

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff)	4:02CR57-SPM
)	
v.)	
)	
XXXX,)	
)	
Defendant.)	
_____)	

MOTION TO DISMISS COUNT AS MULTIPLICITOUS

Defendant, XXXX, hereby moves this Court to dismiss one of the counts of the two count indictment pending in this case as the counts are multiplicitous. In support of this motion, Mr. XXXX sets forth the following facts and argument:

1. Count 1 of the two count indictment charges Mr. XXXX with failing to pay child support from February 10, 1994 until June 23, 1998 in violation of 18 U.S.C. § 228.
2. Count 2 of the two count indictment charges Mr. XXXX with failing to pay child support in an amount greater than \$10,000 from June 24, 1998 until the date of the indictment in violation of 18 U.S.C. § 228.
3. Congress amended 18 U.S.C. § 228 effective June 24, 1998 to provide for a felony conviction for failure to pay child support for a period of two years or longer or in an amount greater than \$10,000. *See* 18 U.S.C. § 228(a)(3).
4. Nevertheless, under the amended statute, amounts due before June 24, 1998 can be included in determining whether, in an indictment

charging a violation of 18 U.S.C. § 228(a)(3) filed after June 24, 1998, the child support was due for a period of two years or longer and/or whether the amount due is greater than \$10,000. *See United States v. Wilson*, 210 F.3d 230 (4th Cir. 2000); *United States v. Russell* 186 F.3d 883 (8th Cir. 1999).

4. “Multiplicity is the charging of a single offense in more than one count. When the government charges a defendant in multiplicitous counts, two vices may arise. First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes--not one.” *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991), *cert. denied*, 503 U.S. 960 (1992).

5. To determine whether an indictment is multiplicitous, the court must “first determine the allowable unit of prosecution.” *Id.*

6. There is absolutely no indication that Congress intended 18 U.S.C. § 228 to be broken up between different time periods in which child support was not paid in order to charge a defendant with multiple counts of failing to pay child support.¹ In short, 18 U.S.C. § 228 provides for only one unit of prosecution.

¹ Indeed, the Supreme Court has held that there is a “presumption” against allowing multiple prosecutions arising out of one act. *Bell v. United States*, 349 U.S. 81, 83 (1955) (“When Congress has the will it has no difficulty in expressing it...that is, of defining what it desires to make the unit of prosecution....When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”)

7. To force Mr. XXXX to go to trial on an indictment which clearly contains multiplicitous counts would “improperly prejudice [him before] a jury by suggesting that [he] has committed [two] crimes--not one.” *Id.*

8. The remedy for multiplicitous counts is to require the government to elect on which count it will proceed to trial. *See United States v. Seda*, 978 F.2d 779, 782 (2d Cir. 1992); *United States v. Feldhacker*, 849 F.2d 293, 298 (8th Cir. 1988). Within a sufficient time prior to trial, the government should be required to elect whether it wishes to proceed on Count 1 *or* Count 2.

WHEREFORE, XXXX respectfully requests this Court to require the government to elect, at least two weeks prior to trial, whether it wishes to proceed on Count 1 *or* Count 2. The other Count should then be dismissed.

Respectfully submitted,

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Attorney for Defendant

XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on December 16, 2002, I caused the foregoing document to be served by first class mail, postage prepaid, on Paul Alan Sprowls, United States Attorney's Office 111 N. Adams Street, 4th Floor, Tallahassee, Florida 32301.

F. Clinton Broden

CERTIFICATE OF CONFERENCE

Pursuant to Local Rules of the Northern District of Florida, I, F. Clinton Broden, certify that I attempted to confer on this motion by telephone with Paul Alan Sprowls, counsel for the United States of America, on December 16, 2002 but was told that Mr. Sprowls was out of the office and would not return until the date the motion was due to be filed.

F. Clinton Broden

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ORDER

_____ Upon consideration of Defendant's Motion to Dismiss Count as Multiplicitous said motion is this _____ day of December, 2002 GRANTED.

ORDERED the government shall notify the Defendant on or before _____ of whether it will proceed to trial on Count 1 *or* Count 2.

FURTHER ORDERED upon the government's election, the non-elected count will be dismissed.

STEPHAN P. MICKLE
UNITED STATES DISTRICT JUDGE