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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. MCGREGOR	)	
THOMAS E. COKER	)	
JAMES E. PREUITT	)	
LARRY P. MEANS	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER, JR.	)	
JOSEPH R. CROSBY	)	

UNITED STATES' CONSOLIDATED MOTION TO (1) SEVER THE REMAINING DEFENDANTS, (2) CONTINUE THE FIRST SEVERED TRIAL, AND (3) PERMIT THE PARTIES TO MEET WITH PRIOR MEMBERS OF THE JURY

The United States, through undersigned counsel, hereby moves the Court to sever the remaining seven defendants as discussed below, continue the October 3, 2011, trial setting to October, 31, 2011, and permit the parties to meet with willing jurors from the first trial in the presence of the Court. In support of the consolidated motion, the government states as follows:

I. Severance of the Remaining Defendants Is Warranted

The Indictment in this matter originally charged eleven defendants. Prior to trial, defendants Ronald E. Gilley and Jarrod D. Massey pleaded guilty for their charged conduct. All nine remaining defendants proceeded to trial, which commenced on June 6, 2011. Two months later, on August 11, 2011, the jury acquitted two defendants, Quinton T. Ross, Jr., and Robert B. Geddie, Jr., on all counts. Although the jury acquitted the remaining seven defendants on a variety of counts (primarily the extortion and honest services mail and wire fraud counts), it deadlocked on the bulk of the core bribery allegations as to each defendant.

The government now moves to sever the remaining defendants into three trial settings, with defendants McGregor and Crosby tried together on October 31, 2011, defendant Smith tried in January 2012, and the remaining defendants—Coker, Means, Preuitt, and Walker—tried upon completion of defendant Smith's trial. Prior to trial, defendants McGregor, Smith, Means, and Walker moved to sever, and the government subsequently opposed their motions, citing the strong preference in the law for trying co-defendants together. See Zafiro v. United States, 506 U.S. 534 (1993).[1] However, having now concluded a two-month trial in this matter, following which the jury was unable to reach unanimous agreement as to the core bribery allegations against seven of the nine defendants, the government now believes that severance is the most likely means to ensure resolution of the remaining counts as to the remaining defendants.

Experience from the first trial in this matter establishes that this is the rare case in which severed trials involving fewer defendants are preferable and ultimately will be more efficient than a single trial involving all defendants. Although the government initially believed a single trial was the best course of action to ensure resolution of all defendants and all counts, the experience of that trial proved otherwise.

Indeed, the trial made clear the perils of trying these defendants together in a complex corruption case. Prior to trial, neither the government nor the Court could foresee the myriad practical and logistical difficulties that contributed to the jury's inability to reach verdicts on the core charges in the Indictment. For example, although the trial in this matter lasted approximately two

[1] The government filed its opposition approximately two months prior to defendant Gilley's guilty plea on April 22, 2011. The government's opposition to severance was based in part on the fact that evidence of Gilley's guilt was so intertwined with the other nine defendants as to make severance infeasible.

months, with the government's case-in-chief occupying all but one day of the trial, the vast majority of trial time was expended in cross-examination and re-cross-examination by the defendants. Cross-examinations lasted, in some cases, over a week. There is no doubt that these 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. Breaking the defendants into smaller groups would diminish the potential for lengthy and confusing re-cross-examinations concerning matters outside the scope of the government's direct examinations that were raised allegedly during other defendants' cross-examinations.

Severing the trials as suggested by the government would result in significantly shorter presentation of the government's evidence as well. Indeed, severance would permit a much more streamlined presentation by the government, and would also benefit the defendants to the extent that they would not feel compelled to defend allegations that only tangentially implicated them. The trials would be shorter, and the evidence less voluminous. For example, a trial involving only defendants McGregor and Crosby, which the government anticipates would take two to three weeks, 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. A trial involving only defendant Smith would focus on her relationship with Gilley, including his funding of her campaigns, as well as Smith's alleged efforts to bribe Steve French. Indeed, 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. Likewise, a final trial involving defendants Preuitt, Means, Walker, and Coker would focus on a very limited period of time—March 2010—during which defendants Preuitt and Means allegedly worked with one another to secure bribe payments from Walker, Coker, and

McGregor, among others, in exchange for their votes in favor of SB380. In contrast, trials involving McGregor, Crosby, and Smith would require evidence concerning a much broader period of time.

