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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

MOTION OF MILTON McGREGOR FOR DISMISSAL OR OTHER RELIEF, BASED ON DUPLICITOUS NATURE OF COUNTS FIVE AND TEN

Milton McGregor hereby respectfully moves for dismissal or other relief, as discussed herein, based on the duplicitous nature of Counts Five and Ten of the indictment (Doc. 3). This motion is related to a motion by Mr. Coker, Doc. 426.

Counts 5 and 10 are improperly "duplicitous." A count in an indictment is duplicitous if it charges, in one count, two or more separate and distinct offenses. *United States v. Schlei*, 122 F.2d 944, 977 (11th Cir. 1997). The Eleventh Circuit adheres to the approach to duplicitousness derived from *Bins v. United States*, 331 F.2d 390 (5th Cir. 1964): in a nutshell, if distinct alleged violations can be charged separately, they must be charged separately. *Schlei*, 122 F.3d at 979.

The duplicitous nature of Count Five, in this regard, is easily seen through a comparison with Counts Six and Seven. Count Five is a § 666(a)(2) charge against Mr. McGregor and others, for allegedly promising campaign contributions. (Doc. 3, pp. 43-

44, ¶¶ 197-98). Counts Six and Seven are § 666(a)(1)(B) charges against Senator Means, for allegedly agreeing to accept those same campaign contributions. (Doc. 3, pp. 44-45, ¶¶ 199-202). Counts Six and Seven appropriately divide the allegation into two separate and distinct offenses. Count Six alleges agreement to accept $100,000 in campaign contributions from Mr. Gilley, Mr. Massey and Lobbyist A (but not Mr. McGregor). (Doc. 3, p. 44, ¶ 200). Count Seven alleges agreement to accept "an unspecified amount" in campaign contributions from Mr. McGregor (but not from others). (Doc. 3, p. 45, ¶ 202). Yet on the alleged "promisor" side, Count Five, these two separate and distinct counts are all lumped together, such that Mr. McGregor is alleged to be criminally responsible not only for his own alleged promise (allegedly involving an "unspecified amount" of campaign contributions) but also for an alleged promise of $100,000 in campaign contributions made by Mr. Massey and others. (Doc. 3, p. 43, ¶ 198). Count Five is duplicitous, as it improperly contains in one count the mirror image of the two separate and distinct Counts Six and Seven.

Similarly, the duplicitous nature of Count Ten is reflected in comparison to Counts Eleven and Twelve. Count Eleven charges Senator Ross under § 666(a)(1)(B) with agreeing to accept "at least $20,000" in campaign contributions from Mr. Gilley, Mr. Massey, and Lobbyist A. (Doc. 3, pp. 48-49, ¶¶ 209-10). Count Twelve, separately and distinctly, charges Senator Ross under § 666(a)(1)(B) with agreeing to accept "an unspecified amount of campaign contributions" from Mr. McGregor and Mr. Coker. (Doc. 3, p. 49, ¶¶ 211-12). Yet on the alleged "promisor" side, Count Ten lumps these two separate and distinct things into one single count. (Doc. 3, pp. 47-48, ¶¶ 207-08).

Counts Five and Ten are therefore duplicitous under the *Schlei/Bins* standard. As for the question of remedy, the best remedy would be to dismiss Counts 5 and 10, at least as to Mr. McGregor. That would be the best remedy, because anything less would be in derogation of the role of the grand jury, which is supposed to be allowed to decide whether to bring charges (with appropriate guidance as to legal form from prosecutors, guidance that was lacking in this instance). However, Mr. McGregor recognizes that lesser remedies such as striking part of the duplicitous charge, and requiring prosecutors to make an election as to which part of the charge to pursue, are reflected in the caselaw. *See, e.g., Schlei*, 122 F.3d at 979 (error in refusal to strike part of the duplicitous charge); *Reno v. United States*, 317 F.2d 499, 502 (5th Cir. 1963) (expressing a preference for lesser remedy such as requiring election, rather than dismissal of duplicitous count in its entirety). Therefore, if the Court does not dismiss these counts, the Court should strike from them any allegation that Mr. McGregor is responsible for any campaign contributions allegedly promised or offered by anyone other than himself. In other words, the Court should at least narrow Count Five as against Mr. McGregor so that it parallels Count Seven, and should at least narrow Count Ten as against Mr. McGregor so that it parallels Count Twelve. Trying Mr. McGregor under Counts Five and Ten for promises allegedly made by others, promises that are parallel to Counts Six and Eleven, would be contrary to the law of duplicitousness as described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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Of Counsel