GRANTED

No. 99-116

In The

Supreme Court of the United States

JEFFREY ALLAN FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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December 15, 1999

QUESTION PRESENTED

Whether Medicare payments to a hospital for services provided to Medicare patients qualify as "benefits" to meet the jurisdictional requirements of Title 18 U.S.C. § 666 so as to federalize crimes of theft, embezzlement, and bribery involving the hospital.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 168 F.3d 1273 (11th Cir. 1999), and is reproduced in the Appendix accompanying the Petition for Writ of Certiorari in this case at 1.[1]

JURISDICTION

The Eleventh Circuit entered judgment on March 4, 1999. On April 28, 1999, the Eleventh Circuit denied Mr. Fischer's motion for rehearing and suggestion for rehearing *en banc*. On July 15, 1999, Mr. Fischer filed his Petition for a Writ of Certiorari. The Court granted the Petition on November 1, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The central statutory provision involved in this case is 18 U.S.C. § 666, which criminalizes theft or bribery concerning programs receiving federal funds. The statute provides as

[1] Throughout this brief, Pet. App. refers to the Appendix to the Petition for Writ of Certiorari. J. App. refers to the Joint Appendix filed with this Court. R. refers to the Record on Appeal filed with the Court of Appeals for the Eleventh Circuit.

follows:

(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 anything 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.

(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.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent

establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666 (Supp. 1999).

STATEMENT OF THE CASE

A. The Charges Against Petitioner

On December 7, 1995, a federal grand jury in the United States District Court for the Middle District of Florida returned a six-count indictment against Petitioner. (J. App. 1; R. 1-1). All the charges therein stemmed from a $1.2 million loan made by the West Volusia Hospital Authority ("WVHA") to Quality Medical Consultants, Inc. ("QMC"). (R. 1-1).

Specifically, Counts One and Two alleged that Petitioner, as QMC's President, had procured the loan by fraud and a bribe of $10,000 to Robert Caddick, WVHA's Chief Financial Officer, in violation of 18 U.S.C. § 666. (R. 1-1). Counts Three through Six alleged mail fraud, wire fraud, and conspiracy. (R. 1-1).

On June 12, 1996, the grand jury returned a superseding indictment, which set forth the first six counts and added seven counts of money laundering in violation of 18 U.S.C. § 1957. (J. App. 1, 6-23). The unlawful activity specified in the money laundering counts was a violation of 18 U.S.C. § 666. (J. App. 19-21).

Petitioner pleaded not guilty to each count, and the case proceeded to trial. (J. App. 1).

B. The Trial

Petitioner's trial before the district court and a jury commenced on July 15, 1996. (J. App. 1). The evidence introduced during the trial established the following.

Petitioner was the President and part owner of QMC, a private company that performed various auditing services for hospitals. (R. 5-54, 6-207, 6-484).

WVHA was an independent taxing district created for the purpose of administering hospitals in Volusia County, Florida. (J. App. 32). Caddick was the Chief Financial Officer of WVHA. (R. 8-860). Historically, WVHA had the authority to invest its excess funds. (See R. 8-861). In early 1993, however, WVHA modified its investment policy to improve the return on investments. (J. App. 36). Specifically, WVHA decided that it would move away from investing its cash reserves in bank accounts and would move toward investing those reserves in solid investment accounts at higher yields over longer periods. (R. 7-636-7-737).

In the summer of 1993, WVHA loaned $1.2 million to QMC. (R. 6-398). This loan resulted primarily from negotiations between Fischer and Caddick. (R. 6-380, 6-383). WVHA believed that the loan to QMC was proper under its current investment policy. (R. 7-652). Furthermore, WVHA's attorney advised that the loan was legal under Florida law. (J. App. 34). After QMC received the $1.2 million loan from

WVHA, QMC paid $10,000 to Caddick's mother. (R. 5-172).

The government maintained at trial that the loan had been secured by fraud because Fischer had pledged an invalid letter of credit. Additionally, the government contended that Fischer had fraudulently pledged QMC's accounts receivable to secure the loan when those accounts were already pledged to another creditor. Finally, the government argued that the loan was secured by a $10,000 bribe from Fischer to Caddick.

