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.	)	

OPPOSITION TO GOVERNMENT'S MOTION TO SEVER, AND TO GOVERNMENT'S MOTION TO PERMIT MEETING WITH JURORS

Milton McGregor respectfully opposes the Government's motion to sever the case. The Government has proposed splitting the trial into three pieces. One piece would include only Mr. McGregor and Mr. Crosby.

Mr. McGregor also respectfully opposes the Government's motion asking the Court to permit and facilitate a meeting with jurors.

Both of the above motions are in Doc. 1697.

1. The Court should not sever the case.

A. Introduction: the governing standard under *United States v. Lopez*

The Government's suggestion of severance is meritless and inappropriate under *United States v. Lopez*, ___ F.3d ___, 2011 U.S. App. LEXIS 17000 (11th Cir. 2011). As the Eleventh Circuit stated in *Lopez*, there is "a solid body of law favoring joint trials and placing a heavy burden on those who want to be tried separately." *Id.*, *23. The Court

stated, "Joint trials play a vital role in the criminal justice system and serve important interests: they reduce the risk of inconsistent verdicts and the unfairness inherent in serial trials, lighten the burden on victims and witnesses, increase efficiency, and conserve scarce judicial resources." *Id.*

The Court continued, "In this circuit, the rule about joint trials is that "'defendants who are indicted together are usually tried together.'" *Id.*, *23-24. "That rule is even more pronounced in conspiracy cases where the refrain is that 'defendants charged with a common conspiracy should be tried together.'" *Id.*, *24.

The Court said that the rule of joint trials in conspiracy cases is "not quite ironclad," *id.*, *25, but it is extremely close: "The exceptional circumstances justifying a deviation from the rule, however, are few and far between. A defendant seeking a severance must carry the 'heavy burden of demonstrating [that] compelling prejudice' would result from a joint trial." *Id.* "To show compelling prejudice, a defendant must establish that a joint trial would actually prejudice the defendant and that a severance is the only proper remedy for that prejudice—jury instructions or some other remedy short of severance will not work." *Id.* "The potential for prejudice from a joint trial is not enough." *Id.*

We pause here to note that the burden of showing real compelling prejudice is at least as heavy, when it is the Government that seeks the severance. The burden on the Government actually ought to be even higher, in a case like this one where it was the Government that joined the defendants and counts in the first place. *See Garris v. United States*, 418 F.2d 467, 469 (D.C. Cir. 1969) ("Our case involves a reversal of customary

roles, with the government seeking severance. It appears to be accepted that there is a double standard, a heavier burden when severance is sought by the government rather than defendant.") But at the very least, the Government as movant has the same heavy burden as a defendant would. *See, e.g., United States v. Clay*, 579 F.3d 919, 928 (8th Cir. 2009) (holding that burden of proving prejudice is the same no matter which party moves for severance). *See also* Fed. R. Crim. P. 14(a) (imposing same standard to justify order of severance, no matter which side is allegedly prejudiced).

Returning now to *Lopez*, the Eleventh Circuit specifically addressed the possibility that a multi-defendant multi-count trial might be too complicated for jurors – and the Court gave little credence to that, pointing out many huge and lengthy cases where denial of severance was affirmed. "The bar for showing that kind of prejudice is so high that only in the rarest case can a defendant clear it, as indicated by the fact that we have declined to find that severance was required in some complex, multi-defendant cases." *Id.*, *28.

Under *Lopez*, the Government's arguments for severance are far too weak to justify relief, particularly where it was the Government itself that chose to bring a conspiracy case against all defendants jointly.

B. Severance would be inefficient, as well as unfair to the defendants.

As we will explain further below, the Government has not met its heavy burden of showing compelling prejudice to it, from the joinder that it chose at the outset of the case. Without meaning to distract from that point – without forgetting that the heavy burden is

on the Government to show a true need for severance – we first discuss reasons why severance would be wrong in this case.

