IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	*	
V.	*	CRIMINAL ACTION NO: 2:10cr186-MHT
HARRI ANNE SMITH,	*	
DEFENDANT.	*	

DEFENDANT HARRI ANNE SMITH'S MOTION FOR SEVERANCE AND BRIEF IN SUPPORT THEREOF

COMES NOW the defendant, Harri Anne Smith, by and through her attorneys of record, and respectfully moves this Honorable Court to sever and order a separate trial for Defendant Smith pursuant to Rule 8(b) and Rule 14 of the Federal Rules of Criminal Procedure.

BACKGROUND

Defendant Smith was indicted on October 1, 2010. As the Court is aware, the indictment consists of sixty-five pages in length, two hundred forty- seven separate paragraphs, thirty-nine counts, eleven defendants, a forfeiture section, and 8 various criminal charges.

The defendants named in the indictment and the charges against each, is listed as follows:

Milton E. McGregor was charged with one count of conspiracy, six counts of

federal program bribery, and eleven counts of honest services mail and wire fraud;

Ronald E. Gilley was charged with one count of conspiracy, six counts of federal program bribery, eleven counts of honest services mail and wire fraud, and four counts of money laundering;

Jarrod D. Massey was charged with one count of conspiracy, five counts of federal program bribery, and eleven counts of honest services mail and wire fraud;

Thomas E. Coker was charged with one count of conspiracy, two counts of federal program bribery, and eleven counts of honest services mail and wire fraud;

Robert B. Geddie, Jr. was charged with one count of conspiracy, one count of federal program bribery, eleven counts of honest services mail and wire fraud, and one count of obstruction of justice;

Jarrell W. Walker, Jr. was charged with one count of conspiracy, one count of federal program bribery, and eleven counts of honest services mail and wire fraud;

Harri Anne H. Smith was charged with one count of conspiracy, two counts of federal program bribery, one count of extortion, eleven counts of honest services mail and wire fraud, and four counts of money laundering;

Larry P. Means was charged with one count of conspiracy, two counts of federal program bribery, two counts of attempted extortion, and eleven counts of honest services mail and wire fraud;

James E. Preuitt was charged with one count of conspiracy, one count of

federal program bribery, one count of attempted extortion, eleven counts of honest services mail and wire fraud, and one count of making a false statement;

Quinton T. Ross, Jr.was charged with one count of conspiracy, two counts federal program bribery, two counts of attempted extortion, and eleven counts of honest services mail and wire fraud; and

Joseph R. Crosby was charged with one count of conspiracy, one count of federal program bribery, and eleven counts of honest services mail and wire fraud.

As more specific to Defendant Smith, she is only charged in ten of the thirty-nine counts. As to individual paragraphs, Defendant Smith is mentioned in forty-three of the two hundred forty- seven paragraphs. However, Defendant Smith is only mentioned historically, innocently, or by reference in twenty-five of the forty-three paragraphs.

Next, an examination of specific counts shows that count one, the general conspiracy count, is alleged in one hundred sixty-three of the paragraphs. Of this total, Defendant Smith is mentioned in only twenty-nine of these paragraphs containing any real substance. Defendant Smith is only mentioned one time with the other 10 co-defendants in paragraphs twenty-eight and six times with seven co-defendants. Thus the remaining one hundred fifty-six paragraphs in the general conspiracy count only mentions Defendant Smith's real involvement with one co-defendant, that being Defendant Gilley.

After the allegations in the general conspiracy count, Defendant Smith is only mentioned in eight of the remaining thirty-eight counts and in only eleven of the remaining fifty-one paragraphs. (Not including forfeiture).

ANALYSIS AND ARGUMENT

RULE 8 (b)

Pursuant to Federal Rules of Criminal Procedure 8(b), joinder of multiple defendants in an indictment is appropriate.