In short, proceeding with a single trial involving all seven remaining defendants is likely to generate many of the same time-consuming and confusing issues that plagued the first trial, running the risk of a similar outcome and thus future retrials. As discussed below, the Court is justified in severing the defendants in this matter under both Rule 14 of the Federal Rules of Criminal Procedure and the Court's inherent authority to manage is docket. At bottom, severance ultimately will save the Court time and resources while providing all parties the most focused and fair forum for resolution of all the charges pending against the defendants.

A. Severance Is Appropriate Under Rule 14(a)

Rule 14 of the Federal Rules of Criminal Procedure permits a district court to grant a severance if joinder "appears to prejudice a defendant or the government." Fed. R. Crim. P. 14(a). The decision whether to grant a severance is within the broad discretion of the district court. United States v. Chavez, 584 F.3d 1354, 1360 (11th Cir. 2009). In Zafiro, the Supreme Court held that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539 (emphasis added); see also United States v. Blankenship, 382 F.3d 1110, 1124 (11th Cir. 2004).[2] To that end, courts have granted severance where the risk of jury confusion stemming from a non-severed trial prejudiced the parties. For example, in United States

[2] The government does not contend that the defendants and charges in this case were improperly joined under Rule 8.

v. Kennedy, 819 F. Supp. 1510 (D. Colo. 1993), the district court granted the government's motion to sever under Rule 14(a) based in part on "the burden of a joint trial on a jury." Id. at 1515. The government argued that "in a joint trial of all 16 defendants, the jury could become so overwhelmed that they would vote to acquit rather than to sift through and thoughtfully consider the evidence pertaining to each defendant." Id. Four of the defendants in that case echoed the government's concern, noting the possibility that the jurors would be unable "to compartmentalize the large amount of evidence in this case or to adequately consider limiting instructions." Id. Rejecting a variety of arguments made by other defendants, who relied on the general preference for joint trials, the court concluded in part that severance would "minimize the overall potential prejudice for all parties and maximize reliability of jury judgments about guilt or innocence." Id. at 1517; see also United States v. Dioguardi, 20 F.R.D. 10, 14 (S.D.N.Y. 1956) (granting government's Rule 14 motion to sever seven-defendant case into two trials where "a severance will enable the Government to make a simpler and clearer presentation of evidence to the jury than would be the case in a joint trial").

The risk of juror confusion in this case justifies severance under Rule 14(a). This risk is not merely speculative—it is real. Having conducted one lengthy, multi-defendant trial in this case, the parties and the Court are well situated to evaluate the jury's verdicts and, in particular, their inability to reach a unanimous decision in favor of guilt or innocence on the most serious bribery allegations against seven of the nine defendants. The evidence adduced at the first trial, comprising significant witness testimony, copious financial records, and many hours of recorded conversations, likely was overwhelming for the jurors, who were charged with sifting through this voluminous evidence in evaluating each count as to each defendant. Faced with such volume, the finders of fact were unable

to reach unanimity as to seven of the defendants.

The likelihood of juror confusion remains significant should the Court proceed with a single trial involving all remaining defendants. As noted, severed trials would permit the government to tailor and reduce its evidence as necessary to the specific proceeding. Another joint trial, on the other hand, would require presentation of almost all of the evidence previously introduced. In light of the first jury's inability to reach unanimity, the risk that a future jury will be unable to dispose of the remaining counts and defendants is high, thus necessitating yet another retrial. There is no reason to believe the possibility of juror confusion would diminish in any future trial so long as all defendants and all charges are tried together, raising the possibility of additional retrials. Cf. United States v. Day, 405 F.3d 1293, 1297 (11th Cir. 2005) (noting that the preference for joint trials is rooted in part in the need to promote efficiency and the conservation of scarce judicial resources).

However, were the Court to grant severance, the possibility of juror confusion would be diminished appreciably and the possibility of total resolution would be increased. Each individual trial would be limited factually such that the presentation of evidence would be streamlined and easier to understand, a scenario that benefits all parties—and most importantly the jury. As such, breaking the remaining seven defendants into three separate trials would alleviate the compelling prejudice suffered by the government, the defense, and the Court stemming from the likelihood of continued juror confusion attendant in a single trial.

The Eleventh Circuit's application of Rule 14 in United States v. Lopez, No. 09-12802, 2011 WL 3570298 (11th Cir. 2011) (slip op.), is distinguishable from the present case. As an initial matter, the court in Lopez—as well as in the three cases it cites, United States v. Hill, 643 F.3d 807 (11th Cir. 2011); United States v. Kopituk, 690 F.2d 1289, 1320 (11th Cir.1982); United States v.

