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
	)	
THOMAS E. COKER	)	
MILTON E. MCGREGOR	)	

UNITED STATES' COMBINED RESPONSE TO DEFENDANT COKER'S AND McGREGOR'S MOTIONS FOR DISMISSAL OR OTHER RELIEF BASED ON DUPLICITOUS NATURE OF COUNTS FIVE AND TEN

The United States of America, through undersigned counsel, hereby responds to defendant Coker's motion to dismiss Count Ten based upon its duplicitous nature (Dkt. No. 426) and defendant McGregor's motion to dismiss Counts Five and Ten or other relief based on their duplicitous nature (Dkt. No. 451). As demonstrated below, neither Count Five nor Ten is duplicitous because no defendant is charged with more than one offense in either Count. Additionally, the allegations in Count One are explicitly incorporated into both Counts Five and Ten, which make clear which defendant is charged with what conduct. The Indictment, therefore, is not duplicitous and defendants' motions to dismiss Counts Five and Ten should be denied. Moreover, any perceived confusion from the Indictment, however unlikely, is cured by the United States' delineation of the scope of the pending charges and can be further remedied by the Court, if necessary, with appropriate charging and jury instructions.

I. Defendants' Motions

A. Defendant Coker

On February 3, 2011, defendant Coker filed a motion for dismissal of Count Ten of the

Indictment arguing that it is improperly duplicitous because it charges defendants Gilley, Massey, McGregor, Coker and Lobbyist A with promising to give campaign contributions, including promises of $25,000 and other unspecified amounts to defendant Ross to influence him in connection with an upcoming vote on pro-gambling legislation. Defendant Coker then points to Count Eleven of the Indictment wherein defendant Ross is charged with agreeing to accept campaign contributions of "at least $20,000" from defendants Gilley, Massey and Lobbyist A, and Count Twelve where defendant Ross is charged with agreeing to accept "an unspecified amount" of campaign contributions from defendants McGregor and Coker. Defendant Coker claims that because Count Ten does not mirror Counts Eleven and Twelve, the Indictment is duplicitous and thus, Count Ten must be dismissed, at least as to defendant Coker. In the alternative, defendant Coker asks the Court to strike from these counts any allegation that defendant Coker is responsible for any campaign contributions allegedly promised or offered by anyone other than himself.

B. Defendant McGregor

On February 4, 2011, defendant McGregor filed a similar motion seeking to dismiss both Counts Five and Ten of the Indictment based on their alleged duplicitous nature. Defendant McGregor claims that Count Five contains allegations that defendants Gilley, Massey, McGregor and Lobbyist A promised to give campaign contributions, including promises of $100,000 and other unspecified amounts, to influence and reward defendant Means in connection with an upcoming vote on pro-gambling legislation. Relatedly, defendant McGregor notes that Count Six of the Indictment charges defendant Means with agreeing to accept "approximately $100,000" from defendants Gilley, Massey and Lobbyist A, while Count Seven charges defendant Means with agreeing to accept an "unspecified amount" of campaign contributions from defendant McGregor. Defendant McGregor

claims that because Count Five does not mirror Counts Six and Seven, those Counts are duplicitous and thus, must be dismissed, at least as to defendant McGregor. In the alternative, defendant McGregor asks the Court to strike from these Counts any allegation that defendant McGregor is responsible for any campaign contributions allegedly promised or offered by anyone other than himself.

II. Argument

A count in an indictment is duplicitous if it charges two or more separate and distinct offenses. United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). "[T]he key issue to be determined is what conduct constitutes a single offense." United States v. Seher, 562 F.3d 1344 (11th Cir. 2009) (citing Schlei, 122 F.3d at 977). Duplicity is only a pleading rule and, thus, the operative question is whether an indictment can be read to charge only one violation in each count. C. Wright, 1A Federal Practice and Procedure: Criminal § 142 (3d ed. 1999). Moreover, "as is proper for pleading rules, duplicity . . . [is] not fatal to an indictment. . . ." Id.; see United States v. Quinn, 401 F. Supp. 2d 80, 104 n.24 (D.D.C. 2005). "Duplicitous pleading . . . is not presumptively invalid; rather it is impermissible only if it prejudices the defendant. United States v. Olmeda, 461 F.3d 271, 281 (2d Cir. 2006).

Read properly, the Indictment in this case is not duplicitous. Neither Count Five nor Ten charge defendants McGregor or Coker with multiple offenses within the same Count. Rather, each Count charges multiple defendants with the same offenses – federal program bribery and aiding and abetting in violation of 18 U.S.C. §§ 666(a)(2) and 2. Both defendants McGregor and Coker claim that, as currently pled, they are in jeopardy of being tried under Counts Five and Ten for promises allegedly made by other defendants. This is simply not the case.