> …if they are alleged to have participants in the same act or transaction, or in the same series of acts or transactions constituting an offense or offenses. F.R.C.P. 8(b)

It has been long recognized by the courts that joint trials of multiple defendants is preferred. *Zafiro v. United States*, 506 U.S. 534, 537 (1993). *United States v. Sans*, 731 F.2d 1521, 1533 (11th Cir. 1984), cert. den. 469 U.S. 1111 (1985). The basis for this joint trial preferences is to promote judicial economy by the avoidance of multiple trials. *Zafiro*, supra at 537 (1993). However, courts cannot achieve this economical objective where substantial prejudice to the right of a criminal defendant to a fair trial exists; or there exists an improper joinder; or there exists allegations of prosecutorial misconduct. *Zafiro*, supra at 540 (1993); *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1988); *United States v. Levine*, 546 F.2d 658, 661 (5th Cir. 1977); *United States v. McClain*, 823 F.2d 1457, 1466-1467 (11th Cir. 1987); *United States v. Hewes*, 729 F.2d 1302, 1318 (11th Cir. 1984); *United States v. Morales*, 868

F.2d 1562, 1568 (11th Cir. 1989); *United States v. Russell*, 703 F.2d 1243 (11th Cir. 1983); *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985).

The starting point in order to determine the soundness of joinder is for the trial court to first examine the "face" of the indictment. *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985); *United States v. Liss*, 265 F.3d 1220, 1227 (11th Cir. 2001); *United States v. Morales*, 868 F.2d 1562, 1567 (11th Cir. 1989). This examination of joinder

> ...requires a showing that the offenses were part of "the same act or transaction or...the same series of acts or transactions.... The purpose is to prevent the "cumulation of prejudice from charging several defendants with similar but unrelated offenses. *United States v. Bova*, 493 F.2d 33, 35 (5th Cir. 1974); *United States v. Butera*, 677 F.2d 1336, 1385 (11th Cir. 1982).

Thus, for a defendant to have engaged in the "same series of acts or transactions" it must be shown by the government "...that the acts alleged are united by some substantial identity of facts and/or participants." *United States v. Butera*, 677 F.2d 1376, 1384 (11th Cir. 1982); *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985). Joinder will therefore be improper under Rule 8(b) "...where the parties are not the same, and where the offenses are in no wise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them." *United States v. Bova*, 493 F.2d 33, 36 (5th Cir. 1974). Stated differently, "...whether there is a "substantial identity" of facts and participants

between the offenses charged." *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985); *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978). For example, an improper joinder occurs where "...defendants in parallel conspiracies with the same purpose and a natural defendant." *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975); *United States v. Nettles*, 570 F.2d 547, 552 (5th Cir. 1978).

Furthermore, it has clearly been held that "the character of the acts must have been similar, id. , and each of the actors must have known that he acted in furtherance of a common plan in which other participants were involved." *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977); *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985). [1]

As this specifically relates to a charge of conspiracy, joinder of all conspirators is initially allowed, as long as the conspiracy charge provides a "common link" and demonstrates that the charge arose from or "grew out of" the same act or transactions. *United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987); *United States v. Elam* 678 F.2d 1234, 1247 (5th Cir. 1982); *United States v. Deleon*, 641 F.2d 330, 337 (5th Cir. 1981). While this is commonly referred to as a "wheel conspiracy" for joinder purposes, it is necessary that the conspirators "...who form the wheel's spokes must have been aware and must do something in furtherance of some single, illegal

[1] Defendant Smith concedes that not every actor must have participated in every phase of the conspiracy or that she knew every actor or action taken. *United States v. Russell*, 703 F.2d 1243 (11th Cir. 1983); *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985).

enterprise" and some interaction between the conspirators. *United States v. Levine*, 546 F.2d 658, 664 (5th Cir. 1977)[2] *United States v. Ellis*, 709 F.2d 688, 690 (11th Cir. 1983). In other words, joinder is not permissible where the conspiracies have "...different participants and completely different event actions." *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975). Specifically, it was determined that even though there existed a "similar illegal objective" involving fraud, the parties "...neither depended on, was aided by or had any operational interest in the success of the other conspiracy". *United States v. Castro*, 829 F.2d 1038, 1047 (11th Cir. 1987).

Also, permissible joinder exists "...only if the substantive offenses alleged in the indictment fall within the scope of the conspiracy" *United States v. Gentile*, 495 F.2d 626, 632 (5th Cir. 1974); *United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987).

