IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:10-cr-186-MHT**
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

TOM COKER'S RESPONSE TO THE COURT'S PROPOSED INSTRUCTIONS TO THE JURY

COMES NOW TOM COKER, by and through his attorney of record and files this Response to the Court's Proposed Instructions to the Jury. This submission is divided into two sections: 1) Objections to the Court's proposed charge and 2) Objections to the Court's failure to give instructions requested. These Objections are being submitted prior to the Court's final charge as directed by the Court. During the charge conference the Court advised that it was going to incorporate and include Coker's objections identified below as number 1, 3, 5, 6, 12, 17 and 20. If those changes are made then those enumerated objections will become moot.

Objections to the Court's Charge

1). On Page 7, the first full paragraph, which recites the 11th Circuit's Basic Instruction 5, the Court has added the word "necessarily" to the 4th sentence ("Also, the number of witnesses testifying concerning any particular dispute is not necessarily

controlling.") This modifies the meaning of the charge in a way that makes it an incorrect statement of the law. The 11th Circuit Pattern charge clearly states that the number of witnesses is not controlling. It is further prejudicial to the defense which called a lesser number of witnesses than the Government.

2). On Page 13, the third element of the Conspiracy charge currently does not require that "one of the conspirators knowingly engage in a least one overt act as described in the Indictment." This final clause, "as described in the Indictment", is omitted from the Court's current charge but is included in the 11th Circuit's Pattern Offense Instruction 13.1.[1]

3). On Page 14, the first full paragraph, the Court's charge omits the term "knowingly". As such, it is an incorrect statement of the law. The last sentence of that paragraph should read: "...that a conspirator knowingly commits to accomplish some object of the conspiracy."

4). On Page 14, the second full paragraph, the Court's charge omits the term "knowingly". As such, it is an incorrect statement of the law. The second full sentence should read: "...understanding the unlawful purpose of the plan and knowingly and willfully joined in the plan...."

5). On Page 15, the first full paragraph, fails to specify that the single overall

[1] These objections are being submitted before there is a final agreed upon redacted Indictment. If all the overt acts are removed from the redacted Indictment, that is submitted to the jury, Coker withdraws this objection.

conspiracy must be the one charged in the indictment. The end of the sentence should read: "... unless one of the several conspiracies proved is the single overall conspiracy which the Indictment charges."

6). Similarly, on page 15, the first sentence of the second paragraph should read: "You must decide whether the single overall conspiracy charge in the Indictment existed between...."

7). On Page 16, the first element of the Federal Programs Bribery should be amended to reflect that the Government must prove that it is the "Legislature of the State of Alabama" which received benefits greater than $10,000. Both Counts Eight and Ten allege respectively that Senators Preuitt and Ross were members of the Alabama Senate. Further, the Indictment asserts throughout that the focus of the bribery scheme was the Alabama Legislature. Accordingly, the Government must prove the charges as set forth in the Indictment.

8). On Page 17, the fifth element of the Federal Programs Bribery should be amended to reflect that: "there was an explicit quid pro quo."[2]

9). On Page 17, Coker objects to the definition of "thing of value" because it includes the term "intangible". Further the definition is subjective in that, in its present

[2] Coker has already expressly adopted the requested instructions (and the law set forth therein) of McGregor's Requested Jury Instructions: Exhibit A–instructions regarding "quid pro quo" and related issues. Coker has also adopted McGregor's Exhibits B-F in his proposed instructions. Coker does so again as they relate to this Court's proposed jury instructions.

form, it is defined as what "the person soliciting or accepting considers to be worth something". Both of these matter violate to due process clause and are so vague as to prevent a reasonable person from understanding that they are violating the law.

10). On Page 18, Coker objects to the definition of "agent". The definition of an agent is confusing in its present form. Coker agrees that an agent is a person authorized to act on behalf of another (and in this case it should be on behalf of the State of Alabama and specifically with respect to its funds). However, the remaining portion of the definition, ameliorates this principle by implying that simply being an employee, etc. authorizes you to act on behalf of the principal. That is simply not the law.

11). On Page 19, the last paragraph, the first sentence should be modified to state that: "... when there is an explicit quid pro quo...."

12). Coker objects to the entire last paragraph on page 21 (that carries on to page 22). It is not a correct statement of the law that: "It is not a defense that the agent would have lawfully performed the specific official action even without the agreement...." An again, "... or which the agent would have taken anyway." If such were the case, there would not be a quid pro quo, let alone, an explicit one.

