

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
)
THOMAS E. COKER,)
)
 Defendant.)

**MOTION OF TOM COKER FOR DISMISSAL
OF COUNT TEN BASED ON ITS DUPLICITOUS NATURE**

Tom Coker hereby respectfully moves for dismissal or other relief, as discussed herein, based on the duplicitous nature of Count Ten of the indictment (Doc. 3).

Count 10 is 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. "A duplicitous count poses three dangers: "(1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence." *Schlei* at 977.¹

¹ The Second Circuit has expounded even further stating that the doctrine of duplicity's "underlying policy concerns [are]: (1) avoiding uncertainty of general guilty verdict by concealing finding of guilty as to one crime and not guilty as to other, (2) avoiding risk that jurors may not have been unanimous as to any one of the crimes

In the case at hand, 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).

Count Ten is duplicitous under the *Schlei/Bins* standard. As for the question of remedy, the best remedy would be to dismiss Count 10, at least as to Coker. 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 and what charges to bring. However, Coker 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 Coker is responsible for any campaign contributions allegedly promised or offered by anyone

charged, (3) assuring defendant adequate notice of charged crimes, (4) providing basis for appropriate sentencing, and (5) providing adequate protection against double jeopardy in subsequent prosecution).” *U.S. v. Olmeda*, 461 F.3d 271, 281 (C.A.2 (N.Y.),2006)

other than himself. In other words, the Court should at least narrow Count Ten as against Coker so that it parallels Count Twelve. Trying Coker on Count Ten as it exists, runs the risk of violating the policy considerations set out above, including the possibility of the jury returning a conviction without unanimously agreeing on the same offense and failure to provide adequate notice to the defendants of the charged crime.

Respectfully submitted,

/s/ David McKnight

David McKnight
BAXLEY, DILLARD, DAUPHIN
MCKNIGHT & JAMES
2008 Third Avenue South
Birmingham, Alabama 35233
Telephone: 205.271.1100
Fax: 205.271.1108
Email: dmcknight@baxleydillard.com

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 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.

/s/ David McKnight

Of Counsel