As applied to the examination of the indictment in Defendant Smith's case, there is no doubt that it lists all eleven defendants in a conspiracy in count one. However, in looking at the alleged overt acts in which Defendant Smith was involved in the conspiracy count, count one shows the following: (listed by paragraph)

40. Defendant Smith asked two legislators to go to dinner with Co-Defendants Massey and Gilley;

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[2] Quotes *Kotteallos v. United States*, 328 U.S. 750, 755 (1946).

41. Smith "attempted to persuade" a legislator to support bingo legislation at another dinner with Co-Defendant Gilley;

42. Defendant Smith told a legislator that she "believed" Co-Defendant Gilley could do what Gilley told a legislator privately;

45. Defendant Smith had a discussion with a legislator about support Gilley could proved if the legislator "favored" bingo legislation;

47. Defendant Gilley questioned by legislator of "possible" campaign support as previously mentioned by Defendant Smith;

62. Defendant Massey told Defendant Gilley to get Defendant Smith to talk to a legislator and make sure the legislator knows that if he does not support bingo legislation that Defendants Gilley and Massey were "going to make [his] life a living hell";

115. Defendant Smith asked Defendant Gilley during a phone call if wanted to talk to Defendant Preuitt;

133. That two years ago Defendant Smith "introduced an anti-gambling Bill in the State Senate";

134. During a phone call, Defendant Smith told a legislator that "she believed" Defendant Gilley would contribute to his campaign (same allegations paragraphs 42 and 45;

135-139 and

141-144. Only alleges campaign contribution from Defendant Gilley.

145. Defendant Gilley asked Defendant Smith to talk to other legislators and get them to vote for the bingo legislation;

146. Defendant Gilley asked Defendant Smith to "put pressure on other legislators to vote pro bingo";

147-148. Discussion between Defendant Smith and Gilley on putting contributions in PACs;

149. Defendant Smith asked Defendant Gilley if Defendant Preuitt was okay;

150. Defendant Smith voted for the bingo legislation;

151. Phone call between Defendants Gilley and Smith about getting or "make an example" out of legislators who voted against the bingo Bill;

152. Defendant Gilley wanted Defendant Smith to "propose additional legislation";

153-154. Conversation between Defendants Walker and Massey about campaign fund support; and

155. Defendant Smith received campaign contributions.

While their overt allegations do, somewhat, involve Defendant Gilley, there is absolutely no mention of any involvement with Co-Defendants Milton

McGregor, Thomas Coker, Robert Geddie, Jarrod Massey, Larry Means, James Preuitt, Quinton Ross, Jarrell Walker, and Joseph Crosby.

Therefore, there is no common denominator between 90% of the co-defendants and Defendant Smith.

There exist no allegations in the indictment that Defendant Smith even met with or talked to Co-Defendants Milton McGregor, Thomas Coker, Robert Geddie, Jarrod Massey, Larry Means, Quinton Ross, Jarrell Walker or Joseph Crosby. Furthermore, the only discussion with Co-Defendant James Preuitt was to hand him the phone to talk privately with Co-Defendant Gilley. It is therefore easy to understand that there is more than one conspiracy alleged in count one since there are "...different participants and completely different overt actions." *United States v. Marioneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975).

Now moving to the substantive counts, the face of the indictment would show: (as to counts)

Count II. Only involved Co-Defendants Gilley, Massey and Defendant Smith in a general allegation about offering a legislator money for his vote. However, this is only a general allegation and contradicts the overt acts allegation in paragraph 42 that Defendant Smith only believed Co-Defendant Gilley would help in campaign donations;

Count XIV. Only involves Defendants Smith and Gilley and taking campaign

contributions for a vote;

Count XXI. Only involves Defendants Smith and Gilley about campaign contributions (extortion);

Count XXVII-XXXIII. Only a general allegation of honest services involving all eleven defendants: However, only Count 33 involves Defendant Smith with Defendant Gilley and Counts 28-30 involve Defendants Crosby, McGregor, Coker, and Preuitt; and

Count XXXIV-XXXVI. Only involves four checks through a bank between Defendants Gilley and Smith.

Once again, the only real alleged involvement Defendant Smith has is with Defendant Gilley. There is no direct mention of any involvement, knowledge, meetings, conversations, or activities other than with Defendant Gilley.

