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.	)	

DEFENDANT TOM COKER'S OBJECTIONS TO THE RECOMMENDATION (DOC. 858) OF THE MAGISTRATE JUDGE REGARDING COKER'S MOTION TO DISMISS COUNT TEN BASED ON ITS DUPLICITOUS NATURE (DOC. 426)

Defendant Tom Coker, by and through counsel, pursuant to Fed.R.Crim.P. 59, hereby objects to the District Court the Recommendation of the Magistrate Judge regarding Coker's Motion to Dismiss Count Ten (which incorporated McGregor's Motion to Dismiss Counts Five and Ten).[1] Both Coker and McGregor based their request for dismissal on the issue of duplicity. The Government issued a single combined Response to these motions and the Magistrate Judge issued a single combined Recommendation. Coker herein specifically renews his Motion to Dismiss addressed by such Recommendation. Coker further adopts the motion of McGregor and his appeal thereto

[1] The relevant documents for this Appeal Include: The Recommendation of the Magistrate Judge (Doc. 858); Coker's Motion to Dismiss (Doc. 426); McGregor's Motion to Dismiss (Doc. 451); and the Government's Combined Response (Doc. 609).

which is being filed on this same date, to the extent that the relief sought therein is consistent with this filing. The Magistrate Judge's Recommendation is contrary to the law in numerous respects, as set forth below.

I. Standard of Review

The Motions referenced above are dispositive motions. Specifically, Coker seeks the dismissal of Count Ten based on duplicity. Fed.R.Crim.P. 59(b)(3) states as follows

> **(3) De Novo Review of Recommendations.** The district judge must consider de novo any objections to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions. (Emphasis added).

The *de novo review* is the least deferential standard of review. The name *de novo* simply means 'anew' or 'afresh'. Accordingly, the reviewing district judge reviews the findings from the same position as the magistrate court, with no deference to the lower court's determination. The undersigned knows that both the Magistrate Judge and the District Court take these motions and this standard of review seriously as do other courts. In *U.S. v. Quinney,* 238 Fed.Appx. 150, 153-154 (6th Cir. 2007) the Sixth Circuit very bluntly stated:

> [B]y failing to review the magistrate's report under the appropriate "de novo" standard, the district judge has failed to fulfill his duties as an Article III judge. Although Congress did intend the magistrates to lend assistance to the overburdened district courts when appropriate, the carefully drafted statutory standards for review of the magistrate's findings are meant to insure that the district courts will not abdicate their responsibility.... [A]s the statutory design and legislative history of the Federal Magistrates Act [codified at 28 U.S.C. § 636] makes evident, Congress intended the

> standards for review of a magistrate's findings to be taken seriously and applied in accord with the express language set forth in that statute."

II. Objections and Argument

The Magistrate Judge correctly summarized Coker's motion as addressing duplicity. He further correctly assessed the dangers of allowing a duplicitous count to remain in the indictment. Specifically he wrote that "A count in an indictment is duplicitous if it charges two or more 'separate and distinct' offenses. 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." (Doc. 858 pp. 1-2)

However, the Magistrate Judge failed to properly assess the dangers present in the current indictment which are dissimilar from those of the run of the mill case. The Magistrate Judge noted that "Coker's concern is that Count Ten lumps the separate offenses in Counts Eleven and Twelve into a single count". (Doc. 858 p.2) That is in part true. The indictment (and Coker's motion–Doc. 426 p.2) raise a more complicated scenario. Not only does Count Ten lump separate offenses, but it lumps separate offenses against separate defendants. A breakdown of Count Ten is as follows:

1. Statute: Bribery under 18 USC §666(a)(2)

2. Individuals charged: Gilley, Massey, McGregor, and Coker.

3. Alleged bribe: $25,000 and other unspecified amounts.[2]

The Magistrate Judge's rationale, was that it is appropriate for Coker to be charged in one count with offering both $25,000 and other unspecified amounts. Under that scenario, the Court asserted it could deal with the situation by requiring the Government to elect or via jury instructions. The Magistrate Judge's supported his position by citing *United States v. Robinson,* 651 F.2d 1188 (6th Cir. 1981) which dealt which multiple crimes being charged against a single individual in a single count. In *Robinson* the defendant complained when the allegations of Count One (conspiracy) were incorporated into Counts Two and Three (mail and wire fraud). Robinson alleged this was duplicitious and the Court correctly disagreed. Those are not the facts presented here.