This discussion also constitutes a response to the Government's suggestion that severance is appropriate as a mere "case management" matter without a showing of prejudice. Furthermore, the primary relevant "case management" concern in this instance should be the default norm of joint trials, for all the efficiency and fairness reasons noted in the line of caselaw that culminates in *Lopez*. That is, the invocation of "case management" should not actually lead the Court to use a standard that is different from *Lopez*.

The first strong reason not to sever this case into three parts, as the Government requests, is the efficiency concerns that are so central to every severance dispute. There can be no doubt that three trials would take substantially more time, and more public expenditure, in the aggregate than one trial would. Even just beginning with the process of jury selection, three trials would require the calling of three times as many jurors, or at least nearly that many. It would require at least double the amount of aggregate time spent in *voir dire* (both group and individual). The Court's questioning, and the Government's questioning, would be repeated three times with three groups of potential jurors. Defense questioning during *voir dir*e would perhaps be somewhat less than three times as long, but it would be close.

Then the presentation of evidence would be far longer in the aggregate if the case was severed into three trials. Much evidence would be repeated three times, and more would be repeated at least twice. After all, each trial would have to involve proof of the

same conspiracy – not just of each particular on-trial defendant's part in it, but of the conspiracy as a whole – because each defendant in Count One is charged with having joined the one single overall conspiracy. "Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of knowledge of the overall scheme is critical to a finding of conspiratorial intent." *United States v. Chandler*, 388 F.3d 796, 806 (11th Cir. 2004). There is not a separate charge of "conspiring to bribe Senator A," "conspiring to bribe Senator B," and so forth.

Furthermore, every Government witness would have to be thoroughly cross-examined on all sources of bias and incorrectness, in each trial where that witness testified. Thus much of the same cross-examination would occur multiple times, even though with different lawyers each time. This would constitute repetition and waste of time, as compared with a joint trial.

The Government was correct, earlier in the case, when it told the Court that severance would lead to trying the same case repeatedly. In December 2010, in Doc. 282, the Government argued (pp. 6-7) that all defendants should be tried together because that would be so much more efficient. The Government emphasized that the evidence of the conspiracy was the same as to all defendants. "[A]ll of the defendants are charged with participating in a single conspiracy, which will be proven with a single set of recorded conversations, documents, and witness testimony. The defendants should be tried together, in a single trial that will ensure effective use of judicial resources." (Doc. 282, p. 6). The Government emphasized the legal principles that were just reaffirmed in *Lopez*, about the general rule that conspiracy cases must usually be tried jointly. (*Id.*).

The Government concluded that "severance of defendants McGregor and Smith, who have not joined in the motion for a continuance, would waste judicial resources by forcing the Court to adjudicate two highly similar, overlapping, and lengthy trials. Such duplicative efforts are unwarranted here, and should be avoided entirely by denying the defendants' motions." (Doc. 282, pp. 6-7).

The Government made nearly identical statements again, in Doc. 546 pp. 6-7, when opposing further motions for continuance. Again, the Government urged the Court that severance would cause a waste of judicial resources, as it would require the Government to put on essentially the same trial repeatedly.

The Government had told the Court similar things orally, in the hearing on December 14, 2010, p. 40, lines 17-20. The Court inquired about the possibility of a severance, and Mr. Ainsworth replied that this would lead to repetition and waste of time: "I think that would be a waste of the Court's resources. I think that we would be ultimately asking for at least two trials where the same material is covered during both trials." When the Court asked Mr. Ainsworth whether he had thought about the logistics of having so many defendants being tried at once, Mr. Ainsworth replied that he had indeed thought about it "thoroughly," and he said, "I think it is far more practical than trying two or three times the same case." *Id.*, p. 41, lines 2, 7-8.[1]

[1] Mr. McGregor, by contrast, is not merely changing a position for strategic reasons. In his motion to sever (Doc. 362) Mr. McGregor relied primarily on two grounds: *first*, that he preferred a speedier trial while other defendants wanted continuances, and *second* that trying all the defendants at once would be burdensome as a practical matter. By opposing a severance now, Mr. McGregor is not being inconsistent with that earlier-stated position. The reasons that weighed in favor of severance, then, do not weigh so strongly in favor of