An examination of other cases similar to Defendant Smith's would indicate a required severance when that defendant was not named in all counts and not alleged to have participated in one common conspiracy.

The case of *Gentile* holds that:

> The common thread running through the various counts of the indictment is the common involvement of Tsotsos and Gentile. Beyond that there is nothing in the indictment which indicates the defendants has acted in concert or participated in a common scheme or plan. On the contrary, the allegations of the indictment evince that LaPonzina and Lucadana were not involved in Gentile's activities concerning his own outstanding tax liability and that neither of them had anything to do with

> the separate attempts to influence the determination of the other's tax liability. The money offers were made on different days and were of varying amounts. The dates of the various conversations which constitute the overt acts of the two alleged conspiracies also evidence a pattern of separate and independent conspiracies...Under Rule 8(b) the government has an obligation to allege more than that the offenses are of a similar nature or that there are common participants. *United States v. Gentile*, 60 F.R.D. 686, 688 (S.D. N.Y. 1973).

In *Ellis* the court found joinder improper and held that "...for a wheel conspiracy to exist, those people who form the wheel's spokes must have been aware and must do something in furtherance of some single, illegal enterprise. If not, there is no rim to enclose the spokes." *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977); *United States v. Ellis*, 709 F.2d 688, 689-690 (11th Cir. 1983).

In *Nettles*, the court reasoned that "the connection between different groups is limited to a few individuals common to each but those individuals commit[ted] separate acts which involve them in separate offenses." *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978).

In *Castro* there were separate schemes used to obtain money for a company. *United States v. Castro*, 829 F.2d 1038 (11th Cir. 1987).

Even though a single conspiracy was alleged, the court held that "the character of the acts must have been similar, and each of the actors must have known that he acted in furtherance of a common plan in which other participants were involved...." *United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987).

In *Butera*, our circuit court noted that the government "...must demonstrate that the acts alleged are united by some substantial identity of facts and/or participants." *United States v. Butera*, 677 F.2d 1376, 1384 (11th Cir. 1982). Such is not the indictment present here.

Finally, Defendant Smith also argues "prosecutorial bad faith or an erroneous interpretation of the law" as to why joinder is improper. *United States v. Andrews*, 765 F.2d 1491, 1496 (11th Cir. 1985).

Federal wiretapping laws were created to regulate the interception of governmental monitoring of personal or private telephonic conversations. The main driving force behind the necessity to regulate this activity is that this governmental action is an intrusion upon a private citizen's right to privacy. Accordingly, the interception and any subsequent use of disclosure of the intercepted communications, are regulated to preserve privacy. *See, e.g. Adams v. Lankford,* 788 F.2d 1493, 1498 (11th Cir. 1986); *United States v. Domme*, 753 F.2d 950, 952 (11th Cir. 1985) ("In an effort to ensure more extensive protection of privacy, Congress enacted legislation that controls the use of electronic surveillance. 18 U.S.C. §2510 et seq."). Among other things, the regulatory scheme includes a statutory requirement that communications intercepted by law enforcement must be sealed by court order. *See U.S.C. §2518.*

The United States, during the course of its investigation in this case, used wire taps on a grand scale. As such, it was Ordered by this Court that disclosure was forbidden unless it was affirmatively authorized by §2517 or by further order of the Court itself. *See, e.g.,* Order of April 8, 2010, Doc. 16 in No. 10-1959, at p.2 ("the contents of said discs and/no recordings be disclosed only upon order of this Court or any other Court of competent jurisdiction, except as otherwise authorized by Title 18, United States Code, Section 2517").

In the case of *United States v. Kemp*, 365 F. Supp. 2d 618, 624 (E.D. Pa. 2005) the Court held that under the law, prosecutors must not put sealed intercepted communications into the public record in advance of trial, by quoting or attaching such materials in public filings. The opinion included a section titled, "Court Approval is Required for Pretrial Release of Title III and Grand Jury Materials." *Id* at 631. The Court held: It is clear from the above review of Title III and Rule 6 that no party in a criminal case, including the government has the unilateral right to disclose in a brief, press release or otherwise, at least prior to the introduction into evidence at either a hearing or trial, intercepted communications or grand jury materials. *Id.* (emphasis supplied). "From a review of the applicable law, the Court concludes that the government was under an obligation to file any memoranda containing these materials under seal, unless alternatively, the Court, upon request, had authorized public dissemination." *Id.* (emphasis supplied).