Hernandez, 921 F.2d 1569, 1580–81 (11th Cir.1991)—addressed defense, not government, requests for severance. 2011 WL 3570298, at *24 (noting that "only in the rarest case can a defendant clear" the bar for showing prejudice based on case complexity/likelihood of confusion) (emphasis added). More critically, however, none of those cases involved a retrial. Rather, the potential for juror confusion based on case complexity clearly was not as pronounced in those cases as it is in the present prosecution because the juries in each case actually were able to reach unanimous verdicts. That is not the case here. Cutting against any complexity-based argument in those cases, therefore, was the fact that the jury successfully sifted through the evidence to render a verdict. Lopez certainly did not foreclose the possibility that severance was appropriate where evidence that a "jury could not keep the charges and evidence straight" was provided by the fact of a deadlocked jury. Id. at *29. That simply was not the factual scenario confronted in Lopez.

In addition, it is clear that the defendants will suffer no prejudice from a severance. To the contrary, with the government's presentations more specifically tailored to the individual defendants on trial, the defendants need no longer be concerned with alleged "spillover" related to acts of other defendants not on trial. And to the extent that they would be subject to shorter trials, focused more narrowly on the allegations implicating each most directly, severance actually would inure to their benefit. Likewise, defense counsel would be able to save time and resources during trial preparation.

On the other hand, failure to sever would uniquely prejudice the government.. While a severance of defendants McGregor and Crosby would be the most important factor in streamlining the government's proof at trial, a severance of defendant Smith is also warranted so that the government can introduce testimony from Joshua Blades concerning a statement defendant Preuitt made to him about defendant Smith. During the first trial, the government intended to call Blades

in order to establish that defendant Preuitt told him that, while defendant Preuitt was speaking with Gilley on defendant Smith's phone, she (defendant Smith) passed defendant Preuitt a note with a significant dollar amount written on it. The Court excluded this testimony, and the government elected not to call Blades. 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's recollection. Continued joinder of defendants Smith and Preuitt therefore prejudices the government to the extent it cannot introduce Blades's testimony. See United States v. Rubin, 609 F.2d 51, 65 (2d Cir. 1979) (no abuse of discretion for trial judge to grant government motion to sever defendant from his co-defendants and try him separately where government sought to introduce statements he made during interviews with federal agents that would create potential Bruton problems with respect to the other defendants).

As a result, the Court should grant a severance under Rule 14 in order to avoid continued and compelling prejudice to all parties based on the significant likelihood of juror confusion arising from the complex allegations present in this case, and to alleviate prejudice to the government based on its inability to introduce the Blades testimony at a joint trial. See Chavez, 584 F.3d at 1360 (district court's decision to grant or deny severance reviewed for abuse of discretion).

B. Severance Is Appropriate For Purposes of Efficient Case Management

Even if the Court concludes that severance is not warranted pursuant to Rule 14, it nevertheless should sever based on case-management considerations. To that end, the power to order separate trials "rests within the broad discretion of the District Court as an aspect of its inherent right and duty to manage its own calendar." United States v. Gay, 567 F.2d 916, 919 (9th Cir. 1978).

This right exists wholly independent of a district court's authority under Rule 14. See United States v. Leichter, 160 F.3d 33, 36 (1st Cir. 1998). "Not every trial management decision is designed to avoid prejudice." Id.; see also id. (addressing district court's decision to sever based on its assumption "that, whatever the outcome of the trial on [the conspiracy count], the government would dismiss the remaining counts").

The district court in Kennedy granted the government's motion to sever based on justifications under Rule 14, as well as general case-management considerations. 819 F. Supp. at 1515. The court noted that "[m]any courts have identified severance of defendants as a means to assist with the management of complex multi-defendant cases." Id. (citing United States v. Casemento, 887 F.2d 1141, 1149-53 (2d Cir. 1989); United States v. Mancuso, 130 F.R.D. 128, 130-34 (D. Nev. 1990); United States v. Andrews, 754 F. Supp. 1161, 1170–89 (N.D. Ill. 1990); United States v. Shea, 750 F. Supp. 46, 49-50 (D. Mass. 1990); United States v. Gambino, 729 F. Supp. 954, 969-71 (S.D.N.Y.), rev' d in part, 920 F.2d 1108 (2d Cir. 1990)).