Petitioner maintained at trial that he believed the letter of credit was valid. Additionally, Petitioner contended that although QMC had previously pledged its accounts receivable to another creditor, that pledge was not inconsistent with its obligations to WVHA. Finally, Petitioner asserted that the $10,000 payment to Caddick was an after-the-fact gratuity and not an illegal bribe and that the payment was submitted to Caddick's mother simply at Caddick's request.

The only evidence introduced at trial to establish the statutory prerequisite for a fraud and bribery conviction under 18 U.S.C. § 666 -- *i.e.*, that the affected entity, WVHA, had received, in any one year, benefits in excess of $10,000 under a federal program -- was the very brief testimony of Robert Bowman, WVHA's finance director. Specifically, Mr. Bowman testified:

> Q. During 1993, did West Volusia Hospital Authority collect any money from the federal

government?

A. Yes. They collected significant funds. Most health care organizations collect a majority of their funds from programs that are funded by the federal government.

Q. And when you say a lot of money, could you give us a general rough idea, during 1993, how much money was collected from the federal government, let's say in Medicare alone?

A. Between 10 and 15 million dollars.

(J. App. 25).

Cross-examination of Mr. Bowman revealed that the $10-15 million in federal funds was paid to WVHA for providing services to patients receiving benefits under the federal Medicare program. (J. App. 26-28). There was no evidence introduced that WVHA administered any programs or federal funds for the federal government. For example, there was no testimony that WVHA received monies from the federal government in the same way a Medicare intermediary or carrier receives monies and then made reimbursement decisions regarding those monies. The testimony was simply that WVHA received payments for services. (J. App. 26-28).

The jury convicted Petitioner on all counts. (J. App. 2). On October 25, 1996, the district court sentenced Petitioner, pursuant to the federal sentencing guidelines, to sixty-five months' imprisonment, three years' supervised release, and 100 hours' community service. (J. App. 2). In addition, Petitioner was required to participate in a mental health treatment program and to pay $1,200,000 in restitution. (J. App. 2). Petitioner timely filed an appeal. (J. App. 3). Petitioner began serving his prison sentence on January 8, 1997. (See J. App. 3).

While his appeal was pending, Petitioner filed two motions for a new trial based on newly discovered evidence and numerous *Brady* violations committed by the government which came to light only after the conclusion of the trial. (J. App. 3-4; R. 1-124, 1-139).[2] The district court denied both of these

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[2] During Petitioner's trial, Caddick refused to cooperate with Fischer's counsel and did not testify per Fischer's subpoena because the case against Caddick was still pending. (R. 1-139, Ex. A, at 4). After pleading guilty and being sentenced, Caddick provided affidavits to Petitioner which revealed for the first time that he had been cooperating with the government since November of 1994, over a year before Fischer's indictment. (R. 1-129, Caddick Aff. ¶ 7).

The government's decision not to call Caddick as a witness is explained in Caddick's affidavit, when he revealed that the prosecutor had stated: "Unless you give me something useful, your testimony in all likelihood will acquit Mr. Fischer." (R. 1-139, Ex. A, at 3). Caddick also disclosed in the affidavits that the $10,000 payment was not a bribe, as he had agreed to make the $1.2 million loan prior to requesting and receiving the payment. (R. 1-129, Caddick Aff. ¶ 5; R. 1-139, Ex. A, at 1-2). In addition, Caddick set forth that he had not mentioned his mother's name to Fischer until August of 1993, which was well after the loan had been made. (R. 1-129, Caddick Aff. ¶ 2; R. 1-139, Ex. A, at 6).

The prosecution did not reveal this information even though it was inconsistent with the prosecutor's theory of the case. The prosecution

motions without an evidentiary hearing. (J. App. 3-4; R. 1-130, 1-142). Petitioner filed appeals from both of those denials. (J. App. 3-4; R. 1-132, 1-143).

The Court of Appeals for the Eleventh Circuit consolidated Petitioners' appeals from his convictions and from the denials of his motions for a new trial. (J. App. 4-5).

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed Petitioner's convictions under 18 U.S.C. § 666. (Pet. App. 1). The Court found that "based entirely on the plain language of § 666(b)" the statutory prerequisite for Petitioner's convictions was satisfied. (Pet. App. 11). Specifically, the Court held -- without elaboration -- that "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." (Pet. App. 11).