Further, as long as Mr. McGregor is charged in Count 26, evidence about Senator Smith's relationship with Mr. Gilley will be part of the trial of Mr. McGregor as well as being part of the trial of Senator Smith. As long as Mr. McGregor, Mr. Coker and Mr. Walker are charged in Count 8, and Senator Preuitt in Count 9, much of the same evidence will be part of the trials of each of them. As long as Mr. McGregor and Mr. Coker are charged in Count 31, again much of the same evidence will be introduced in their respective trials. Evidence about Senator Beason will no doubt be part of the trial of Senator Smith as well as being part of the trial of Mr. McGregor. And so on.

The Government tells the Court in its motion that the trial against Mr. McGregor "would focus primarily on defendant McGregor's alleged conduct with respect to Scott Beason and Barry Mask, as well as his $3,000 payments to Crosby." (Motion, p. 3). This is not a statement that the Court can accept at face value. It ignores the fact that Mr. McGregor is charged in Counts 5 (regarding Senator Means) and 8 (regarding Senator Preuitt). It ignores the fact that he is charged in all "honest services" counts, including even one count that only concerns an interaction between Mr. Gilley and Senator Smith. It ignores the fact that he is charged, like all others but Mr. Crosby, with having been part of the one single overarching conspiracy.

So, three trials would take nearly three times as long as one trial, as the Government tries to prove the same conspiracy three times. Three trials would also involve more work by the Court out of the jury's presence.

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severance now. There is no apparent disagreement among defendants at this point regarding when the trial should take place; and there are three fewer defendants remaining for trial, now, than there were when Mr. McGregor filed Doc. 362.

Moreover, the Court could not know in advance when it could set the second and third severed trials, if they were done serially. The Court would have to space the severed trials far apart, stretching out well into 2012. The Government has suggested that the first severed trial could be finished within three weeks or so, including jury selection, but Mr. McGregor respectfully suggests that that is a fantasy. Even if the Government opts for a presentation with few witnesses, so as to try to avoid the obvious defects in the case that were shown through cross-examination of witnesses during the first trial, Mr. McGregor may call those witnesses himself. And Mr. McGregor may call other defense witnesses, and he may testify. The first severed trial could even end up taking longer than the original trial, if Mr. McGregor testifies or if he calls many witnesses. None of this can be known until the trial is well underway. So even if the Court set the first severed trial for early October, there is no guarantee at all that it will be complete before December or even later. The second severed trial could not start until January, as even the Government concedes. The third severed trial could not start immediately after that one was done, because jurors would have to be summoned, schedules set, etc. – and so if the Court severed the cases and tried them serially, the Court would be hearing this case for over half a year at a conservative estimate.[2]

In addition to these efficiency concerns, there are further fairness concerns as well. As the Eleventh Circuit noted in *Lopez*, severance risks unfairness to the defendant who

[2] If the Court did sever the cases, the better alternative would be to set each severed case for trial at the same time, in early 2012. That way, at least, no defendant or defense counsel would be put to trial sooner than they can be ready, yet the case would be tried to completion during the first portion of the year.

is tried first, in that the other defendants get to sit back, watch, and learn. Those concerns are amplified in this case, as the first trial showed how very powerful the combined defense was. A joint trial allowed the various defense counsel to share ideas and to share burdens, in a way that helped make a fair defense possible against the enormous power of the federal government. "Even the wealthiest of criminal defendants is at a substantial disadvantage compared to the government." *United States v. Carmichael*, 326 F.Supp.2d 1267, 1294 (M.D. Ala. 2004). This more-effective defense is no doubt part of what the Government hopes to avoid by severance.

