IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **v.** **JOHN M. MUSHRIQUI,** **JEANA MUSHRIQUI** **R. PATRICK CALDWELL,** **JOHN GREGORY GODSEY,** **MARK F. MORALES, et al.** **Defendants.**	**Case No. 1:09-CR-335 (RJL)**

DEFENDANTS' MOTION FOR MISTRIAL[1]

John M. Mushriqui, Jeana Mushriqui, R. Patrick Caldwell, John Gregory Godsey, and Marc Frederick Morales (collectively, "defendants"), by and through their undersigned counsel, hereby supplement their oral motions for a mistrial previously made on December 22, 2011, and in support thereof state:

Introduction

The defendants were improperly joined for trial in the Superseding Indictment through a conspiracy charge that the government knew it could never prove. The consequence of this improper joinder was the admission in the government's case-in-chief of hearsay statements of alleged co-conspirators and other testimony and exhibits that would not have been admissible at individual trials. The prejudice to defendants was compounded by the prosecutor's opening statement, which joined the six defendants on trial together with sixteen other defendants not on

[1] Pursuant to the Court's instruction, on December 29, 2011 the defendants informed the government that they would be filing this motion today. The defendants are not seeking to inconvenience the Court or the jury and are therefore prepared to continue with the presentation of their defenses while the Court considers the appropriate relief.

trial, including some whom have pled guilty – and repeatedly charged defendants with collective wrongdoing. Similarly, the prosecutors posed numerous questions to government witnesses to elicit testimony regarding what "all the defendants" did, were told, or agreed to.

The prejudice resulting from this misjoinder is so great that it cannot be cured by striking testimony and exhibits, or through curative instructions to the jury. Even if the court declines at this time to address whether or not joinder of the defendants was proper, without the conspiracy charge the defendants are now entitled to a severance, which at this point in the proceedings would have the practical effect of a mistrial.[2]

Argument

I. Only Significant and Explicit Jury Instructions and Striking of Evidence and Testimony Can Possibly Minimize the Prejudice to Defendants

Where a trial court has admitted evidence subject to connection and at the close of the government's case the necessary connection has not been proven, "the court must upon motion, and may sua sponte, strike the testimony that has not been sufficiently connected and direct the jury to disregard it." *United States v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (citing *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969); *United States v. Ziegler*, 583 F.2d 77, 80 (2d Cir. 1978)).

Thus, the government's evidence admitted subject to connection would have to be stricken in its entirety because of the government's failure to establish a viable conspiracy linking all of the defendants. This evidence includes: (a) the testimony of Jonathan Spiller, and all exhibits admitted through his testimony; (b) all testimony from any witness regarding any

[2] Specifically, the defendants would have to be severed into three groups as follows: (1) John Mushriqui and Jeana Mushriqui, (2) Patrick Caldwell, (3) John Gregory Godsey and Marc Morales.

other participant in the Gabon deal, who is not currently on trial, unless that testimony also concerned a defendant who is currently on trial; (c) GX 170 and any testimony relating to GX 170; (d) any government document admitted as an exhibit which was not sent to or from, or does not refer to a defendant who is currently on trial; [3] (e) any government recording admitted as an exhibit which does not include as a participant a defendant currently on trial.[4]

Furthermore, the Court would have to instruct the jury that evidence that would not have been admissible at separate trials can only be considered against certain defendants. This evidence includes: (a) the testimony of Tom O'Dea, and all exhibits admitted through his testimony, which should only be considered as to Caldwell; (b) the testimony of Special Agent Lenhart regarding the interview of Jeana Mushriqui, which should only be considered as to Jeana Mushriqui; (c) the testimony of Special Agent Lenhart regarding the interview of John Mushriqui, which should only be considered as to John Mushriqui; (d) exhibits and testimony regarding particular defendants, which should only be considered as to the defendant who was present and/or participating, or sending and/or receiving, including any recordings, documents, related testimony, and testimony regarding a particular defendant's actions or conduct.[5]

The foregoing instructions, however, would not be sufficient to cure the prejudice caused by the conspiracy charge and improper joinder of these defendant for trial. Because the prosecutors featured the conspiracy charge in opening statement and throughout their three month long presentation of the evidence, the jury has been indoctrinated with the government's

[3] Defendants have included a list of exhibits that fall into this category, attached as Exhibit 1.

[4] Defendants have included a list of exhibits that fall into this category, attached as Exhibit 2.

[5] Defendants have included a list of jury instructions that would have to be given if the Court does not grant a mistrial, attached as Exhibit 3.

theory of collective wrongdoing. The prosecutors repeatedly elicited testimony from their witnesses about "the industry," alleged actions by "the defendants," and information that "defendants were told" by Bistrong or the undercover agents. It does not appear possible to unring the "conspiracy bell."