The Court stated further that the legislative history of § 666(b) also supported its conclusion. (Pet. App. 11). According to the Court, its holding fulfilled the policy aspirations of the statute's drafters, stating that the

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strenuously argued that Fischer knew the payment was a bribe because Caddick had directed the payment to his mother prior to the loan. (R. 8-951). The prosecution also failed to disclose that Caddick had been given and passed three polygraph examinations by the government. (R. 1-129, Caddick Aff. ¶ 7; 1-139, Ex. A, at 3). The information withheld was critical to Fischer's defense that the payment was an after-the-fact gratuity solicited by Caddick and not a *quid pro quo* for the loan.

"determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance program." (Pet. App. 11-12).

SUMMARY OF ARGUMENT

Medicare payments to a hospital for services provided to Medicare patients do not qualify as "benefits" and, therefore, cannot satisfy the statutory prerequisite for conviction under 18 U.S.C. § 666 for four reasons.

First, the plain language of 18 U.S.C. § 666(b) provides that the entity affected by defendant's theft or bribery must have received benefits under a federal program. Under the federal Medicare program, it is the patient who receives the benefits, while the hospital simply receives payments for services provided. Moreover, the plain language of 18 U.S.C. § 666(c) specifically exempts Medicare payments from the statute's coverage, as they are expenses reimbursed in the usual course of business. Accordingly, the plain language of 18 U.S.C. § 666 clearly contemplates a distinction between benefits and payments.

Second, the legislative history and purpose of 18 U.S.C. § 666 confirm that the statute is intended to address

theft and bribery in connection with entities that actually receive and administer benefits under a federal program and not simply entities that receive payments or expenses reimbursed in the usual course of business.

Third, the Court's precedents in analogous contexts support the conclusion that a hospital's receipt of Medicare payments does not constitute the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666.

Fourth, a finding by this Court that the receipt of payments for services provided under a federal program equates to the receipt of benefits under that program would lead to virtually limitless federal liability and thereby violate the fundamental principles of our federal system of government.

ARGUMENT

Federal crimes "are solely creatures of statute." *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). Therefore, "when assessing the reach of a federal criminal statute, [courts] must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area." *Dowling* v. *United States*, 473 U.S. 207, 213 (1985). It is, after all, "the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

In the matter before this Court, the plain language, legislative history, and purpose of 18 U.S.C. § 666 unequivocally mandate that Medicare payments to a hospital for services provided to Medicare patients cannot satisfy the statutory prerequisite for conviction. Furthermore, a contrary conclusion would violate this Court's precedents as well as the fundamental precepts of federalism.

I. THE PLAIN LANGUAGE OF 18 U.S.C. § 666 DEMONSTRATES THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The criminal statute at issue here, 18 U.S.C. § 666, requires -- as a statutory prerequisite for conviction -- that the organization, government, or agency affected by the defendant's theft or bribery receive "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." 18 U.S.C. § 666(b). The statute provides further that it "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).

The starting point in every case involving the construction of a statute is, of course, the language of the statute itself. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197

(1976). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Salinas* v. *United States*, 118 S. Ct. 469, 474 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)).

The Eleventh Circuit's tortured construction of § 666 is contrary to the plain language of the statute.

A. Medicare Payments to a Hospital for Services Provided to Medicare Patients Do Not Qualify as Benefits under 18 U.S.C. § 666(b).

An individual cannot be convicted under 18 U.S.C. § 666 unless the government has proven that the affected entity *received benefits under a federal program*. 18 U.S.C. § 666(b). In the instant case, the Eleventh Circuit held that WVHA's receipt of payments from Medicare for services provided to patients constituted receipt of benefits within the meaning of the statute and, therefore, satisfied the statutory prerequisite for Fisher's convictions. (Pet. App. 11 ("Because WVHA received *payments* under a federal assistance program, WVHA received a type of '*benefits*' expressly covered by § 666(b).") (emphasis added)). The language of the statute, however, is completely bereft of any support for this conclusion. No where does the language provide that a payment -- without more -- is a type of benefit. The language expressly states that the entity must receive benefits under a federal program, not merely payments.

A brief examination of the federal Medicare program

illustrates that it is the patient who receives the benefits under that federal program and not the health care provider. The hospital or other health care provider simply receives payments from Medicare for services provided to patients. The party that receives the benefits of that federal program is -- and remains at all times -- the individual patient.