The instant indictment combines in one count, multiple yet separate crimes against multiple defendants. The Count Ten allegations are that Gilley, Massey and Lobbyist A bribed Ross with "$25,000" AND also that McGregor and Coker bribed Ross with other "unspecified benefits". This is different from the *Robinson* case and exacerbates the harm, requiring the dismissal of Count Ten rather than the less restrictive alternatives that might be available under different circumstances.

In his Order, the Magistrate Judge relied on the Government's representation that it had "confirmed on the record... that the pending charges relate specifically to the

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[2] Related counts include: Count 11 charges Ross with accepting at least $20,000 from Gilley, Massey and Lobbyist A and Count 12 charges Ross with accepting "unspecified amounts" from McGregor and Coker.

defendants' individual conduct." (Doc. 609 p.5) This misses the point. That Count Eleven charges Ross with accepting items from Gilley, Massey and Lobbyist A and Count Twelve charges him separately with accepting items from McGregor and Coker, can in no way alleviate the harm that is caused by these separate crimes against separate individuals being combined into a single count, Count Ten.[3]

The Magistrate Judge went on to note that "the Government defends that charges by essentially making an election and indicating which counts relate to which individual defendants". (Doc. 858 p.2) This highlights the disconnect between Coker's motion and the Recommendation. Further it cuts to the heart of the problem. The issue is not which counts (Eleven and Twelve) relate to which defendant. The issue is that a single count (Ten) charges completely separate crimes against completely separate individuals. This extraordinary combination requires the extraordinary relief of the dismissal of Count Ten.[4]

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[3] The Magistrate Judge's analysis would have been more appropriate if Counts Eleven and Twelve had been combined charging Ross with accepting $25,000 and other unspecified benefits. Under those circumstance, theoretically, he could be convicted if he accepted either the $25,000 or the other benefits (although the evidence will show neither to be the case). Instead, as it presently stands, Coker (and McGregor) run the risk of being convicted of conduct that the Indictment charges, and the Government has thereafter affirmed, only relates to Gilley, Massey and Lobbyist A.

[4] Coker acknowledges that he admitted the relief sought is extraordinary in his original filing but he also asserts that it is appropriate under these circumstances.

III. Conclusion

WHEREFORE, Coker specifically requests that Count Ten of the Indictment be dismissed due to its duplicitious nature.

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 April 18, 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 the following:

Robert D. Segall
Shannon L. Holliday
J. David Martin
Ashley Nicole Penhale
Clayton Rushing Tartt
Copeland, Franco, Screws & Gill, P.A.
P.O. Box 347
Montgomery, AL 36101-0347

Joseph C. Espy, III
Benjamin J. Espy
William M. Espy
Melton, Espy & Williams, P.C.
P.O. Drawer 5130
Montgomery, AL 36103

Fred D. Gray
Walter E. McGowan
Gray, Langford, Sapp, McGowan
Gray, Gray & Nathanson, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239

Samuel H. Heldman
The Gardner Firm, P.C.
2805 31st Street NW
Washington, DC 20008

Justin Shur
Brenda K. Morris
Emily Rae Woods
Barak Cohen
Eric Olshan
U.S. Department of Justice
1400 New York Ave, NW 12th Floor
Washington, DC 20005

Louis V. Franklin
Stephen P. Feaga
U.S. Attorney's Office
P.O. Box 197
Montgomery, AL 36101

G. Doug Jones
Thomas Julian Butler
Anil Ashok Mujumdar
Jeremy S. Walker
Haskell Slaughter Young & Rediker
2001 Park Place North, Suite 1400
Birmingham, AL 35203

Samuel H. Franklin
Jackson R. Sharman, III
Jeffrey P. Doss
Lightfoot, Franklin & White LLC
400 20th Street North
Birmingham, AL 35203

James P. Judkins
Larry D. Simpson
Judkins, Simpson, High & Schulte
1102 North Gadsden Street
Tallahassee, FL 32303

William N. Clark
Stephen Wesley Shaw
Redden Mills & Clark, LLP
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
Tyrone Carlton Means
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103

John Mark Englehart
Englehart Law Offices
9457 Alysbury Place
Montgomery, AL 36117-6005

J. W. Parkman, III
Joshua Logan McKeown
Richard Martin Adams
William Calvin White, II
Parkman, Adams & White, LLC
505 20th Street North, Suite 825
Birmingham, AL 35203

Susan G. James
Denise A. Simmons
Susan G. James & Associates
600 South McDonough Street
Montgomery, AL 36104

Jeffery C. Duffey
Law Office of Jeffery C. Duffey
600 South McDonough Street
Montgomery, AL 36104

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

/s/ David McKnight
_____
Of Counsel