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 REPLY TO UNITED STATES' RESPONSE REGARDING DUPLICITY OF COUNT TEN AND POTENTIAL PINKERTON INSTRUCTION

COMES NOW TOM COKER, by and through his attorney of record and replies to the Government's Duplicity and Pinkerton response as follows:

11th Circuit Law is Clear–Count 10 is Duplicitious

Regardless of whether the Government seeks a *Pinkerton* charge or not, Count Ten is duplicitous and should be dismissed. The prevailing standard in this Circuit is very clear and was established in *Bins v. U.S.,* 331 F.2d 390 (5th Cir. 1964). *Bins* holds that while two or more offenses may be joined in the same indictment it is "**require[d]** that each be stated in a separate count." (emphasis added) Count 10 of the current indictment violates this rule and is contrary to the law of the Eleventh Circuit. While other circuits are more lenient in this regard the Eleventh Circuit has remained firm that duplicity cases must be addressed under the "*Bins* analysis". (See, *United States v. Schlei,* 122 F.3d 944,

979 (11th Cir. 1997) ("Other circuits have not adopted the ... approach of *Bins*. The Eleventh Circuit however, has adhered to the *Bins* court's analysis.") *U.S. v. Davis*, 730 F.2d 669, 672 (11th Cir. 1984) ("Although the rationale of *Canas* may be tempting, we are bound by the decision of the former Fifth Circuit Court of Appeals in Bins"). Under *Bins*, Count 10 is duplicitous and due to be dismissed.

Even Under *Saleh* The Joinder In Count 10 Is Error

At the hearing on this matter the Court raised the case of *United States v. Saleh,* 875 F.2d 535 (6th Cir. 1989) to support the proposition that there is no duplicity problem because the single count indictment grouped defendants rather than multiple offenses against a single defendant. As such, this decision would be contrary to the law of the Eleventh Circuit and should not be followed by this Court. However, in *Saleh* the Sixth Circuit did not condone the joinder of the two crimes into one count but, to the contrary found it to be error. The Sixth Circuit ruled:

> Nevertheless, even a liberal construction of Rule 8(b) does not support the government's argument that joint indictment was proper in this case.... On these facts we hold that joint indictment violated Rule 8(b); therefore the defendants' motions to sever should have been granted.

Id. at 538. Although the Court went on to hold that this error harmless because it was cured by the instructions of the court and the "overwhelming" evidence in the case, the point is, the Court found the joinder to be error.[1] By allowing Count 10 to stand, even

[1] Although the Sixth Circuit found the error to be harmless , the Eleventh Circuit found in *Schlei* that the trial court abused its discretion allowing a duplicitous count to go

under the *Saleh* analysis, error is being allowed to proceed which this Court can only hope is cured.[2] The fairer and safer course of action is to dismiss the Count or require the Government to elect (which it has already done by accepting the guilty pleas of Gilley and Massey). Otherwise, as the dissenting opinion in *Saleh* observed: "[i]t is impossible to say that the jury did not similarly confuse the evidence against one defendant with the evidence against the other. In view of the confusion, it is even impossible to say that the jury did not in fact convict the two defendants of a joint crime rather than two separate crimes." *Id.* at 539-40. Given Coker's due process rights, coupled with his liberty interests that are at stake, this is not a roll of the dice this Court should condone. Under *Saleh*, Count 10 is duplicitous and due to be dismissed.

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to the jury (*Schlei*, supra at 980) and the Fifth Circuit, in *Bins,* called it reversible error. *Bins,* supra at 393.

[2] Other trial court's in the Sixth Circuit have even cited *Saleh* for the proposition that such counts should not be joined. (See, *U.S. v. Gallo,* 1999 WL 9848, 4 (S.D.N.Y.,1999) (citing *Saleh* as standing for the principle "that even under a 'liberal construction of Rule 8(b)' it was not proper to join both defendants in the same indictment where the evidence indicated 'only that each defendant violated the same statutes at the same time and place').

