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.	)	

MOTION TO DISMISS COUNTS 1, 8 AND 31 OF THE INDICTMENT AS TO TOM COKER AND BRIEF IN SUPPORT THEREOF

COMES NOW the Defendant, Thomas E. Coker, by counsel, and submits this Motion and Brief, requesting this Honorable Court to dismiss the remaining counts against him on the grounds of Double Jeopardy. As grounds for and in support of his motion Coker states as follows:

1. Coker seeks the dismissal of all remaining counts against him, based on the issue-preclusion component of Double Jeopardy, and based on the jury's not guilty verdicts on certain counts. The law and facts regarding this issue have previously been addressed in Coker's Motion for Judgment of Acquittal After Discharge of the Jury. (Doc. 1748 pp. 35-36) Further, they have also been addressed (and Coker adopts) the arguments set out in Preuitt's Brief (Doc. 1807), Means' Brief (Doc. 1750) and

McGregor's Briefs (Docs. 1804 and 1805)[1] raising this identical issue. Out of an abundance of caution and as a supplement to his previously filed Motion (and those adopted above), Coker makes this Motion to Dismiss based on Double Jeopardy grounds.

2. In order to promote judicial economy, Coker adopts the arguments and authorities cited above as if herein set forth and will not repeat them herein.

3. As additional, support for this Motion, Coker presents this Court with the recently decided case of *United States v. Coughlin,* 610 F.3d 89 (DC Cir. 2010). In addition, Coker cites the Court to the factual similarity of Counts 29 (Coker acquitted) and Counts 31 (jury hung).

Additional Factual Support: Counts 29 and 31

Both Counts 29 and 31 allege violations of the honest services wire fraud statute. Both Counts 29 and 31 involve calls between Milton McGregor and Tom Coker, while McGregor was in Nevada and Coker was in Alabama, which are very similar in content. Count 29 involves a call which occurred on March 16, 2010 at 2:57 p.m. and a transcript of this recording was admitted as J-136. Count 31 involves a call which occurred on March 17, 2010 at 10:26 a.m. and a transcript of this recording was admitted as J-138. Coker was found not guilty of Count 29 but the jury did not reach a verdict on Count 31. The content of the calls is so similar that the United States used these two calls as an

[1] Document 1804 is McGregor's Motion for Judgment of Acquttal and the issue is dealt with on pages 45-59. Document 1805 is McGregor's Motion to Dismiss Based on Double Jeopardy.

example of juror confusion and inconsistency in support of its motion for severance at the hearing held on August 25th before this Court. Since Coker has been found not guilty on Count 29 the Goverment is precluded from retrying him on Count 31 (and as set out below Counts 1 and 8).

The specific content of these calls which is alleged to have violated the honest services provisions are identical in both counts and that is that the conversation concerned "the pro-gambling legislation and PREUITT'S vote". (Indictment p. 59) The essence of both conversations as it relates to this issue is very similar and deals specifically with Dr. Hubbert and his position as to Preuitt's campaign. There is nothing of an illegal nature in either call. That the jury returned a verdict of not guilty on Count 29 and could not reach a verdict on Count 31 is wholly inexplicable from the content of these calls. In fact, the content of the calls is so innocuous that neither call is itemized or addressed in any fashion in the extensively detailed overt acts section of the conspiracy charge. The jurors verdict on Count 29 requires this Court, at a minimum, to dismiss Count 31. However, as noted below, even if the Government asserts that there are differences in these calls and the Court finds such to exist, that is entirely irrelevant and Double Jeopardy still bars a re-trial as noted below.

Additional Legal Support: *Coughlin*

In *United States v. Coughlin*, 610 F.3d 89 (DC Cir. 2010), the defendant was alleged to have committed honest services mail fraud with regard to the September 11th

Victim Compensation Fund which had awarded him over $300,000 for damages he claimed to have sustained in the 9/11 attack on the Pentagon. Five of the charges brought against Coughlin, a naval officer, charged mail fraud (one for each time he had sent a letter to the VCF fund claiming he was eligible for compensation).[2] The jury acquitted Coughlin on 3 mail fraud counts but was unable to reach a verdict on 2 others.

The Government moved to retry the officer, and he objected, citing the prohibition on double jeopardy. During the second trial, the Supreme Court handed down the *Yeager* case.[3] In light of *Yeager* the Coughlin moved to dismiss the remaining counts on double jeopardy grounds. The district court denied the motion. Couglin then filed an appeal and an emergency motion to stay the ongoing retrial. The DC Circuit Court reversed the trial court and dismissed the remaining counts holding that the jury necessarily decided that Coughlin lacked fraudulent intent during the entire period encompassed by the charged mailings. *Id.* at 97.

Citing the United States Supreme Court case of *Carter v. United States,* 530 U.S. 255, 261 (2000), the Court noted that in essence, the mail fraud statute requires two basic elements: 1) a scheme to defraud and 2) a mailing for the purpose of executing that scheme. *Id.* at 286. In reaching its decision, the Circuit Court ruled that the content of

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[2] *Coughlin's* jury hung on two other counts: one count of theft of public money and one count of making a false and fraudulent claim. Neither are applicable to Coker and thus not addressed in this Brief.

[3] The case of *Yeager v. United States*, 129 S.Ct. 2360 (2009) is addressed in Coker's Motion for Judgment of Acquittal. (Doc. 1748 pp.35-36)

the mailings were irrelevant. The Court wrote:

> The jury may well have thought there were no misrepresentations in any of the three mailings at issue. But even if it did, it could not have acquitted Coughlin on that basis. The law is clear that 'innocent mailings'–ones that contain no false information–may supply the mailing element. It is also clear that 'the elements of mail fraud may be satisfied where the mailings are routine.

Id. at 287. Therefore, the Court noted that it could conclude that the jury necessarily found that [Coughlin] lacked fraudulent intent when he mailed each of the three letters referenced in those counts. *Id.* at 287. The Court's reasoning was that "all of these mailings would have furthered a fraudulent scheme–if there were one ...." *Id.* at 288. In explaining its rationale, the Court wrote the following which is equally applicable to Coker:

> The government did not proffer at trial–and does not suggest on appeal–any evidence or theory to support the proposition that Coughlin harbored a fraudulent scheme on February 3 (Count One), abandoned it on February 17 and 20 (Counts Two and Three), revived it on March 9 (Count Four), and abandoned it again prior to seeking a hearing on April 30 (Count Five). Nor can we identify any record support for such a bouncing ball of a mail fraud scheme.

Id. at 289. Similarly, there is no "bouncing ball" of a wire fraud scheme as it relates to Coker–he did not harbor the requisite intent in early March, abandon it on March 16th and then revive it on March 17th. Therefore, Coker may not be re-tried as to Count 31.

In addition, the jury was unable to reach a verdict as to two other Coker counts, namely: Count One (conspiracy to commit bribery) and Count Eight (bribery as to Preuitt). It is established that the scheme to defraud, as alleged in the honest services

counts, is a bribery scheme as alleged in the substantive bribery counts. Accordingly, since the jury has found, by acquitting Coker on Count 29, that Coker did not have the intent to commit the scheme (i.e. the bribery scheme), Coker cannot be tried again on that issue as it relates to Counts One and Eight. Accordingly, the Government is barred from retrying Coker on Counts One, Eight or Twenty Nine by the Double Jeopardy doctrine. Coker's Motion to Dismiss all remaining counts against him is due to be granted.

WHEREFORE, Coker respectfully requests that his Motion to Dismiss be granted.

Respectfully submitted this 3rd day of October, 2011.

s/ David McKnight
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David McKnight
Of Counsel