

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA ) No. [REDACTED]  
 )  
 V. )  
 [REDACTED] )  
 )

MOTION TO DISMISS COUNT ONE FOR DUPLICITY

Now comes the defendant, by and through undersigned counsel, moving to dismiss Count One of the indictment against her for duplicity, and in support thereof shows unto the Court the following:

Defendant is charged in a two-count indictment returned [REDACTED]. Count One charges a conspiracy between [REDACTED], to commit two objects: (1) unlawful possession of cocaine hydrochloride with intent to distribute, and (2) unlawful possession of in excess of 50 grams of cocaine base "crack" with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)--carrying a penalty of 10 years to life imprisonment. Count Two represents a substantive count of possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)--carrying a penalty of 5 to 40 years imprisonment.

Although the drugs charged in Count One are both Schedule II substances, because the penalty doubles for "crack" versus

cocaine, defendant submits it is duplicitous, representing two separate offenses.

#### ARGUMENT

"Duplicity" is "the joining in a single count of two or more distinct and separate offenses." United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993), quoting 1 Charles A. Wright, Federal Practice and Procedure, § 142 at 469 (2d ed. 1982). The principal problems with duplicitous indictments derive from four concerns: "(1) prejudicial evidentiary rulings at trial; (2) the lack of adequate notice of the nature of the charges against the defendant; (3) prejudice in obtaining appellate review and prevention of double jeopardy; and (4) risk of a jury's non-unanimous verdict." United States v. Cooper, 966 F.2d 936, 939 n.3 (5th Cir.)(citations omitted), cert. denied, 506 U.S. 980 (1992). When an indictment is duplicitous, jurors may fail to acquit on one charge because they have decided to convict on a second charge that has been improperly joined with the first charge in a single count. When such a situation occurs, it is impossible to determine whether the twelve jurors unanimously agreed that the defendant committed either of the two offenses charged in the duplicitous count. United States v. Morse, 785 F.2d 771, 774 (9th Cir.), cert. denied, 476 U.S. 1186 (1986) (citation omitted).

In regard to sentencing, the Supreme Court has recently acknowledged the concern involving general verdicts on dual object narcotic conspiracies carrying differing penalties in the case of Edwards v. United States, ruling below, United States v. Edwards, 105 F.3d 1179 (7th Cir. 1997), pet. for cert. granted in part, 62 Crim.L.Rep. 3045, no. 96-8732 (U.S. Oct. 22, 1997). The lower court held that a general verdict of guilty on a conspiracy involving cocaine and "crack" does not require the court to sentence just on the drug carrying the lesser penalty but permits the district court judge to find the drug or drugs involved and fix punishment accordingly. On review, the court will determine whether, given these circumstances, the defendant must be sentenced on the basis of the objective carrying the lesser penalty or given a new trial.

Should the government respond that a conspiracy under § 846 alleging multiple controlled substances constitutes but one "agreement" to commit a single offense, then such a position would be inconsistent with its charging instrument. By crafting Count One as it has, the government itself notes the inconsistent penalties--and the defendant submits, separate offenses--by elevating what should be a one-object conspiracy into two and applying the greater penalty. The drug schedule does not differentiate types of cocaine. Both cocaine

hydrochloride and cocaine base "crack" are deemed all inclusive Schedule II controlled substances. See 21 U.S.C. § 812, **Schedule II**, (a)(4) (West Supp. 1998). The single object of the conspiracy is, therefore, possession with intent to distribute cocaine, a Schedule II controlled substance. However, punishment for drug conspiracy is defined by the object underlying drug offense, see 21 U.S.C. § 846; United States v. Shabani, 513 U.S. 10, 16 (1994), which is clearly why the government divided the objects--vastly different penalties are prescribed for the underlying possessions of cocaine base "crack" versus cocaine hydrochloride. By separating the objectives as it did, the government implicitly acknowledges Congress' intent that simultaneous possession of two controlled substances carrying different penalties be separate offenses, see United States v. Grandison, 783 F.2d 1152, 1156 (4th Cir.), cert. denied, 479 U.S. 845 (1986). Although the drugs in Grandison (heroin and cocaine) were in different schedules, possession of each provided different penalties giving rise to two offenses. Id. at 1156. The defendant submits the holding is analogous to this case where there is a simultaneous "agreement" to possess two different drugs carrying dramatically disparate sentences.

WHEREFORE, the defendant submits Count One of the indictment

against defendant Adger is duplicitous and should be dismissed.

Respectfully submitted this the 16th day of [REDACTED].

[REDACTED]  
Federal Public Defender

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[REDACTED]  
Assistant Federal Public Defender  
North Carolina State Bar No. [REDACTED]  
P. O. Box 400  
Greensboro, NC 27402  
(336) 333-5455

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Motion to Dismiss Count One for Duplicity upon [REDACTED] [REDACTED], Assistant United States Attorney for the Middle District of North Carolina, P. O. Box 1858, Greensboro, North Carolina, 27402, by hand-delivering or by mailing a copy of the same.

This the 16th day of [REDACTED].

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[REDACTED]  
Assistant Federal Public Defender