Furthermore, severance would quite likely lead to less understanding on the jury's part, in ways that would unfairly help the Government. For instance, with regard to the conspiracy charge, a jury that was considering that charge *only* against Mr. McGregor (as the Government proposes) would have a very different understanding than would a jury that was considering the charge against several defendants. When considering the same charge against several defendants, the jury would clearly see the importance of deciding *who* was conspiring *with whom*, if anyone. But if the jury was only considering the conspiracy count against Mr. McGregor, it would be far too easy for the jury to lose sight of that crucial aspect of the question, and to convict without even knowing who Mr. McGregor was supposedly conspiring with.

In other ways, too, severance would likely do more to hinder the jury's consideration of the case, than to help it. For instance, it is likely that one or more defendants will choose to testify in a second trial. While no defendant testified in the first trial, decisions of that sort often change in a retrial. If there were severance, and if a

defendant in one of the later trials decided to testify, then the result in effect would be that the juries and the defendants in the earlier trials would have been deprived of that testimony. By maintaining the current single-trial status, the jury will have the full benefit of hearing any such testimony, and the jury can take it into account for instance in deciding the conspiracy charge against other defendants. Severing the trial would give each jury only a partial picture of the truth if any defendant testifies.

C. The Government's proffered reasons for severance are insufficient.

The Government has not demonstrated compelling prejudice to it, that would permit severance over the defendants' objection.

The basic reason for the Government's new proposal of severance is that the Government thinks it will affect the verdict. That was the first avowed justification that the Government gave, in the conference call on August 15; the Government believes that a unanimous verdict would be more likely in a severed trial.[3] (The clear implication is that the Government believes that *conviction* would be more likely in a severed trial. The Government seeks severance because it now thinks that severance will help it win. But in any event, whether or not the Court draws that obvious inference about the Government's strategy, the Government's contention is that the likelihood of a unanimous verdict would be increased.)

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[3] August 15 telephone conference: "MR. SHUR: I think one of the reasons for the large volume of unresolved counts was that, at least from an outsider's perspective, it seems like it was a difficult job for the jurors to digest and analyze a large amount of evidence with respect to a large number of complex charges against nine defendants. I think a trial against fewer defendants with less evidence and fewer charges would be easier for a jury to resolve. "

That is not a proper basis for severance, especially under the circumstances of this case. The Government chose to indict all defendants together. The Government successfully opposed all motions to sever, arguing that there was no legally sufficient basis for any severance. For the Court to grant a severance now at the Government's request, in response to the Government's argument that doing so would affect the likely outcome of the case, would be inappropriate.

As stated in *Lopez*, there can be extremely rare extraordinary cases where a single trial is too much for a jury to handle. But, as the Government correctly urged the first time around – and as the Court implicitly understood, when the Court refused all prior requests for severance – this is not one of those extremely rare cases. The fact that the jury could not agree on a fraction of the charges is not evidence that the case was too much for the jury to handle. There is absolutely no reason to believe that the jury was confused by the breadth of the case, when it was tried as a whole. Failure to reach a unanimous verdict on a minority of the charges is not, in any sense, evidence of jury confusion. It is evidence, instead, of different jurors' differing views of the evidence on some counts. So, severing the case in order to make it narrower would not solve any problem of jury confusion. Rather than being confused, the jury was merely *divided* on some counts, and it was unanimous on many others. Being divided on some counts is perfectly appropriate, and is not something that the Court should try to "fix" in a second trial through severance. As the Eleventh Circuit recognized in *Lopez*, juries can and do handle cases substantially longer and more complicated than this one.

This case is very different from *United States v. Kennedy*, 819 F.Supp. 1510 (D. Colo. 1993), a rare case upon which the Government relies as having granted a Government motion for severance. In *Kennedy* there were 16 defendants remaining for trial – more than twice as many as remain in our case, and a number that would tax the largest courtroom. The case was neatly divisible into two segments (six defendants who were charged under RICO, and the rest who were not). There was a rather precise showing by the Government about 39 witnesses who would testify in the first trial but not the second and 76 witnesses who would testify in the second trial but not the first. And there were serious *Bruton* problems, much more significant than anything that this case involves. *Kennedy* does not support severance here.