A review of count one of the indictment would clearly show that of the 153 paragraphs alleged as overt acts, fifty seven percent (57%) contain wiretap allegations.[3]

Therefore, if you discount or excise these paragraphs in count one, there would be little left for a court to even consider a joinder.

The same is true for the substantive counts since the indictment incorporated all of the aforementioned wiretap paragraphs into each substantive count.

Therefore, for each or all of the reasons listed above, Defendant Smith moves for severance from each and every defendant listed in the indictment.

RULE 14

Defendant Smith would also aver that severance is warranted pursuant to Rule 14. *Federal Rules of Criminal Procedure*, *Rule 14* provides the trial court with flexibility in its management of the case when a joint trial may appear to risk creating prejudice to a party. *United States v. Lane*, 475 U.S. 438, 449 (1986).

Basically, Rule 14 mandates that a trial court "...balance the right of the defendants to a fair trial, absent the prejudice inherent in a joint trial, against the interests of judicial economy and efficiency." *United States v. Gonzalez*, 804 F.2d

[3] See paragraphs 47, 53, 55, 56 - 69, 71, 72, 75 - 81, 83, 84, 86 - 101, 103, 104 - 111, 113, 115, 119, 126 - 129, 131, 143, 145 -147, 149, 151-154, 157, 159, 161, 169-173, 175-177, 182, 183, 185, 186-190.

691, 694 (11th Cir. 1986); *United States v. Hewes*, 729 F.2d 1302, 1318 (11th Cir. 1984); *United States v. Phillips*, 664 F.2d 971, 1016 (5th Cir. 1981).

Thus a severance is warranted under Rule 14(a) when there is a serious risk that a joint trial would compromise a specific right of one of the defendants or prevent the jury from making a reliable determination of guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). The burden is placed on a defendant to demonstrate specific and compelling prejudice. *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005); *United States v. Knowles*, 66 F.2d 1146, 1159 (11th Cir. 1995); *United States v. Krenning*, 93 F.3d 1257, 1267 (5th Cir. 1996).

To support severance under Rule 14(a), Defendant Smith offers six legally established arguments and one new argument in the Eleventh Circuit.

Defendant Smith begins with the one new argument. As previously established, there are eleven defendants with forty-three attorneys and a 65 page indictment. [4] In other circuits, it has long been recognized that "mega-trials" have placed a "systematic heavy burden ...on the criminal justice system and most importantly, on the jury system and jury selection process." *United States v. Delatorre*, 522 F. Supp. 2d 1034, 1057 (N.D. Ill. 2007); *United States v. Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); *United States v. Casamento*, 887 F.2d 1141, 1152 (2nd Cir. 1989); *United States v. Simmons*, 431 F.Supp. 2d 38, 67 (D.C. 1006). A "mega-trial" has generally

[4] At the time of the writing of this motion.

been designated as one consisting of more than ten defendants and longer than 44 pages in an indictment, more or less.[5] After a detailed examination of several prejudices, the District Court stated that:

> This Court fervently hopes that the U.S. Attorney's Office will seriously consider the issues raised by this opinion before joining more than ten individuals in one indictment. *Delatorre*, supra at 1251.

The first prejudice alleged by Defendant Smith concerns "jury prejudice". This prejudice is due to long trials "...makes it more likely that the jury will not be able to render an intelligent verdict". *United States v. Warner*, 506 F.3d 517, 523 (7th Cir. 1007). Long trials potentially limit "...the complexity that a jury can handle" and confusion among the jury. *United States v. DeCologero*, 364 F.3d 12, 24 (1st Cir. 2004); *United States v. Sophie*, 900 F.2d 1064, 1083 (7th Cir. 1990). It was well stated in the *Warner* dissent that"

> It is that jurors' expectations that trials will be conducted quickly and efficiently have steadily increased each year. Our computer-age society expects everything to be conducted in "real time". Thus, it is this Court's belief that today's jurors have an even harder time making sound decisions after a trial which involves hundreds of hours of trial testimony and thousands of trial exhibits. Simply put, an inordinately long and inefficient trial substantially increases poor jury decisions on multiple levels. *See Warner*, at 523 (Posner, Jr. dissenting).