II. The Defendants Were Improperly Joined in the Superseding Indictment

Federal Rule of Criminal Procedure 8(b) provides that an "indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). "The propriety of joinder is determined as a legal matter by evaluating only the 'indictment and any other pretrial evidence offered by the Government.'" *United States v. Carson*, 455 F.3d 336, 372 (D.C. Cir. 2006) (quoting *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1996)).

On its face the Superseding Indictment arguably contains sufficient allegations of an overarching conspiracy. However, the Court's acquittal of the defendants on the conspiracy charge, when considered together with pretrial representations by the government regarding the basis for its overarching conspiracy theory, demonstrates that the initial joinder was improper.

In a series of pre-trial motions defendants sought dismissal of Count One of the Superseding Indictment or, alternatively, relief from misjoinder on the ground that the government's overarching conspiracy theory could not be proven. *See* Motion to Dismiss Count 1 of the Superseding Indictment (Dkt. No. 463); Defendant R. Patrick Caldwell's Motion for Relief from Prejudicial Joinder (Dkt. No. 467); Motion for Relief from Misjoinder (Dkt. No. 471); and Defendants' Joint Motion for Leave to Join and Adopt Severance and Misjoinder Motions (Dkt. No. 473). The prosecutors opposed this relief in an omnibus pleading styled

Government's Response to Defendants' Motions to Dismiss and Relief from Misjoinder and Prejudicial Joinder (Dkt. No. 492), (hereinafter "Government's Opposition" or "Gov't Opp."). The Government's Opposition contained detailed representations regarding what the prosecutors would prove in order to support the allegation in Count One of the Superseding Indictment that defendants had "agree[d] to pay Latour a 20% 'commission' – totaling $3M – in connection with the $15 million [Gabon] deal, believing that half of the 'commission' would be paid as a bribe to the Minister of Defense of [Gabon] and the other half would be split between Bistrong and Latour for their corrupt services." *See* Superseding Indictment at ¶ 30.c.

Specifically, the prosecutors represented to the Court that the evidence would show:

- all defendants were told that fulfilling the $15M budget was a requirement,
- the deal "required a $1.5 million corrupt payment to the [MOD],"
- the deal "could not have been consummated without the participation of other suppliers," and
- that "[w]ithout fulfilling the procurement, the suppliers would not have been able to pay the $3 million commission required to finance the $1.5 million payment to the Minister of defense."

Gov't Opp. At 7-8.[6] Importantly, these representations were made at a time when the sources of this supposed evidence – the recordings of the meetings and calls in which defendants were pitched by Bistrong and Latour – were fully known to the prosecutors. Stated another way, there was no realistic expectation that the government's witnesses could elaborate at trial on what defendants were told about the structure of the Gabon opportunity presented by Bistrong and Latour.

The prosecutor's representations were not borne out by the evidence. As the Court recognized in its ruling on defendants' motion for judgment of acquittal,

[6] The defendants do not know if similar representations were made to the grand jury.

> Although certain common elements of the deal were indeed mentioned in the various pitch meetings that the defendants attended – $15 million budget, $3 million commission to be split between the agent and the Minister of Defense – the deal as it was structured did not necessarily link the success or failure of any of the defendant's deal with the success or failure of any of the others', nor did it necessarily link the cost and budget of any one of the transactions with the cost and budget of the entire be enterprise as a whole.
>
> Indeed, it is no surprise that the various defendants viewed themselves as competing against one another to sell as much as possible of their goods within the maximum of the $15 million budgeted. And none were told that the 1.5 million payment was an absolute requirement that had to be met for the deal to go forward.
>
> Moreover, consistent with this point, the defendants were never told if one or more of the participants dropped out, the deal would be jeopardized, let alone doomed. Indeed, as a mathematical matter, the deal, as structured, could not even generate the $3 million commission or $1.5 million alleged bribe to the Minister of Defense even if each defendant did participate in the scheme as structured because using the 20 percent commission formula, the most that could have been generated was a $2.4 million commission.
>
> [T]here is not enough evidence of the kind necessary to enable a rational trier of fact to find beyond a reasonable doubt the type of interdependence and common goal necessary for an overarching conspiracy of the type charged in this superseding indictment.

December 22, 2011, AM Tr. at 6-8.