A Pinkerton Charge Is All The More Reason Why Count 10 Should Be Dismissed[3]

The Government's acknowledgment that it will seek a Pinkerton charge is all the more reason why Coker's motion is due to be granted. As Coker has previously pointed out the issue of duplicity raises concerns of:

- avoiding the uncertainty of a general guilty verdict by concealing the finding of guilt as to one crime and the finding of not guilty as to another;
- avoiding the risk that jurors may not have been unanimous as to any one of the crimes charged;
- assuring the defendant adequate notice of charged crimes;
- providing the basis for appropriate sentencing (if necessary);
- providing adequate protection against double jeopardy in subsequent prosecutions; and
- difficulties dealing with the admissibility of evidence. (Doc. 426 pp.1-2)

Those dangers alone are sufficient reason to dismiss Count 10 under normal circumstances. However, this is not a normal case. Those issues are compounded by the fact that:

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[3] This filing addresses the impact of a *Pinkerton* charge on Coker's assertion that Count 10 is duplicitous. It does not address whether a *Pinkerton* charge is appropriate. It is believed that the latter decision will be made at the charge conference, with input from all the defendants and not just that of Coker and McGregor. However, Coker believes that such a charge is inappropriate and adopts the arguments of McGregor who will be making a supplemental filing today regarding duplicity and *Pinkerton* liability in general.

- this is a complex case involving charges against nine different persons;
- the charges involve complex federal criminal statutes, each of which will have to be explained to the jury (including the elements of charges of conspiracy; bribery under both (a)(2) and (a)(1)(B); Hobbs Act; honest services mail and wire fraud; money laundering; false statements; obstruction of justice; and forfeiture–some of the statutes having cutting edge issues and conflicts among the circuits);
- count 10 charges separate crimes against different groups of people, occurring at different times through different means;
- the "other group" of people (Gilley and Massey) have already pled guilty to their activities which should not have been included in the same count to start with;
- Count 10 is a bribery count and the divergent elements ($25,000 by Gilley and Massey versus "other unspecified benefits" by McGregor and Coker) go directly to the issue of quid pro quo, which as addressed in other motions, and is complicated by First Amendment and Due Process issues;
- the charge against McGregor and Coker of "other unspecified benefits" brings significant vagueness into the count by itself; and
- the cautionary instructions in this case are already going to be confusing as to which evidence applies to which defendant in which count (and, if not

remedied, will now have to be made with regard to defendants in the same count).

Now the Government seeks to introduce a *Pinkerton* charge which has been described as "rather convoluted and confusing" in and of itself. *People of Virigin Islands v. Ward*, 2010 WL 3037256, 11 (V.I.Super., 2010). The Government's decision to seek this charge should be the final straw. In its Response the Government asserts that *Pinkerton* adds the following addition burdens on the jurors:

- determining whether the criminal act of one coconspirator was committed within the scope of the conspiracy
- whether it was in furtherance of the conspiracy;
- whether it was reasonably foreseeable as a necessary or natural consequence of the conspiracy. (Doc. 1023 p.1)

But, if the Government receives a Pinkerton charge, then the defense would be entitled to have the jury instructed that liability will not lie, if the substantive crime did not fall within the scope of the unlawful project or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *U.S. v. Hansen,* 262 F.3d 1217, 1246 (11th Cir. 2001). This is simply too much to ask of a jury (and unfair to the defendant) when all this could have simply been resolved by proper drafting of the indictment and charging separate crimes in separate counts as called for in *Bins*. Coker's liberty should rise and fall on his guilt or

innocence, not on the hope that this incorrectly drafted count can be sorted through by the jury and cured by the Court. Further, the Court should not be required to guess what the grand jury intended when it returned Count 10 and the Government should not be allowed to invade the province of the grand jury and tell us what it believes the grand jurors intended. Under the combination of all these factors, and on grounds of fundamental fairness, Count 10 is duplicitous and due to be dismissed.

Respectfully submitted,

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