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[5] *Delatorre* supra at 1049-1089 shows 14 defendants, a 44 page indictment, and a trial to last more than 4 months; *United States v. Casamento*, 887 F.2d 1141, 1151-1152 (2nd Cir. 1989).

Courts should also take into consideration the hardships on jury members such as home life, employment, finances, and physical endurance. *United States v. Baker*, 10 F.3d 1374, 1391 (9th Cir. 1993).

Next, Defendant Smith would next aver "procedural complications". Defendant Smith would submit that no courtroom in the Middle District is large enough to effectively handle this many defendants with this many attorneys. Other cases have also recognized the problem in courtroom space. *United States v. Gray*, 173 F.Supp. 2d 1,10 (D.D.C. 2001); *United States v. Shea*, 750 F.Supp. 46, 50 (D. Mass. 1990); *Delatorre*, supra at 1054. In a whimsical comment, it was stated that "...the seating arrangements, while "suitable perhaps for enjoying an afternoon of football", were "of questionable propriety for a protracted trial. *United States v. Ellender*, 947 F.2d 748, 754-755 (5th Cir. 1991). Such a space limitation cannot accommodate this number of people without the hardship of crowding defendants together, creating prejudice from other defendants and attorneys listening to Sixth Amendment privileged communications at trial table; inability to have discovery at easy access; or attorneys being able to move quickly to a podium or side bar.

White the government may argue judicial efficiency and economy, Defendant Smith would contend that in such large trials, severance would better each. *United States v. Baker*, 10 F.3d 1374, 1389-1390 (9th Cir. 1993). It is argued that separate trials cost less due to: (1) less costs in not having to modify courtrooms (2) less time

spent in cautionary instructions (3) separate trials become more streamlined and faster (4)less sidebars, arguments, motions and delays, and (5) less charge for prejudice to all defendants.

In moving to established grounds for severance pursuant to Rule 14, Defendant Smith would submit there are six to be considered.

First, Defendant Smith would again aver that there are two or more separate conspiracies alleged in count one. As mentioned previously in our Rule 8 (b) argument, severance is necessary where there are joined defendants all seeking a similar purpose but involved in "parallel conspiracies...". *United States v. Nettles,* 570 F.2d 547, 552 (5th Cir. 1978); *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975). As previously stated, Defendant Smith was neither aware of anything that other alleged groups[6] were doing, nor involved in any "overt action" of other groups. *Nettles*, supra at 551 (5th Cir. 1978). While the Eleventh Circuit holds that two or more conspiracies alleged in a single count does not constitute a guaranteed severance, Defendant Smith would contend that such a joinder results in actual prejudice. *United States v. Bovain*, 708 F.2d 606, 610 (11th Cir. 1983). This prejudice would consist of the overwhelming amount of evidence the government will submit against these other groups; The fact that jurors will simply catagorize

[6] Another group like Defendants McGregor, Ross, Walker, Crosby, Coker, Geddie, or Preuitt or a group like Defendants Gilley, Walker, Massey or Preuitt.

Defendant Smith into one of the groups, or be persuaded that because Defendant Smith sits with these others, she must be involved.

Second, Defendant Smith would contend that between Defendants there exists "antagonistic and mutually exclusive defenses". *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986). In deciding whether or not to grant severance, the conflict between defendants should be "...so irreconcilable that the jury will infer that both defendants are guilty solely because of the conflict." *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986). Thus, "it is necessary that the two defenses be mutually exclusive and irreconcilable." *United States v. Andrews*, 765 F.2d 1491, 1498 (11th Cir. 1985). Such is the situation presented herein.