13). On Page 30, the third element of the Honest Services Charges incorrectly states the law. The 11th Circuit Pattern Charges 50.2 and 51.2 both require that the defendant act "willfully" (not "knowingly"). As set out in Basic Instruction 9.1 "willfully" is a completely different standard that "knowingly" and in fact, requires

among other things "the specific intent to something the law forbids".

14). On Page 30, the fifth element should require "an explicit quid pro quo".

15). On Page 31, the first sentence of the first full paragraph is objectionable because the Government must prove the scheme that was charged in the Indictment–not a scheme that is "substantially the same as the one charged in the Indictment."

16). On Page 35, the first sentence of the third full paragraph, should require: "... an illegal and explicit quid pro quo...."

17). Coker objects to the last paragraph on page 36 (carrying onto page 37) as it is not required or consistent with the facts of this case.

18). Coker objects to the Pinkerton charge being given at all in this case (as set out on pages 44-45 of the proposed jury instruction). Coker renews all his previous objections and filings in this regard, including those addressed in his duplicity motion with regard to Count 10 of the Indictment and the oral argument thereon.

19). On Page 46, Coker objects to the Court's instruction with regard to the term willfully. Specifically, Coker objects to the portion stating that: "... the person need not be aware of the specific law or rule that his or her conduct may be violating." Coker expressly objects to this charge based on his due process right and to avoid unconstitutional vagueness. The allegations of the Indictment involve campaign contributions, political speech and First Amendment rights so that this statement of the law is improper and inapplicable to the facts of this case.

20). On Page 46, the Court correctly quotes a portion of Basic Instruction 10.4 (the portion that relates to each defendant being considered separately and individually). However, the Court omits the portion that each charge must also be considered separately. Coker requests the Court insert: "Each charge and the evidence pertaining to it should also be considered separately."

Objections to the Denial of Coker's Requested Jury Instructions

Tom Coker objects to the following requested jury instructions which are not covered by the Court's proposed charge. Each of the following charges are: a) an accurate statement of the law; b) neither confusing nor misleading; and c) there is a factual basis for each.

21). Request #8--Bad Reputation or Opinion for Truthfulness (this charge is applicable as Gilley, Massey and Pouncy all opined that the others had poor reputation/opinion for truthfulness. The only exception was that Massey testified that Pouncy was honest.).

22). Request #13--Consider Only the Crimes Charged (applicable as Pouncy testified that Coker was getting offers together for Means, although Coker is not charged with bribing Means).

23). Request #25--Substantial Assistance (applicable as it clearly explains the 5K process. All three of the pleading government witnesses–Gilley, Massey and Pouncy–had

5K provisions in their plea agreements through which they testified they are hoping to reduce their sentence. The current charge fails to take into consideration the express role that the Government plays in holding the key to moving for a 5K and that the Judge cannot force the Government to file such a motion)[3].

24). Request #63--"Knowingly" Devised the Scheme (this request more accurately state the law than the Judge's current charge. However, in the alternative, the currently proposed charge could be covered by including the term knowingly on page 31, the second line as follows: "...defendant knowingly devised or participated....")

25). Request #70--What a Conspiracy is Not (this charge is applicable because of the testimony that the Gilley-folks and the McGregor-folks were both seeking passage of the bill but were doing so by different means and the charge clearly explains that having the same "ultimate goal" is not sufficient to prove a conspiracy. Further, this requested charge talks about joint and parallel activity which is consistent with the evidence in the case showing that there was not a single conspiracy but in fact two conspiracies: "The Gilley-folks" and "The McGregor-folks".)

26). Request #71--"The Conspiracy" Alleged in the Indictment (this charge is appropriate because the Indictment that was returned included the specific language that the things of value were offered "in return for" favorable votes. This is the conspiracy

[3] The originally submitted charge has a typographical error in the second paragraph wherein the word "drug" should be replaced by the word "bribery".

which the Government must prove–the one alleged in the Indictment.)

27). In addition, in Coker's Requested Charges Coker adopted numerous McGregor charges. Coker now adopts McGregor's objections to his charges which were omitted and are not covered by the Court's proposed charge.

28). Coker adopts the objections of all other defendants raised in regard to the proposed charge.

29). Coker adopts the requested charges of all other defendants which are not covered by the Court's proposed charges.

30). Coker adopts all the grounds in his previously filed motions, oral argument and other pleadings concerning the aforementioned jury instruction issues. Coker similarly adopts the previously filed motions, argument and other pleadings concerning the same which have been raised by all co-defendants.

Respectfully submitted,

/s/ David McKnight

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Certificate of Service

I certify that on August 4th, 2011, a true and correct copy of the foregoing was filed with PACER and copies distributed to all counsel of record on this date.

/s/ David McKnight

David McKnight