Medicare is the federal health insurance program specifically established for individuals who are either disabled or 65 years of age or older. 42 U.S.C. § 1395 *et seq*. The Health Care Financing Administration ("HCFA"), which is a division of the United States Department of Health and Human Services, administers the Medicare Program. To that end, HCFA contracts with local insurance companies, which are called intermediaries under Part A and carriers under Part B, to process claims for reimbursement. 42 U.S.C. §§ 1395h, 1395u.

Medicare essentially consists of two parts: Hospital Insurance, which is known as Part A, and Supplementary Medical Insurance, which is known as Part B. See 42 U.S.C. § 1395 *et seq*. Part A provides insurance benefits for inpatient hospital services, skilled nursing facility services, home health care, and hospice care. 42 U.S.C. §§ 1395c-1395i-4. Part B provides insurance benefits for the cost of physician services, outpatient hospital services, medical equipment and supplies, and other health services and supplies. 42 U.S.C. §§ 1395j-1395w-4. Under Part A, the health care provider receives payments directly from Medicare. 42 U.S.C. § 1395f. Under

Part B, the health care provider receives payments either directly from Medicare or from the individual patient. 42 U.S.C. § 1395n.[3]

The language of the Medicare statute itself is absolutely clear that the patient is the recipient of the benefits, not the service provider. The statute prefaces that "[a]ny *individual entitled to insurance benefits* under this subchapter may obtain *health services* from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to *provide* him such *services*." 42 U.S.C. § 1395a (emphasis added). Part A specifically states: "The *benefits provided to an individual* by the insurance program under this part shall consist of entitlement to have *payment* made on his behalf." 42 U.S.C. § 1395d(a) (emphasis added). Part B specifically states: "The *benefits provided to an individual* by the insurance program established by this part shall consist of entitlement to have *payment* made to him or on his behalf." 42 U.S.C. § 1395k(a)(1) (emphasis added). Part B provides further that Medicare's use of private insurance carriers is intended "to provide for the administration of the benefits under this part with maximum efficiency and convenience for *individuals entitled to benefits* under this part

[3] In this case, the government failed to establish at trial whether the Medicare payments WVHA received were for services provided under Part A or Part B. The distinction between the two programs, however, ultimately is immaterial to the issue before the Court and, therefore, should have no bearing on the Court's analysis.

and for *providers of services . . . to such individuals*." 42 U.S.C. § 1395u(a) (emphasis added). A hospital is defined specifically under the statute as a "*provider of services*" and not a recipient of benefits. 42 U.S.C. § 1395x(u) (emphasis added). Under both Part A and Part B, therefore, it is the individual patient who receives the benefits, while the qualified health care provider simply provides services and receives payments for those services on a cost basis.

Accordingly, when the plain meaning of the term "benefits" is viewed in the relevant context of the federal Medicare program, it is beyond peradventure that WVHA did not receive the "benefits" necessary to satisfy the statutory prerequisite for Petitioner's convictions. To countenance the Eleventh Circuit's holding in this case -- *i.e.*, that the receipt of any payment for goods or services provided under a federal program equates to the receipt of a benefit under that program -- would lead to absurd results and a virtually limitless reach of Congress' authority under the Spending Power.

For example, under the Eleventh Circuit's rationale, a grocery store owner who receives payments from the federal government for groceries it provides to food stamp recipients would be considered to have received benefits under the federal food stamp program. Certainly, it is the customer who has received benefits under that federal program; the store owner has simply been compensated for the goods it provided. See *United States* v. *LaHue*, 998 F. Supp. 1182, 1192 (D. Kan.

1998) (finding that "there is no jurisdiction under section 666 when the target recipient of the pertinent federal benefit has received the funds Congress intended him or her to receive"), *aff'd*, 170 F.3d 1026 (10th Cir. 1999).

Similarly, under the Eleventh Circuit's reasoning, a university that accepts federal student loan checks as payment for the classes, housing, and meals it provides to students would be deemed to have received benefits under the federal student loan program. Undeniably, it is the student who is the beneficiary of that program, and the university is simply compensated for the goods and services it provided. See *United States* v. *Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993) (holding that the college never received federal funds under the loan program).

Many entities -- like WVHA -- receive payments from the federal government for goods or services that they provide under circumstances that may well be traceable ultimately to a federal program. The conclusion of the Eleventh Circuit that those payments are benefits, within the meaning of 18 U.S.C. § 666(b), should be rejected by this Court.