The Government mentioned, in the August 15 conference call, one putative bit of prejudice to it from the joinder of defendants. "Mr. Shur: I think the Government was prejudiced, based on trying all these defendants together, because there was at least -- there were certain pieces of evidence the Government was unable to present due to some of the *Bruton* and confrontation clause issues that surfaced because of all of the defendants being tied together." The Government's experienced prosecutors had surely read *Bruton* and later Confrontation Clause caselaw before deciding to bring a single indictment charging all defendants together. The Government's cry of prejudice is therefore reminiscent of the old story of the parricide who asks for mercy because he is an orphan.

In fact, the evidentiary limitations arising from the joint trial are not nearly severe enough in their impact on the Government to constitute prejudice in the relevant sense.

The Government, in its motion, mentions only *one* single bit of evidence that it could not introduce in the joint trial. This was the expected testimony by Mr. Blades, to the effect that Senator Preuitt told him that Senator Smith had said or done something.

This testimony would clearly be inadmissible hearsay as against Senator Smith, and indeed as against anyone else other than Senator Preuitt. Mr. Blades would be recounting something that Senator Preuitt allegedly told him out of court: simple hearsay. And the alleged statement was not "in furtherance of" any conspiracy, so it would remain inadmissible against people other than the declarant, Senator Preuitt. (The Court addressed this, and so ruled, on July 22.) Therefore the Government could not introduce this evidence against Senator Smith, even if her trial were severed from everyone else's. (The Government is even more wrong in suggesting that it could introduce this evidence against Senator Smith, after which Senator Smith could call Senator Preuitt to rebut the testimony. Doc. 1697 p. 8. Senator Smith cannot force Senator Preuitt to testify, particularly where (under the Government's proposal) Senator Preuitt would still be awaiting his trial at the time of Senator Smith's trial.)

As to Senator Preuitt, this small bit of desired evidence is of no relevance to any charge against him. It does not pertain to any "bribe" with which Senator Preuitt is charged substantively in Count 9. It is, also, not evidence that he conspired with anyone. It is of such limited relevance that the Government did not even press the point of seeking to introduce this evidence against Mr. Preuitt alone, at the first trial, after the Court ruled it inadmissible against others. At best this evidence is of tangential minor relevance to some charge against Senator Preuitt, with its relevance (if any) being so minor and

tangential that excluding it does not constitute such "compelling prejudice," *Lopez*, as to warrant severance.

2. The Court should not allow or arrange a meeting between counsel and jurors.

The Court should also deny the Government's request that the Court permit and facilitate a meeting with jurors. This Court's Local Rule 47.1 reflects a norm that such meetings should not ordinarily take place, unless a juror himself or herself affirmatively desires such a meeting and reaches out for it. While Rule 47.1 formally does not rule out the possibility that the Court would authorize a party-initiated meeting, the Rule implicitly calls for a showing of "cause" before the Court will allow (much less facilitate) such a meeting. There is no cause for the Court to assist the Government with such a meeting in this case.[4]

Jurors are, and have been, free to contact either side, both sides, or neither side if they would like the opportunity to talk. One juror has chosen to speak to the press, and her comments have been widely reported. Other jurors have thereby been reminded, if they needed reminding, that they are free to speak as well. It can safely be inferred that any juror who wanted to talk to counsel would have done so.

Any communication by the Court at this point, suggesting that jurors might do that, and telling them that the Court would facilitate such a meeting, would be an imposition. The implicit message would be that the Court has some desire that the meeting take place. A reasonable juror would make that inference, since if the Court did

[4] Certainly we agree that if there were such a meeting, it should be open to all parties' counsel, not just the Government's.

not want such a meeting the Court would simply let the jurors move on with their lives rather than reaching back out to them. The Government asks, Doc. 1697 p. 12, that the Court "invite" jurors to meet "if they so choose." Many jurors, as people who are (a) polite, (b) appreciative of the Court's respectful treatment of them, and (c) accustomed after months to the fact that the Court occupies a position of power over jurors, would naturally feel some compulsion to "accept" the invitation even if their own personal preference would be to decline. The jurors gave an enormous amount of their time to the Court and to the parties (including the prosecutors) already, and the Court should not do anything that even tends to suggest to any jurors that they ought to give more of themselves.