At the time that they successfully opposed defendants' pretrial motions, the prosecutors knew that the government lacked the evidence to sustain the overarching conspiracy charge contained in Count One. The prosecutors forced defendants into a joint trial where they were obliged to defend against the distinct substantive FCPA charges filed against them, as well as the meritless conspiracy charge, burdened by the introduction of evidence that never would have been admitted in the separate trials to which defendants were entitled. In these circumstances,

the joinder of these defendants and charges was inherently prejudicial and affected defendants' substantial rights.[7]

III. Defendants Should Be Granted a Mistrial for Improper Joinder, or the Defendants Should be Severed

Where instruction cannot cure the prejudice posed by the inadmissible evidence a mistrial is required. *Jackson*, 627 F.2d at 1218 ("Although we are sensitive to the possibility of prejudice arising from the introduction of hearsay evidence that the judge's later instruction to strike cannot divest of its prejudicial effect, the defendant may request, and should receive, a mistrial in these circumstances."). Federal Rule of Criminal Procedure 14 governs severance of offenses or defendants. Rule 14 provides that "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trial, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

While there is no hard-and-fast rule that when a conspiracy count fails, joinder is error as a matter of law, "in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where . . . the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). Thus, even if the Court determines that the defendants were properly joined, severance may still be warranted based on this "continuing duty at all stages of the trial" to sever counts or defendants if there is a risk of prejudice. *Id*.

[7] Defendants request that the Court conduct an *in camera* review of the grand jury transcript to determine whether the evidence and instruction properly support the allegations of an overarching conspiracy in the Superseding Indictment.

Severance is warranted under Rule 14 where 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." *Carson*, 455 F.3d at 374 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). Examples of such prejudice include the "presence of evidence admissible against one defendant but not another or by the unavailability of exculpatory evidence to a single defendant in a joint trial that would be available in a single trial." *Id*. (citing *Zafiro*, 506 U.S. at 539).

The evidence presented by the government is rife with that which may have been admissible against one defendant but not another. Examples of such evidence include:

- The testimony of Tom O'Dea, which would have been admissible against Caldwell in a separate trial on the substantive FCPA counts, but would have been inadmissible in a separate trial of any of the four remaining defendants
- The testimony of Special Agent Lenhart, which would have been admissible against Jeana and John Mushriqui in a separate trial, but would have been inadmissible in a separate trial of any of the four remaining defendants
- All testimony relating to, or particular recordings or documents that involved, only one or two of the defendants which would have been admissible against one or two of the defendants in a separate trial of the particular defendant(s), but would have been inadmissible in against any of the other defendants

Even more egregious, however, is the evidence that would have been inadmissible against any individual defendant, absent the baseless allegations of an overarching conspiracy linking all of the defendants together. This includes all evidence the Court conditionally admitted subject to connection. Examples of this evidence include:

- The testimony of Jonathan Spiller
- The testimony of Special Agent Reynolds regarding the post arrest statement of Mr. Giordenella, who was acquitted by the Court
- All testimony about any participant in the Gabon deal who is not currently on trial, unless such testimony also concerned one of the defendants on trial. This includes testimony regarding any individual listed in GX 170 who is not currently on trial, such as Haim Geri, David Painter, Lee Wares, Andrew

Bigelow and Helmie Ashiblie. This also includes any evidence relating to Steve Giordanella that does not directly relate to Caldwell

- Hearsay statements of Daniel Alvirez

Further, the joint trial of the six defendants resulted in the Court excluding certain evidence proffered from several defendants, and admitting evidence over the objections of several defendants that was related to or prejudiced other defendants on trial. Examples of these issues include:

- The Court's refusal to admit, over objection of defendant Giordenella, Caldwell Exhibits 16E and 16T, a recording and transcript of a meeting between Tom O'Dea and Richard Bistrong that would have impeached O'Dea
- The Court's admission of evidence relating to Saul Mishken and Daniel Alvirez, over objections of defendants Caldwell, Jeana Mushriqui and John Mushriqui
- The Court's refusal to admit, over objection of defendant Morales, testimony from Agent Forvour that Bistrong was permitted, without authorization from FBI supervisors, to engage in an embezzlement scheme with Daniel Alvirez

Finally, the fact that the government, in furtherance of their misguided conspiracy theory, was permitted to introduce testimony that the same or similar deals that were allegedly offered to the defendants on trial were also offered to others served to unfairly buttress the credibility of Richard Bistrong. *See United States v. Lane*, 584 F.2d 60, 64-5 (11th Cir. 1978).

Conclusion

The prejudicial consequences of the government's folly in pursuing a trial of separate and distinct defendants through a conspiracy theory that was not supported by the evidence requires the Court to grant a mistrial, or order severance, the practical effect of which would be a mistrial.

Dated: January 2, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 2, 2012, I caused the electronic filing of the foregoing ***Defendants' Motion for Mistrial*** using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF.

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