B. Medicare Payments to a Hospital for Services Provided to Medicare Patients Are Specifically Exempted from the Statute's Coverage by 18 U.S.C. § 666(c).

The statute also specifically exempts from coverage *expenses reimbursed in the usual course of business*. 18 U.S.C. § 666(c). Petitioner submits that the Medicare payments WVHA received from the government are precisely the type of expenses exempted under the plain language of 18 U.S.C. § 666(c).

As discussed previously, health care providers -- like WVHA -- provide services to Medicare beneficiaries and are then paid for those services by the government. This is a classic reimbursement scenario, occurring daily in the usual course of business. In fact, this Court has repeatedly held that health care providers are reimbursed for services rendered to Medicare beneficiaries. For example, in the case of *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 119 S. Ct. 930, 932 (1999), the Court acknowledged that "[u]nder the Medicare Act . . . , the Secretary of Health and Human Services reimburses the providers of covered health services to Medicare beneficiaries." Similarly, in *Shalala* v. *Guernsey Memorial Hospital*, 514 U.S. 87, 91 (1995), the Court recognized that "[u]nder the Medicare reimbursement scheme . . . , participating hospitals furnish services to program beneficiaries and are reimbursed by the Secretary through fiscal intermediaries." Additionally, in *Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 404 (1993), the Court stated that "[u]nder the [Medicare] program, providers

of health care services can enter into agreements with the Secretary of Health and Human Services pursuant to which they are reimbursed for certain costs associated with the treatment of Medicare beneficiaries." Finally, in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 205 (1988), the Court acknowledged that "[u]nder the Medicare program, health care providers are reimbursed by the Government for expenses incurred in providing medical services to Medicare beneficiaries."

WVHA's receipt of Medicare payments from the government constituted a purely commercial reimbursement transaction, identical in all respect to transactions between WVHA and other private insurance payors. As such, these payments are reimbursed in the usual course of business and, therefore, outside the reach of 18 U.S.C. § 666. See *United States* v. *Copeland*, 143 F.3d 1439, 1441-42 (11th Cir. 1998) (recognizing that organizations engaged in purely commercial transactions with the federal government are not subject to § 666).

To adopt the Eleventh Circuit's holding that there is simply no distinction between a benefit and a payment under the statute would render, in effect, the language of subsection c superfluous. This Court should reject such a result. *Hohn* v. *United States*, 118 S. Ct. 1969, 1976 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous."); *Freytag* v. *Commissioner*, 501 U.S. 868, 877

(1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990)). Subsections b and c -- when read in conjunction -- clearly contemplate a distinction between benefits and payments.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF 18 U.S.C. § 666 CONFIRM THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The legislative history and purpose of 18 U.S.C. § 666 confirm that the statutory language "receives benefits under a federal program" means the *actual receipt and administration of benefits* under a federal program and not the receipt of payments or the receipt of expenses reimbursed in the usual course of business.

Congress enacted § 666 as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). In enacting § 666, Congress intended "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

Specifically, Congress stated that it was the statute's "intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases." *Id.* at 370.

In the three cases cited by Congress, the government had provided a non-federal entity with federal funding for its operational expenses, including salaries, and then charged that entity with administering federal funds under a specific federal program. The briberies at issue were committed in relation to the administration of those funds. *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975) (bribery of a city agency that the government funded and then charged with administering federal monies under the HUD program); *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981) (bribery of a state program funded entirely by the government and charged with administering federal monies under the CETA program); *United States* v. *Hinton*, 683 F.2d 195 (7th Cir. 1982) (bribery of a community-based non-profit corporation that was funded by and charged with administering federal monies under the HUD program), *aff'd*, 465 U.S. 482 (1984).

These cases confirm that Congress' intent in enacting § 666 was to address malfeasance in connection with the actual receipt and administration of federal funds under a federal program. See *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) (holding that the intent of § 666 was "to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by

agents of organizations to whom such funds are 'disbursed' for further 'distribut[ion]' to or for the benefit of the individual beneficiaries"). Based on this intent, there could, of course, be instances where an entity receives benefits under the federal Medicare program. For example, the federal government does provide intermediaries and carriers with funding for their operational expenses and then entrusts them with the administration of federal funds under the Medicare program. See 42 U.S.C. § 1395h. Fraud or bribery involving such an entity would violate 18 U.S.C. § 666, as it is precisely the type of conduct that jeopardizes the integrity of the vast sums of money distributed through the Medicare program.

