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 H. SMITH,	*	
DEFENDANT.	*	

DEFENDANT HARRI ANNE SMITH'S RESPONSE TO THE GOVERNMENT'S CONSOLIDATED MOTION (DOC 1697)

Comes now Harri Anne H. Smith, by and through undersigned counsel, and files this response to the United States' Consolidated Motion (Doc. 1697) in addition to arguments raised herein, Smith further adopts all arguments raised by Defendant McGregor in his response filed as Document number 1724.

I. Severance

Smith opposes the government's motion to sever the defendants.

The government acknowledges the strong preference for trying co-defendants together. (Doc.1697, p.2) citing Zafiro v. United States, 506 U.S. 534 (1993). Having litigated this prior to the initial trial in this matter, there is no reason to revisit this issue.

The government provides efficiency and prejudice as reasons why severance is preferable. None of the arguments forwarded by the government overcome the strong preference referred to in Zafiro.

A. Efficiency

The government wrongly concludes "severed trials involving fewer defendants are preferable and ultimately will be more efficient than a single trial involving all defendants."

The jury selection phase of the initial trial lasted four full days. During the course of voir dire, defense counsel refrained from asking the same questions asked by other defense counsel. In fact, counsel for Smith completed voir dire on one panel in less than one minute. If severed, such efficiency would not be available. It can be anticipated that, in the event of severance, each trial will require a jury selection process resulting in a similar length of time to strike each jury. Additionally, each separate jury would require separate compensation and costs of sequestration. This is not efficient.

The government's efficiency argument centers on "the vast majority of trial time expended on cross-examination and re-cross-examination by the defendants." Again, counsel for defendants refrained from asking questions that had already been asked by counsel for other defendants. After lengthy

cross-examination by co-defendant's counsel, most attorney's cross was limited to a very short period of time with some having no questions at all. This certainly would not be the case in the event of a severance as each separate trial would require lengthy cross examination of each witness, tripling the total time of courtroom testimony of the key witnesses.

There is no support for the government's assertion that the lengthy examinations and re-examinations tested the jury's attention and patience, ultimately contributing to the jury's inability to reach unanimous verdicts as to most defendants. As previously stated, severance would not substantively decrease the length of cross-examination. Also, it is clear that the jury in the previous trial was able to pay attention to each witness and return unanimous verdicts. This is evidenced by the fact that out of 124 total counts, the jury returned unanimous verdicts in 91 counts, completely acquitting two defendants in the process.

The length of an expected retrial is not reason for severance. It is not that uncommon for juries to serve in excess of two months. Each day of a trial requires that jury's undivided attention, whether the witness is on direct examination or cross examination. If the length of cross-examination were reason to sever, the government would be required to sever any multiple defendant case expected to last two months or more.

Smith disputes the government's assertion that severed trials would result in significantly shorter presentation of the government's evidence. Smith's position is that the opposite would be true. The most lengthy witnesses of the initial trial were Gilley and Massey with each remaining on the stand in excess of one week. Each of these witnesses testimony would be necessary in all three severed trials, and cross examination could be expected to be lengthy in each. Beason's testimony lasted close to a week, and he would be required to testify in at least two, if not all three of the severed trials. Cross examination of Beason in any trial in which he testifies would go on for days. Joinder would significantly shorten the total time Gilley, Massey and Beason spend on the witness stand, promoting judicial economy.

As an example of the judicial economy that the government claims would be provided by a severance, the government argues that ". . . separating defendant Smith would relieve the other two juries from having to consider the money laundering counts, which charge none of the other remaining defendants. (Doc.1697, P.3). The testimony related to the money laundering counts was provided by Gilley through playing 4 audio tapes, the longest of which lasted approximately two minutes. There was also one exhibit introduced through and FBI agent showing four $50,000 checks

written by Gilley being deposited into the four PACs in mid-April 2010. All of the evidence the government can present related to the money laundering counts can be presented in less than twenty minutes, and is hardly grounds for a severance.

The government's argument that severance should be granted to "avoid a five-month delay in proceedings" is misleading. The government itself requests a trial date no earlier than October 31, 2011, and has indicated to the court no conflicts with a January 2012 trial date. A January 2012 trial with all defendants is only two months later than suggested by the government. It also would take into account the great number of conflicts provided by counsel for all defendants with a 2011 trial date. Even the governments proposed schedule would not reasonably result in disposition of all counts until spring 2012, a similar disposition timeline as that proposed by Smith through keeping the cases joined.

The government's contention that "severed trials, involving no more than four defendants in a single trial, would result in a net reduction in the amount of trial time compared to a single trial involving all defendants,"(Doc.1697, p.9) is simply wrong. Joinder would lead to judicial economy, while severance would greatly increase the total amount of time in court.