As indicated above, the allegations in Count One, which charges defendants McGregor, Coker and others with conspiracy in violation of 18 U.S.C. § 371, lists specific overt acts that have been explicitly incorporated by reference into both Counts Five and Ten. As such, a review of the overt acts delineated in Count One identifies that conduct for which the respective defendants have been charged. For instance, paragraph 79 of the Indictment states that "on or about March 24, 2010, Lobbyist A, on instructions from MASSEY, told MEANS that MASSEY and GILLEY would make the $100,000 contribution." This allegation clearly applies only to defendants Massey, Gilley and Lobbyist A, and not to defendant McGregor. Additionally, paragraph 75 of the Indictment refers to a March 22, 2010, telephone conversation between defendants McGregor and Means, in which defendant McGregor promises financial support to defendant Means in unspecified amounts related to the then pending pro-gambling legislation. Again, there is no ambiguity as to which defendant is being charged with this conduct—defendant McGregor.

The same holds true for Count Ten of the Indictment. Count One of the Indictment lists numerous overt acts, which are incorporated by reference into Count Ten. A review of paragraphs 119, 120, 125 and 127 detail the conduct of defendants Gilley, Massey and Lobbyist A with regard to promises of specific amounts of money to defendant Ross. Additionally, paragraphs 129 and 131 of the Indictment describe telephone conversations between defendant McGregor and Ross, and defendants McGregor and Coker in March 2010, in which defendants McGregor and Coker discuss their promises of financial support to defendant Ross in unspecified amounts related to the then pending pro-gambling legislation. Again, there is no ambiguity as to which defendants are being charged with this conduct—defendants McGregor and Coker.

Even apart from the fact that the Indictment is properly pled, the potential parade of horribles typically associated with duplicitous indictments—(1) that a jury may convict a defendant without unanimously agreeing on the same offense; (2) that a defendant may be prejudiced in a subsequent double jeopardy defense; and (3) that a court may have difficulty determining the admissibility of evidence[1]—does not exist here.

First, contrary to the suggestion made by defendant Coker of a perceived danger that the jury's verdict may not be unanimous (a concern the United States submits is unwarranted) could be remedied easily by the Court with an appropriate jury instruction. The United States has little doubt that if the Court believed there was a danger of the jury reaching a less than unanimous verdict, the Court, in consultation with the parties, would fashion an appropriate instruction to the jury about what they must agree upon to reach a unanimous verdict. Courts routinely fashion such instructions and have done so in cases involving far more complex facts than are at issue here. See, e.g., Schlei, 122 F.3d at 980 (finding unanimity instruction to jury could have cured risk that jury improperly convicted defendant without unanimous agreement on which of multiple transactions formed basis for conviction); United States v. Bruce, 89 F.3d 886, 890 (D.C. Cir. 1996) (holding that "the judge carefully instructed the jury that they must unanimously agree . . . thereby eliminating the possibility of a nonunanimous verdict."); United States v. Shorter, 809 F.2d 54, 56-58 (D.C. Cir. 1987) (rejecting duplicity argument for dismissal and noting that trial court gave special unanimity instruction). A special verdict form could also be used to help alleviate any possible confusion.

Second, the United States has confirmed on the record, here and in Count One of the Indictment, that the pending charges relate specifically to the defendants' individual conduct.

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[1] See Schlei, 122 F.3d at 977.

Defendants, thus, have no plausible fear of double jeopardy or that the Court will improperly sentence them, because they can rely upon the government's admissions in support of a plea of double jeopardy in a future proceeding or at their future sentencing before the Court. See, e.g., United States v. Shorter, 608 F. Supp. 871, 880, 880 n.24 (D.D.C. 1985) (finding defendant's fears of double jeopardy unwarranted where government affirmed scope of the charges on the record), aff'd, 809 F.2d 54 (D.C. Cir. 1987).

Nevertheless, defendants' concerns can be properly addressed by this Court through the use of limiting instructions with respect to both Counts Five and Ten. See, e.g., United States v. Bins, 331 F.2d 390, 393 (5th Cir. 1964) (noting that a court can correct the duplicitous nature of an indictment through the use of, among other things, a limiting jury instruction). Indeed, this is the preferred remedy in such a situation. In the case of Count Five, any concern that it was duplicitous would be rendered moot by limiting the promise to give campaign contributions of $100,000 to defendant Means to defendants Gilley, Massey and Lobbyist A, and limiting the promise to give campaign contributions in "unspecified amounts" to defendant McGregor. The same remedy could be applied to Count Ten, which would address the concerns of both defendants Coker and McGregor.

III. Conclusion

For the foregoing reasons, the Court should deny defendant Coker's motion to dismiss Count Ten of the Indictment and defendant McGregor's motion to dismiss Counts Five and Ten of the Indictment. Rather, the Court should simply issue limiting instructions as to the two counts so as to prevent any confusion as to which defendants are charged with what conduct.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2011, I filed the foregoing using the Court's CM/ECF system, which will provide notice to counsel of record.

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