Here, however, Petitioner was convicted of fraud and bribery of WVHA, an entity that does not receive any funding from the federal government for its operational expenses and that was not responsible for administering federal funds under any federal program, including Medicare. The Eleventh Circuit's conclusion that federal money is "distributed" to WVHA through the federal Medicare program improperly characterizes the relationship between WVHA and the federal government. (Pet. App. 11-12 ("In this case, our determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money *distributed* to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs." (emphasis added)). No federal monies

were ever distributed to WVHA. WVHA simply received payments for services it provided to Medicare beneficiaries. Such payments do not satisfy the jurisdictional prerequisite of 18 U.S.C. § 666, and, therefore, Petitioner's convictions should be reversed.

III. THE COURT'S PRECEDENTS SUPPORT THE CONCLUSION THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The Court has not yet determined what constitutes the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666. *Salinas* v. *United States*, 118 S. Ct. 469, 472 (1997) ("We denied certiorari on the question whether the monies paid to the county were 'benefits' under a 'Federal program' under § 666(b), and we assume for purposes of this opinion that the payments fit those definitions."). The Court, however, recently considered an analogous question in the civil context -- specifically, when does an entity qualify as a recipient of federal financial assistance under Title IX. *National Collegiate Athletic Ass'n* v. *Smith*, 119 S. Ct. 924 (1999). Petitioner submits that the Court's decision in *Smith* supports the conclusion that a hospital's receipt of Medicare payments does not constitute the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666.

In *Smith*, the Court held that the Association's receipt of dues payments from recipients of federal funds -- *i.e.*,

federally funded member institutions -- did not constitute the receipt of federal financial assistance under Title IX. *Smith*, 119 S. Ct. at 926. The Court found that "[a]t most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members." *Id.* at 929.

In reaching this decision, the Court relied on its decisions in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), and *Grove City College* v. *Bell*, 465 U.S. 555 (1984). According to the Court, the teaching of *Paralyzed Veterans* and *Grove City* was that "[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." *Smith*, 119 S. Ct. at 929.

Petitioner submits that the entity that receives federal assistance under the federal Medicare program is the individual patient. The hospital or other health care provider simply receives payments for services provided and thereby profits economically or indirectly from the federal assistance afforded to those patients. As such, the hospital cannot be considered to have received federal assistance within the meaning of 18 U.S.C. § 666.

IV. THE ELEVENTH CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 666 VIOLATES THE FUNDAMENTAL PRECEPTS OF FEDERALISM.

Not only is the Eleventh Circuit's interpretation of 18 U.S.C. § 666 completely contrary to the plain meaning of the statute, its legislative history, and this Court's precedents, it also directly contradicts the fundamental precepts of federalism.

A long recognized constitutional principle, deeply rooted in our criminal justice system, is that the general police power resides in the states, not in the federal government. Therefore, the "States possess primary authority for defining and enforcing the criminal law." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). As this Court has acknowledged: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977).

The Eleventh Circuit's interpretation of § 666 that the receipt of any payment for goods or services provided under a federal program equates to the receipt of a benefit under that program would, in effect, lead to virtually limitless federal liability. To endorse such a broad reading of 18 U.S.C. § 666 would validate the continuous and inappropriate expansion of federal law enforcement into areas traditionally and appropriately belonging to state and local governments. The Court should not sanction such a result.

CONCLUSION

For the foregoing reasons, Mr. Fischer respectfully requests that the opinion of the United States Court of Appeals for the Eleventh Circuit be reversed and that his convictions under 18 U.S.C. § 666 and 18 U.S.C. § 1957, which were premised on § 666, be reversed.

Furthermore, Mr. Fischer may be entitled to reversal of his conviction in Count Six, conspiracy, as that count provided that three of the five possible offenses used to support the conspiracy were violations of 18 U.S.C. § 666. See *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931). Additionally, Mr. Fischer's remaining convictions in Counts Three through Five for mail fraud and wire fraud are intertwined with the other allegations of the superseding indictment and may be subject to reversal. Therefore, Mr. Fischer also asks that the case be remanded to the district court to make these determinations.

Respectfully submitted,

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December 15, 1999