The government contends 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. Again, the evidence presented at each suggested trial would be streamlined through the reduction of witnesses, exhibits, and audio recordings. With the allegations narrowed at each trial, cross-examination and re-cross-examination necessarily will be limited. This is true even with respect to the conspiracy count because, as the government previously noted, it would not present all of the evidence of the conspiracy as to all defendants at each of the severed trials

(notwithstanding the fact that such introduction would be proper).[3] Moreover, with each trial involving no more than four defendants, the Court would not have to secure as much courthouse space for the parties or retrofit the courtroom for significant periods of time to accommodate the number of defendants and trial counsel. In short, multiple trials would permit the court to manage its docket more efficiently because each trial would be shorter and less logistically complex.

In addition, were the Court to sever defendants McGregor and Crosby and set their trial first, the disposition of that proceeding quite likely could lead to resolution of some or all of the remaining charges against the other defendants. Also, in light of the defendants' anticipated conflicts with an October 2011 trial date, a severance may also be the only way to ensure that these proceedings move forward at all in 2011. Setting a trial this year as to defendants McGregor and Crosby would require accommodation of fewer attorneys' schedules and would avoid a five-month delay in proceedings. Cf. United States v. Ridner, 2006 U.S. Dist. LEXIS 2856, at *2-3 (E.D. Ky. Jan. 26, 2006) ("Delay is a factor that may be taken into account in determining whether severance is appropriate." (citing United States v. Magnotti, 51 F.R.D. 1, 2 (D. Conn. 1970))). Separating the defendants may result therefore in significant resource- and cost-savings for all parties involved and permit the Court to manage its case load more effectively based on the possibility of just a single, shortened trial against only two defendants. As such, severance is appropriate pursuant to the Court's inherent case-management authority.

II. The Court Should Continue Any Trial Until October 31, 2011

[3] Nevertheless, the Court would still be justified in granting a severance based on case-management concerns even if the total amount of trial time were not reduced as a result of the severance. See Shea, 773 F. Supp. at 501; Mancuso, 130 F.R.D. at 133 ("mere length of trial alone" did not mandate joint trial); United States v. Vastola, 670 F. Supp. 1244, 1263 (D.N.J. 1987) (acknowledging that separate trials could equal the time necessary to conduct a joint trial).

In addition, the government seeks to continue any retrial from October 3, 2011, until October 31, 2011, and to exclude the continued period from the deadlines set by the Speedy Trial Act. The Speedy Trial Act permits trial delays at the request of prosecutors when "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). Here, a key member of the prosecution, Assistant United States Attorney Stephen P. Feaga, will be serving on active duty with the United States Air Force Reserve throughout October 2011, and unavailable to help retry this case until November 2011. Assistant United States Attorney Feaga's significant involvement at trial makes his participation in its retrial potentially critical to facilitating the expeditious resolution of unforeseeable issues and questions that may arise as to evidence and witnesses.

Further, the United States intends to make substantial recommendations regarding juror questionnaires and jury selection procedure. The Court has indicated that if the retrial is to commence on October 3, 2011, questionnaires will need to be circulated in very short order. Because the parties will require sufficient time to consider and propose such recommendations, additional time will be necessary. Justice would therefore best be served by granting the continuance.

The government proposes the following pre-trial deadlines:

- Deadline for proposed modifications to juror questionnaire (6 weeks prior to trial)
- Deadline for proposed preliminary instructions and jury selection questions (4 weeks prior to trial)
- Deadline for motions in limine (4 weeks prior to trial)
- Deadline for expert notices (4 weeks prior to trial)

- Deadline for witness/exhibit lists, exchange of exhibits and new transcripts (2 weeks prior to trial)

III. The Court Should Permit the Parties to Meet with Jurors from the First Trial

Finally, the United States also seeks to contact the jurors and alternate jurors empaneled in the initial trial of this case. Rule 47.1(b) of the Local Rules of the United States District Court for the Middle District of Alabama provides that parties shall not contact jurors or alternate jurors "about any aspect of the case or evidence, the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof" without first filing a motion and securing the Court's permission. As the Court is well aware, after a lengthy trial and contentious deliberations, the core bribery conduct charged in this case remains unresolved. The United States believes that all parties would benefit from receiving feedback from the original jurors in order to help future jurors avoid mistrials. To that end, the United States proposes that the Office of the Clerk of the United States District Court for the Middle District of Alabama contact the first trial's jurors and alternate jurors, and invite them to meet with the parties should they so choose. The government further suggests that such a meeting should take place in a controlled environment, such as the Court's library, that the Court should preliminarily vet questions that the parties would like to pose to the participating jurors and alternates, and that the proceedings be sealed so as not to have any effect on the future jury pool.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2011, I filed the foregoing using the Court's CM/ECF system, which will provide notice to counsel of record.

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