For example, without knowing other co-defendants' strategy at this point, Defendant Smith would state that **she wants all wire taps, all recorded telephone calls, and all recorded conversations submitted in their entirety to a jury, so as to help exonerate her**. On the other hand, it is Defendant Smith's belief that some or all of the other co-defendants will move to quash, disallow, prevent, and/or suppress all of said recordings. Even if a ruling of admissibility is made prior to trial, these other defendants would still object during the trial, thereby forcing Defendant Smith to argue against each defendant's objection or do nothing and allow the jury to believe we are joined with them. If these recordings are ruled inadmissible then the conflict still remains. Defendant Smith will want all recordings introduced at

trial. Furthermore, Defendant Smith would submit that her defense could very well be completely different than others due to the evidence or lack thereof.

In a closely related issue, Defendant Smith would thirdly aver that a severance is mandated where she would need testimony and/or evidence from co-defendants. On this point it has been held that a defendant needs to show a:

> (1) bona fide need for the testimony;
> (2) the substance of the desired testimony;
> (3) its exculpatory nature and effect; and
> (4) that the designated co-defendant will *in fact* testify at a separate trial.
> ....
>
> The trial court should:
>
> (1) examine the significance of the alleged exculpatory testimony in relation to the defendant's theory of defense;
>
> (2) assess the extent to which the defendant might be prejudiced by the absence of the testimony;
>
> (3) pay close attention to judicial administration and economy; and
>
> (4) give weight to the timeliness of the motion.
>
> *United States v. Rice*, 550 F.2d 1364, 1369 (5th Cir. 1976); cert. denied, 434 U.S. 954 (1977); *United States v. Bovain*, 708 F.2d 606, 610 (11th Cir. 1983); *United States v. Baker*, 432 F.2d 1189, 1239 (11th Cir. 2005).

In this case, Defendant Smith will need the testimony of several of the co-defendants. For example, the testimony needed, desired, and exculpatory in nature

can readily be gleaned from the tape recordings themselves. These recordings would show the testimony as follows:

The testimonial evidence from tape excerpts are filed under seal and marked as "Exhibit A". Thus, these statements are not general in nature, conclusory, or self serving. *United States v. Baker*, supra at 1240 (11th Cir. 2005).

That it is obvious from the face of the statements that such is needed, desired, significant and exculpatory. Furthermore, in a severed trial, all witnesses will be available to testify, unlike a trial where all are joined. It has been held of no concern to this argument that a co-defendant might claim the Fifth Amendment in a severed trial. *Byrd v. Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970). This is the exact type of prejudice recognized by the United States Supreme Court. *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *Tifford v. Wainwright*, 568 F.2d 954 (5th Cir. 1979).

In a case on point, it was clearly held that severance was appropriate where a co-defendant "...had in the past made...oral exculpatory statements concerning the movement [Smith]." *Byrd v. Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970).

Fourth, there exists another prejudice recognized as the "spillover effect". *United States v. Baker*, 432 F.3d 1189, 1239 (11th Cir. 2005).

It has long been recognized and understood that joinder may be prejudicial because of the natural tendency to infer guilt by association, a defendant may suffer by being joined with another allegedly "bad man." *United States v. Bova*, 493 F.2d

33, 36 (5th Cir. 1974). The Constitution simply "...demands only that the potential for transference of guilt be minimized to the extent possible under the circumstances...." *United States v. Elliott*, 571 F.2d 880, 905 (5th Cir. 1978); *United States v. Diaz*, 248 F.3d 1065, 1101 (11th Cir. 2001). Such depends on the facts of each particular case. *United States v. Bovain*, 708 F.2d 606, 609 (11th Cir. 1983).

Herein, the "spill over effect" is quite real and substantial. For example, Defendant Smith would contend that there is a likelihood of bad language, criticisms of others, actual threats of physical violence, unrelated incidences of other questionable actions which will be admitted in this case; All of which Defendant Smith was not in any way aware of or involved with. There is simply no way to cure this type of transference by a "curative" instruction. Also, the admission of evidence of possible large sums of money paid or offered to others is prejudicial when Defendant Smith, again, was not aware or involved. Thus, a risk of prejudice exists when "evidence that is probative of a defendant's guilt but technically admissible only against a defendant." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Fifth, another prejudicial effect from joinder can arise from lengthy cases, complex cases, and disparity in evidence cases. These led to a reasoning that "when many defendants are tried together in a complex case and they have markedly different degrees of culpability, the risk of prejudice is heightened." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). A severance can also be warranted "...when there

is a gross disparity in the weight of the evidence presented against the various co-defendants." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *United States v. Shankman,* 13 F. Supp. 2d, 1358, 1367 (S.D. Ga. 1998).

