

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 3:08CR014
)
ROBERT L. MOULTRIE, NIXON E. CAWOOD,)
CHARLES K. MOREHEAD, FACILITY HOLDING)
CORP., d/b/a THE FACILITY GROUP,)
FACILITY MANAGEMENT GROUP, INC.,)
FACILITY CONSTRUCTION MANAGEMENT, INC.,)
and FACILITY DESIGN GROUP, INC.,)
)
Defendants.)

**ROBERT L. MOULTRIE’S MOTION TO SEVER;
TOGETHER WITH SUPPORTING MEMORANDUM OF LAW**

1. Motion

Defendant, Robert L. Moultrie (“Mr. Moultrie”) moves, pursuant to Rules 8, 12(b)(3)(D), and 14 of the Federal Rules of Criminal Procedure, for an Order (1) severing Count 1 from Counts 2-16, and (2) severing Mr. Moultrie from the other defendants in Counts 2-16 of the Superseding Indictment. To the extent necessary, Mr. Moultrie requests that this Court defer judgment on his Motion to Sever until the conclusion of the Government’s case-in-chief at trial. This Motion to Sever is made subject to, and without waiving, Mr. Moultrie’s Motion(s) for Bill of Particulars.

In support of his Motion to Sever, Mr. Moultrie shows as follows:

2. Background.

Mr. Moultrie is President and CEO of “The Facility Group.” The sixteen-count Superseding Indictment charges that The Facility Group and certain of its employees allegedly

participated in two wholly independent sets of activities. First, Count 1 of the Superseding Indictment charges Mr. Moultrie and other employees of The Facility Group with conspiring to violate 18 U.S.C. § 666 by giving a bribe to a public official of the State of Mississippi (“the bribery conspiracy”) in order to obtain for The Facility Group a particular contract from the State of Mississippi in violation of 18 U.S.C. § 371. Counts 2 through 16 charge a completely separate scheme to defraud (“the fraud scheme”) through the submission of allegedly false invoices for payment under that contract, in violation of 18 U.S.C. § 1341.

To the extent the Superseding Indictment attempts to link these two separate sets of activities, that link only could be found in Paragraphs 22, 26, 27, and 44 of Count 1,¹ and paragraphs 12 and 22 of Count 2. Those paragraphs allege that The Facility Group submitted inflated invoices in order to recover the allegedly illegal campaign contributions and expenses. Significantly, the Superseding Indictment fails to identify any act of Mr. Moultrie which allegedly constitutes participation in the alleged fraud scheme, or aiding or abetting any other alleged participant in carrying out the alleged fraud scheme. Moreover, at least one defendant to Counts 2-16 is not charged as an alleged participant in the alleged bribery scheme.

3. Argument and Citation of Authority

a. Rule 8 Requires that Count 1 Be Severed from Counts 2 through 16.

The Court’s misjoinder analysis should proceed under Rule 8. *Accord* United States v. Lane, 735 F.2d 799, 804 (5th Cir.1984) (finding severance of Count 1 of an indictment where the offense alleged in Count 1 was not part of the same transaction or series of transactions that were

¹ Paragraphs 22, 26 and 44 appear to be identical, and appear to be identical to paragraph 12 of Count 2. Thus, there only are three allegations out of the total 67 paragraphs in Counts 1 and 2, which even attempt to link the alleged bribery conspiracy and the alleged fraud scheme.

contained in the following counts of the indictment); *see also* 1A Wright & Leipold, Federal Practice and Procedure § 144, n.1 and accompanying text (4th ed. 2008).

Joinder of defendants is proper only where the indictment alleges that all of the defendants “participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” Harrelson, 754 F.2d at 1176; *see also* United States v. Gentile, 495 F.2d 626, 630 (5th Cir. 1974) (reversal for failure to grant severance). Accordingly, where separate charges are improperly joined in a single indictment, the charges must be severed.

In Gentile, the Government argued that a conspiracy to sell illicit substances alleged in Count 1 of the indictment sufficiently tied the transactions in Counts 2 and 3 together. Count 2 alleged that both defendants sold PCP; however, Count 3 only charged the non-moving defendant with selling LSD. The court found misjoinder, noting that “[f]or a conspiracy to properly tie separate events together so as to permit joinder of defendants, the substantive offense alleged in the indictment must fall within the scope of the conspiracy.” Id.

In finding misjoinder, the court noted several differences between Counts 2 and 3: (1) three weeks between sales; (2) of different drugs; (3) in different locations; and (4) that the movant was not alleged to have been involved in Count 3. Id. at 631.

Here, the government relies on a broadly drawn bribery conspiracy in Count 1 in hopes of tying it to a totally independent, later occurring billing scheme alleged in Counts 2-16, just as in Gentile. While Count 1 is incorporated into Counts 2-16, the only substantive violations alleged in Counts 2-16 are aiding and abetting a scheme to defraud in violation of 18 U.S.C. § 1341. The Superseding Indictment fails to state any alleged conduct of Mr. Moultrie which is alleged to constitute aiding or abetting the fraud scheme. Moreover, the object of the alleged bribery

conspiracy charged in Count 1 (see Paragraph 2) was achieved before the alleged fraud scheme charged in Counts 2-16 began.

The alleged bribery conspiracy is not part of the same act or transaction, or the same series of acts or transactions, as the alleged scheme to defraud. Rather, the alleged bribery conspiracy had a different object than did the alleged fraud scheme, involved different alleged participants, involved a different alleged *modus operandi*, and the facts as alleged would show that the alleged bribery conspiracy achieved its objective before any of the alleged acts of mail fraud, charged in Counts 2-16, took place. This appears to be conceded by the Government who describe the original Indictment as failing to allege that the Mississippi Beef contract was obtained for the purposes of fraudulent billing. (Hearing Transcript of May 1, 2008 Daubert Hearing, p. 93, l. 6-9)² Accordingly, Count 1 is misjoined, and should be severed from Counts 2 through 16.³

b. Severance also should be granted pursuant to Rule 14.

Rule 14 authorizes a court to grant relief if a joint trial appears to prejudice one of the parties. Sufficient grounds for such severance exist 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.” Zafiro v. United States, 506 U.S. 534, 539

² In attempting to demonstrate why Mr. Keifer’s polygraph was irrelevant the Government asked:

So there’s no -- and in the charge indictment that you’ve read in reviewing the Counts 2 through 16, there’s nothing in there that claims he [Mr. Moultrie] obtained this contract knowing that his company would submit fraudulent bills, is there?

The changes caused by the Superseding Indictment have done nothing to cure this fatal flaw in the original indictment.

³ Of course, in the event this Motion is denied, then Mr. Moultrie will renew the Motion based upon the evidence at trial, at which time the Court will be required to grant severance.

(1993). “Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant.” Id. Here, the Indictment fails to identify any alleged conduct of Mr. Moultrie which allegedly constitutes aiding and abetting the alleged fraud scheme. Accordingly, any evidence admissible solely to prove the alleged fraud scheme should not be admissible against Mr. Moultrie at a separate trial for conspiracy to bribe charged in Count 1. Moreover, Mr. Moultrie certainly will be prejudiced by the spillover from trying the alleged fraud scheme (charged in Counts 2-16) with the alleged bribery conspiracy (Count 1). Therefore, Rule 14 requires severance of Mr. Moultrie from the other Defendants in Counts 2-16.⁴

4. Conclusion.

For the foregoing reasons, Mr. Moultrie asks that his Motion be granted.

Respectfully submitted this 10th day of July, 2008.

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⁴ See note 2, *supra*.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2008, I have caused a copy of the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

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