Moreover, if the Court did facilitate such a meeting, there is a substantial likelihood that it would lead to more skirmishes that the Court would do better to avoid. If the parties were facilitated in their efforts to pick jurors' brains about what they thought or what they did, there is a reasonable likelihood that it would lead to some motion or motions claiming that something wrong occurred in deliberations. This is the sort of inquiry that Fed. R. Evid. 606(b) largely seeks to avoid. *See* Advisory Committee Notes to Rule 606(b) ("The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. … Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other

feature of the process. "); *United States v. Siegelman*, 640 F.3d 1159, 1185-86 (11th Cir. 2001). There is no reason why the Court should take unusual steps in this case that could lead to disputes about anything concerning the jury's deliberations.

There is, furthermore, no good reason that would weigh in favor of a decision by the Court to facilitate such a meeting. Lawyers sometimes want to meet with jurors for their own general professional development, to learn how to be better lawyers in the future. To the extent that is the Government's concern, and to the extent the Court deems it an appropriate concern, it could be accommodated after any retrials are complete. But the Government's main goal, avowedly, is something more direct and pointed: the Government wants to quiz these jurors so that the Government can (it hopes) learn how to win in a retrial. (Doc. 1697, p. 12: "The United States believes that all parties would benefit from receiving feedback from the original jurors in order to help future jurors avoid mistrials.") Helping the Government fine-tune its case, we respectfully submit, is not an appropriate reason for the Court to take the unusual action of permitting and facilitating a meeting with jurors. The Government surely knows the weak spots in its case. It knows which witnesses had credibility problems. It knows that the recordings were not enough to convince a single juror on most counts, and that they were not enough to convince most jurors on any counts. Similarly, the Government should not be helped in some effort to fine-tune its jury-selection strategy for the purpose of securing convictions.

Conclusion

For the reasons explained herein, the Court should deny the Government's motion for severance, and should deny the Government's motion regarding a meeting with jurors.

Respectfully submitted,

s/ Benjamin J. Espy
Benjamin J. Espy (ASB-0699-A64E)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Joe Espy, III (ASB-6591-S82J)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180

Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 S. Shackleford Road
Little Rock, AR 72212
Telephone: (501) 954-7878
rwhitney@inveritasinfo.com

CERTIFICATE OF SERVICE

I hereby certify that on August 22nd , 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin V. Shur
Eric Olshan
Barak Cohen
Brenda K. Morris
Emily Rae Woods
John L. Smith
Edward T. Kang
US Department of Justice
1400 New York Avenue
Washington, DC 20005
justin.shur@usdoj.gov
eric.olshan@usdoj.gov
barak.cohen@usdoj.gov
brenda.morris@usdoj.gov
rae.woods@usdoj.gov
edward.kang3@usdoj.gov

Louis V. Franklin, Sr.
Stephen P. Feaga

US Attorney's Office
Post Office Box 197
Montgomery, AL 36101-0197
steve.feaga@usdoj.gov
louis.franklin@udsoj.gov

David McKnight
William J. Baxley
Joel E. Dillard
Stewart D. McKnight, III
Baxley, Dillard, Dauphin, McKnight & James
2008 Third Avenue South
Birmingham, AL 35233
bbaxley@bddmc.com
jdillard@bddmc.com
dmcknight@baxleydillard.com

William N. Clark
William H. Mills
Stephen W. Shaw
Glory R. McLaughlin
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
whm@rmclaw.com
sws@rmclaw.com
grm@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwwise@aol.com

J. W. Parkman, III
Richard M. Adams
Joshua L. McKeown
William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com
adams@parkmanlawfirm.com
jmckeown@parkmanlawfirm.com
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Jeffrey C. Duffey
Law Office of Jeffrey C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

s/ Benjamin J. Espy
Of Counsel