 36.10(b).

SUMMARY

Communications to county officials are not governed by chapter 305 of the Government Code. A county official may be required to report some gifts of food, lodging, transportation, or entertainment under section 159.005(b)(7) of the Local Government Code in order to satisfy the requirements of section 36.10(b) of the Penal Code.

¹ Section 305.003(b) of the Government Code excepts from lobby registration requirements "a member of the judicial, legislative, or executive branch of state government *or* an officer or employee of a political subdivision of the state." (Emphasis added.)

² Food, lodging, transportation, or entertainment may be given as a campaign contribution. Campaign contributions are excepted from the prohibitions on offer and acceptance of benefits. Therefore, in regard to campaign contributions there would be no need to consider the application of the "guest" exception, which is a separate exception from the prohibitions on offer and acceptance of benefits.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA

v.

LUTHER JONES
And GILBERT SANCHEZ

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§
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§
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§

EP-09-CR-1567-FM

**ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS
ALL FIVE COUNTS OF THE INDICTMENT**

On this day, the Court considered Defendants' Joint Motion to Dismiss All Five Counts of the Indictment. The Court finds that the Motion is meritorious in all respects. It is therefore ORDERED that the indictment is dismissed in its entirety.

Signed on this _____ day of September, 2009.

The Honorable Frank Montalvo
United States District Judge