



This count charges three separate offenses – attempt to obstruct an official proceeding, conspiracy to obstruct an official proceeding, and the completed offense of obstructing an official proceeding, in violation of 18 U.S.C. § 1512(c)(2) and (k). This is duplicitous. Consequently, Count One should be dismissed.

## II. ARGUMENT

Duplicity is the improper joinder of distinct and separate offenses in a single count. *See United States v. Starks*, 515 F.2d 112, 116 (3rd Cir. 1975). A duplicitous count may conceal the specific charges against a defendant, allow the jury to convict without unanimity as to the offense,<sup>1</sup> increase the risk of prejudicial evidentiary rulings, or endanger fair sentencing. *Id.* at 116. A motion seeking the dismissal of a count on grounds of duplicity must be made before trial. Fed. R. Crim. P. 12(b)(3)(B)(i).

For a count to be duplicitous, it must charge more than one distinct crime, each requiring its own set of elements. For example, conspiracy and attempt are distinct crimes with different elements.<sup>2</sup> Thus, in *Starks*, 515 F.2d at 116, the Third Circuit found that charging “conspiracy to extort and attempt to extort” in a single

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<sup>1</sup> This would violate a defendant’s Sixth Amendment guarantee to a unanimous verdict.

<sup>2</sup> *United States v. Savaiano*, 843 F.2d 1280, 1292 (10th Cir. 1988) (indicating that conspiracy and attempt are distinct crimes requiring proof of unique elements under *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Hobbs Act count was improper, and defendants' pretrial motions to dismiss should have been granted. The Hobbs Act, 18 U.S.C. § 1951(a) punishes anyone who obstructs commerce by robbery or extortion "or attempts or conspires to do so." *Id.*; See *Abney v. United States*, 97 S.Ct. 2034 (1977) (noting duplicitous nature of single count charging Hobbs Act attempt and conspiracy but finding no prejudice due to detailed jury instruction).

The same problem arises when a *substantive* violation is *also* joined together with either attempt or conspiracy or, as in this case, both. In *United State v. Bonner*, the Middle District of Pennsylvania found that the joinder of an attempt and substantive Hobbs Act offense in one count was duplicitous. 2014 WL 5795601 \*5 (citing *Starks*) (Nov. 6, 2014) (unpublished). Looking back from the perspective of a *habeas* motion under 28 U.S.C. § 2255, in *Bonner*, the district court found no prejudice, citing the detailed jury instructions clarifying the jury's duty reading the duplicitous count. *Id.* at \*6.

The better course of action, as *Starks* indicated, is dismissal. This is especially so when the duplicitous charge is identified in a pretrial motion. The risk of jury confusion or lack of unanimity is simply too great.

The Tenth Circuit had the opportunity to analyze duplicity in the context of a defendant's motion challenging a jumbled count alleging a violation under 18 U.S.C. § 1512(a)(1)(A), a different section of the obstruction statute at issue here. In

*United States v. Washington*, 653 F.3d 1251 (10th Cir. 2011), Mr. Washington was charged with witness tampering for his part in a murder-for-hire scheme. He moved pretrial to dismiss the indictment.

There, the Indictment unartfully charged that the defendants “did *attempt* to kill Lieutenant Bryan Stark by *conspiring* to shoot him with the intent to prevent the attendance or testimony of Lieutenant Bryan Stark in federal court proceedings against [a co-defendant].” *Id.* at 1255 (emphasis added). The government argued that the use of the term “conspiring” was not an effort to allege a separate and distinct offense, but rather, was used in an everyday, non-technical sense “to describe the manner in which both co-defendants *attempted* to kill” the witness. *Id.* at 1262-63. The Court agreed, noting that the referenced conspiring behavior was merely part of the factual description of the attempt. *Id.* The language could not be reasonably read as incorporating the formal elements of a conspiracy offense, as that is charged under 18 U.S.C. § 1512(k). *Id.* at n. 12.

Here, by contrast, Mr. Nalley is charged under 18 U.S.C. § 1512(c)(2) and § 1512(k), the conspiracy provision. Section 1512(c)(2) prohibits both the substantive offense of actually obstructing an official proceeding *and* an attempt to do the same. The government, in Count One, pulls two offenses from § 1512(c)(2) – obstruction and attempted obstruction – and combines those with a conspiracy to obstruct under § 1512(k). There is no question that, here, unlike in *Washington*, the

government has charged three separate and distinct offenses in one count. This is duplicitous and should be dismissed.

**III. CONCLUSION**

WHEREFORE, for all of the above reasons, Mr. Nalley respectfully requests that the Court dismiss Count One of the Indictment.

This 12th day of August, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been formatted in Book Antiqua 13 pt., and was filed by ECF this day with the Clerk of Court with a copy served by ECF notice upon counsel of record as follows:

Adam Alexander, Esq.  
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This 12th day of August 2021.

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