

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

UNITED STATES OF AMERICA )  
 )  
 v. ) CR. NO. 2:10cr186-MHT  
 )  
 MILTON E. McGREGOR )  
 THOMAS E. COKER )

**UNITED STATES' RESPONSE REGARDING DUPLICITY OF COUNTS FIVE AND  
TEN AND A POTENTIAL PINKERTON INSTRUCTION**

The United States of America, as directed by the Court at the hearing on April 25, 2011, submits this supplemental response regarding defendant McGregor's and defendant Coker's motions to dismiss Counts 5 and 10 based upon duplicity (Docs. 426 and 451). On April 25, 2011, the Court instructed the United States to address the potential application of a Pinkerton instruction to the jury in this case, and its impact on the duplicity issue raised by the defendants. As set forth below, the government will be seeking the 11th Circuit pattern instruction on Pinkerton liability as to all substantive counts as to all defendants. However, in the government's view, the Pinkerton instruction should not alter the reasoning relied on in the Recommendation of the Magistrate Judge that the defendants' motions to dismiss based upon duplicity be denied.

Under the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946), the criminal act of one coconspirator, if it was committed within the scope of and in furtherance of the conspiracy, can be attributed to another coconspirator for the purpose of holding the latter responsible for substantive offenses, provided the criminal acts were reasonably foreseeable as a necessary or natural consequence of the conspiracy. Pinkerton, 328 U.S. at 647-48; United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986). It imposes liability on coconspirators for substantive offenses (not

conspiracy) based upon their affiliation with the conspiracy. See United States v. Armstrong, 619 F.3d 380, 387 (5th Cir. 2010). As an alternate theory of liability, like aiding and abetting, it is not a separate crime. The 11th Circuit pattern Pinkerton instruction, an adaptation of the one set forth in United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), states:

During a conspiracy, if a conspirator commits a crime to advance the conspiracy toward its goals, then in some cases a coconspirator may be guilty of the crime even though the coconspirator did not participate directly in the crime.

So regarding counts \_\_\_\_\_, and Defendants \_\_\_\_\_, if you have first found [either] [any] of those Defendants guilty of the crime of conspiracy as charged in Count \_\_\_\_\_, you may also find that Defendant guilty of any of the crimes charged in Counts \_\_\_\_\_ even though the Defendant did not personally participate in the crime. To do so, you must find beyond a reasonable doubt:

1. during the conspiracy a conspirator committed the additional crime charged to further the conspiracy's purpose;
2. the Defendant was a knowing and willful member of the conspiracy when the crime was committed; and
3. It was reasonably foreseeable that a coconspirator would commit the crime as a consequence of the conspiracy.

11th Cir. Pattern Instruction 13.5 ("Pinkerton Instruction").

Appellate review of the propriety of a Pinkerton instruction is limited to "whether the evidence was sufficient for a reasonable jury to have concluded, beyond a reasonable doubt, that the [substantive offense] was a reasonably foreseeable consequence of the [charged conspiracy]." United States v. Mothersill, 87 F.3d 1214, 1217 (11th Cir. 1996) (quoting Alvarez, 755 F.2d at 848). In making this assessment, the appellate court "must view the evidence in the light most favorable to the government and accept all reasonable inferences and credibility choices made by the jury." Alvarez, 755 F.2d at 848. The government will be seeking such an instruction in this case.

As Pinkerton liability is merely an alternative way for defendants to be found guilty of substantive counts, it does not address the potential duplicity issue raised by defendants McGregor and Coker as to Counts 5 and 10. Their argument, in sum, is that each of those counts charge two distinct criminal acts. In its response to the defendants' motions to dismiss, the government has proposed to eliminate that potential duplicity by electing which part of those counts it is pursuing against defendants McGregor and Coker. See Doc. 609 at 6. Specifically, with respect to Count 5, any concern that it is duplicitous is rendered moot by limiting the charge against defendant McGregor to the promise to give defendant Means campaign contributions in "unspecified amounts." The additional conduct in that count (the promise to give \$100,000 to Means) is attributable to defendants Gilley and Massey, and Lobbyist A, all of whom have pled guilty, and thus that specific conduct can be eliminated from the jury's consideration on Count 5 in order to avoid any issue of duplicity.

Similarly, with respect to Count 10, the alleged duplicity is mooted by limiting the charge against defendants McGregor and Coker to the promise to give defendant Ross campaign contributions in "unspecified amounts." The additional conduct in that count (promising \$25,000 to Ross) is attributable to defendants Gilley and Massey, and Lobbyist A, all of whom have pled guilty. Thus, that additional conduct can be eliminated from the jury's consideration on Count 10 in order to avoid any issue of duplicity.

The requested Pinkerton liability instruction will apply to Counts 5 and 10, just as with the other substantive counts; but as to Counts 5 and 10, it will only apply to the conduct that the government has elected as to defendants McGregor and Coker. It will not revive the additional conduct specified in those substantive counts, which was only addressed to Gilley, Massey, and

Lobbyist A.

DATED: April 27, 2011

Respectfully submitted,

LANNY A. BREUER  
Assistant Attorney General, Criminal Division  
Attorney for the United States  
Acting Under Authority of 28 U.S.C. § 515

JACK SMITH, Chief  
Public Integrity Section

By: /s/ Justin V. Shur  
Justin V. Shur  
Deputy Chief  
Public Integrity Section  
Criminal Division  
U.S. Department of Justice  
1400 New York Avenue, NW, 12th Floor  
Washington, DC 20005  
(202) 514-1412

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I caused the foregoing to be filed with the Clerk of the Court, and caused notification to be provided to all counsel of record.

/s/ Justin V. Shur

Justin V. Shur

Deputy Chief

Public Integrity Section

Criminal Division

U.S. Department of Justice

1400 New York Avenue, NW, 12th Floor

Washington, DC 20005

(202) 514-1412