B. Rule 14(a)

Severance is not required under Fed.R.Crim.P. 14(a). The government implies that the jury in the initial trial was confused or overwhelmed based on the fact that they failed to reach a unanimous verdict on all counts. The government further implies that the jury failed to reach a unanimous verdict on any of the core bribery counts. In addition to completely acquitting two defendants of these substantive counts of bribery and conspiracy, the jury returned a total of 91 "not guilty" verdicts. As to Smith, the jury acquitted her of a "core" bribery count in which the government accused her of bribing Rep. Benjamin Lewis in Count II. The government's evidence as to this Count consisted of Lewis' testimony, as well as an audio tape of the alleged bribe. In returning a "not guilty" verdict as to this Count, the jury showed that it was able to sift through the evidence presented by the government and reach a unanimous decision. They further reached a unanimous verdict of "not guilty" against Smith for the extortion charges involving Ronnie Gilley contained in Count 21. The fact that a large majority of charged Counts and two defendants have been discharged by these acquittals only further simplifies the remaining cases.

In support of their motion, the government claims they are prejudiced by joinder in that they were prohibited from introducing the testimony of

Joshua Blades in the initial trial, and they contend they could present this evidence were the severance granted. Smith believes this is inaccurate, and therefore fails as a reason for severance. The government states:

> Severing defendants Preuitt and Smith into separate trials would alleviate the issues defendant Smith raised under Bruton v. United States, 391 U.S. 123 (1968), such that the government **possibly** could introduce Blades's testimony against each defendant, who, in turn, could seek to call the other to dispute Blades' recollection. Continued joinder of defendants Smith and Preuitt therefore prejudices the government to the extent it cannot introduce Blades's testimony. (Doc.1697, P. 8) (emphasis added).

Blades's testimony was excluded because it was inadmissible hearsay. The government sought its' presentation under Fed.R.Evid.801(d)(2)(e) as the statement of a co-conspirator. However, the Court excluded this testimony not under Bruton, but instead by ruling that Preuitt's statement, as relayed by Blades, was not made (1) during the course of or (2) in furtherance of any conspiracy. Severing Smith from the other defendants would do nothing to change this ruling or make this evidence any more admissible.

The government only seeks a severance after receiving 91 "not guilty" verdicts. At no time during the initial trial did the government seek to sever the cases because it had become apparent to them the presentation of the case had become too complex or confusing for the jury. This despite the fact

that counsel for some defendants made requests for severance at some point early in the trial. Only after failing to obtain any convictions does the government now explain the adverse verdicts by reasoning the jury simply must have been confused. No such evidence exists, and the government should not now be allowed to proceed under a different theory of the indictment after having failed to convict anyone during the initial trial under the theory presented to the Grand Jury.

II. Continuance

While Smith agrees the case should be continued from its current October 3, 2011 trial setting. Smith disagrees with the position of the government that an October 31, 2011 trial date is appropriate. In addition to the reasons set forth for continuance in McGregor's Motion to Continue filed under seal on August 17, 2011 and Smith's Motion to Adopt McGregor's Motion to Continue (Doc.1700), Smith anticipates a retrial lasting at least the 9 weeks the initial trial lasted, which would require the jury to serve during Thanksgiving, Christmas and New Year's. Smith fears this may pose a hardship on jurors so that no one would wish to serve during the entire holiday period. For those that are selected to serve, there is a fear of distraction that comes with the holidays, including additional financial

difficulties and concerns potential jurors may encounter serving during the holiday season.

Smith is sensitive to the conflicts posed by ASA Feaga's military service and agrees that a continuance is justified under the Speedy Trial Act based upon the fact that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C.§ 3161(h)(7)(A). Smith would only request the continuance be granted until 2012 to allow additional preparation for trial, to avoid existing attorney conflicts, and to prevent jury service during the entire holiday season.

III. Meet with Jurors

Smith opposes the government's request to meet with the jurors. Their jury service is complete and they should not be subjected to inquisition from government attorney's who indicate their verdict was flawed based on confusion. Additionally, the time necessary to engage in such a meeting would reduce the time allowed for preparation for retrial. As shown in the continuance filings with the Court, all counsel for Defendants have significant matters, other than this case, that must be addressed over the coming months, in addition to trial preparation for retrial of this case. The government's proposal to submit questions to the court for vetting, and then

to bring each juror and alternate to the courthouse for questioning would be time consuming and unnecessary, with little or no relevancy for a retrial that will not include the identical parties or witnesses.

Dated this the 22ND day of August, 2011.

s/ William C. White, II
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Certificate of Service

I hereby certify that I have electronically filed the foregoing document with the Clerk of Court and said electronic system will send a copy of same upon the following counsel of record by email on this the 22nd day of August, 2011:

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