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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

MOTION TO SEVER

Defendant Milton McGregor respectfully moves the Court for an order severing his trial from that of other defendants, such that Mr. McGregor would go to trial on the currently-set schedule in early April [*see*, *e.g.*, Doc. 132] while other defendants would go to trial at some later date. Mr. McGregor respectfully submits that an order to that effect would be the wisest, most fair, and most practical exercise of this Court's discretion.

It has been clear in this case, ever since the arraignment, that Mr. McGregor prefers a speedy trial while most other defendants would prefer more time to prepare. This difference was re-emphasized, and made even more clear, at the December 14 proceeding before this Court. Mr. McGregor does not fault the other defendants for their position, and believes they have a legitimate need for more time in preparing for trial.

This difference has already worked to Mr. McGregor's detriment in multiple ways, during the course of the case so far. It has resulted, for instance, in postponement (at another defendant's request) of consideration of Mr. McGregor's motions to dismiss; Mr.

McGregor had the ability to file such motions well before the motions deadline, but others did not. [Doc. 333 (Order) granting Doc. 313 (motion of co-defendant for postponement)]. Even the currently-set trial date was an accommodation to the desire of other defendants for additional time, as contrasted to Mr. McGregor's desire for a more speedy trial. Thus the joinder of all defendants for trial, in this case, is a detriment to all defendants. Mr. McGregor has had to proceed more slowly than he preferred, causing unnecessary additional months of disruption to his business life and personal life, while most other defendants still feel rushed.

Even more important than this, however, are the practicalities of the situation in terms of the logistics for trial. This Court has the authority, in its discretion, to sever a criminal case based on a concern for the practical logistics in a multi-defendant trial. If trying the entire case at the same time would be unwieldy, the Court has the power to sever the case into parts. *See, e.g., United States v. Barbeito*, 2010 U.S. Dist. LEXIS 55678, *20 (S.D.W.Va. 2010) (severing criminal case because, "[a]mong other things, it will help solve the practical problems associated with trying so many defendants together.")

This Court has already mentioned the problem, of how a trial could be run fairly and effectively in an available courtroom with so many defendants. *See* Transcript of December 14, 2010, at pp. 40-41 ("Have you thought about just the practicality of trying all eleven defendants with the attorneys in one courtroom? … I've thought about it too, and sort of even walked around the courtroom to see whether it's even practical."). The

Court has issued an order that tries to deal with the practicalities. *See* Doc. 316, p.7. But the practical problems remain enormous. A courtroom with so many defendants, lawyers, assistants, support personnel, family members, etc., piled on top of each other for weeks on end, will cause logistical distractions and practical burdens for both the Court and the parties.

The ordinary justification for joint trials is "efficiency." *U.S. v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005) ("In deciding a severance motion, a district court must balance the right of the defendant to a fair trial against the public's interest in efficient and economic administration of justice."). But in this case, both "efficiency" and fairness point in the same direction, because "efficiency" cannot be divorced from practicality. As the Fifth Circuit has said, "we are keenly aware that the claimed 'efficiency' of a joint trial can be a surrogate for the reality that a joint trial of multiple defendants is simply to the advantage of the government." *U.S. v. Simmons*, 374 F.3d 313, 318 (5th Cir. 2004). In this case, there is no real "efficiency" in proceeding on a trial plan that would cause enormous practical headaches for the parties and for the Court.

A severance would further advance the cause of fairness because it would help to ensure that Mr. McGregor is tried on conduct for which he himself is actually responsible. A joint trial in this case risks the likelihood (as alluded to in *Simmons*, *supra*) that Mr. McGregor would be unfairly judged based on evidence about what other people did, even when there was no evidence that he was responsible for it. While the Court can and should try to reduce that likelihood through instructions at trial, the possibility of

unfairness will remain. This might not be grounds for severance if it were standing alone; but it confirms the wisdom of granting a severance on the basis of the other grounds discussed herein.

The propriety of a severance will be even more clear, in this case, if other defendants seek a further continuance. Mr. McGregor expects that at least some other defendants will do that; and the Court has indicated that the issue is open for possible reconsideration. [Doc. 286, denying motions for continuance "without prejudice"; Transcript of December 14, 2010, hearing at p. 51 (indicating that the Court would "revisit this issue" in February or March)]. If other defendants do seek a further continuance, then the best course would be to grant their request, while severing Mr. McGregor from the others and proceeding to trial on the charges against him on the current schedule. This would allow fairness to Mr. McGregor as well as to the others.

Respectfully submitted,

*/s/ Joe Espy, III*
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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 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 all counsel of record.

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Of Counsel