

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.)

**OBJECTION TO “RECOMMENDATION OF THE MAGISTRATE JUDGE”
(DOC. 858), RECOMMENDING DENIAL OF MOTION TO DISMISS (DOC. 451)**

Milton McGregor hereby respectfully objects to the recommendation of the Honorable Wallace Capel, Jr., Doc. 858, in which Judge Capel recommended denial of Mr. McGregor’s motion to dismiss in Doc. 451. This objection is timely made under Fed. R. Crim. P. 59 and 28 U.S.C. § 636,

In Doc. 451, Mr. McGregor sought dismissal of Counts Five and Ten, or other relief in the alternative, because those counts of the indictment were unlawfully “duplicitous” within the meaning of governing law. *See United States v. Schlei*, 122 F.2d 944, 977 (11th Cir. 1997).

Caselaw from our Circuit speaks of remedies short of dismissal, such as forcing the Government to make an election or to narrow the charges in order to save the duplicitous count. Being candid with the Court, Mr. McGregor had recognized as much in his motion. *See* Doc. 451, p. 3 (citing caselaw including *Reno v. United States*, 317 F.2d 499, 502 (5th Cir. 1963)). Nonetheless, Mr. McGregor argued that dismissal was

the appropriate remedy because only this remedy would truly preserve the role of the grand jury.

The Government, responding to Mr. McGregor's motion in an attempt to save the duplicitous counts, committed itself to a narrowing of the charges in question. In light of that fact, and in light of the law as described above, and in light of this Court's ability at trial to give further remedies if necessary such as jury instructions, Judge Capel recommended denial of the motion to dismiss.

Mr. McGregor respectfully submits that a better view of the law would make dismissal the appropriate remedy for an unlawfully duplicitous count. That remedy is necessary and appropriate to preserve the role and authority of the grand jury, as the body that is supposed to determine what charges shall be brought. Where the prosecutors did not properly guide the grand jury about the legal requirements for properly bringing charges, the courts should not hypothesize that the grand jury might have brought differently-framed charges if it had been correctly guided on the law.

Even if this Court agrees with the Recommendation that dismissal is not warranted under existing Circuit precedent, Mr. McGregor requests that the Court recognize that he has preserved this argument for any further review in a higher court as needed. Mr. McGregor further requests that the Court be open to the possibility of dismissing these counts on the grounds of duplicitousness, in the event that the Government makes any attempt whatsoever to undermine the commitments that it made about the narrowed scope of these counts, that led to Judge Capel's recommendation.

Respectfully submitted,

/s/ Benjamin J. Espy
Benjamin J. Espy (ASB-0699-A64E)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Joe Espy, III (ASB-6591-S82J)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.

2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin Shur
Eric Olshan
Brenda K. Morris
Emily Rae Woods
Lewis Franklin
Steve Feaga
Federal Bureau of Investigation
One Commerce Street, Suite 500
Montgomery, AL 36104

G. Doug Jones
Tom Butler
Haskell Slaughter Young & Rediker
2001 Park Place North
Suite 1400
Birmingham, AL 35203

David McKnight
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233

Jack Sharman
Lightfoot, Franklin & White
400 20th Street North
Birmingham, AL 35203

James P. Judkins
JUDKINS, SIMPSON, HIGH & SCHULTE
1102 North Gadsden Street
Tallahassee, Florida 32303

William N. Clark
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109

H. Lewis Gillis
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103

Mark Englehart
Englehart Law Offices
9457 Alysbery Place
Montgomery, AL 36103

J. W. Parkman, III
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203

Susan G. James
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106

/s/ Benjamin J. Espy _____
Of Counsel