United States v. Erwin is one example of a disparity the Fifth Circuit found to mandate severance under Rule 14, where there was "mountainous evidence" introduced at trial that did not pertain to a defendant, whose charges the Fifth Circuit characterized as being "peripherally related to those alleged against the other appellants." In reversing, the Fifth Circuit found that "[t]he prejudice [the defendant] suffered from the joint trial, then, far outweighed any benefit of judicial economy." *United States v. Erwin*, 793 F.2d 656, 666 (5th Cir. 1986).

In this case, the trial, as is, is expected to last several months with ten defendants. There are approximately ten thousand plus recorded conversations, but less than twenty-five in which Defendant Smith was referred to by others or participated in herself. There exists no actual, direct evidence that Defendant Smith discussed or accepted any monies for a bribe or that she extorted anyone. The vast amount of evidence to be presented by the government will have no relationship at all to Defendant Smith. Furthermore, the trial is not just complex because of the numbers, but because of the many different relationships and alleged conspiracies not involving Defendant Smith.

Sixth, as we argued in the Rule 8(b) above, Rule 14 also provides that a complex and lengthy case can also be prejudicial. *United States v. Morales*, 868 F.2d 1562, 1571 (11th Cir. 1989); *United States v. Erwin*, 793 F.2d 656, 666 (5th Cir. 1986). Probably the best statement on this issue comes from the *DeSimone* case wherein it held that:

> We are keenly aware that joint trials, especially those involving numerous defendants and multiple charges, carry substantial risks of manifest unfairness. We do not encourage trials en masse. We must, however, reckon with the realities of this type prosecution. The Constitution does not guarantee a trial free from the burdens that inevitably accompany such a trial; rather, it requires that the potential for transferability of guilt be minimized to the extent possible in order to "individualize each defendant in his relation to the mass." *United States v. DeSimone*, 660 F.2d 532, 541-542 (5th Cir. 1981).

The Eleventh Circuit, while agreeing with the trial court's denial of a severance, did state interesting data that would be indicative of granting a severance in Defendant Smith's case. *United States v. Morales*, 868 F.2d 1562 (11th Cir. 1989). In *Morales* the court found no prejudice where there was no (1) extensive testimony (2) the trial lasted five days (3) there were only three defendants (4) only four counts for the jury to consider and (5) all alleged criminal acts took place the same day. *Morales*, supra at 1571 (11th Cir. 1989). Such is not the case presented here. Defendant Smith's case involves ten defendants, thirty-nine counts; a trial expected to last well over three months; alleged criminal acts that took place over two years; and extensive testimony due to ten thousand plus recorded phone calls, thousands of

text messages, and numerous hours of person to person recorded conversations. Defendant Smith would not only be prejudiced by the complexity, but by the vast amount of prejudicial "spillover" from other evidence.

This becomes even more prejudicial when one considers that most of the evidence does not concern or involve Defendant Smith. Furthermore, most of the evidence to be presented by the government would not be admissible in a separate trial involving only Defendant Smith.[7] Not only does this government evidence involve offenses and transactions which Defendant Smith had nothing to do with but also to which Defendant Smith had no knowledge of. Such obviously creates "a gross disparity in the weight of the evidence presented against various co-defendants. *United States v. Shankman*, 13 F.Supp.2d 1353, 1367 (S.D.Ga. 1998); *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Wherefore, based on the proceeding issues and argument, Defendant Smith respectfully moves this Honorable Court to grant her severance from co-defendants.

Done this the 2nd day of February, 2011.

/s/ James W. Parkman, III
ATTORNEY FOR
HARRI ANNE SMITH

[7] Defendant Smith also adopts her argument on this issue in Rule 8 (b).

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 2nd day of February, 2011, electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to all counsels of record.

/s/ James W. Parkman, III
OF COUNSEL