UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Crim. Case No. 04-80372**
HONORABLE VICTORIA A. ROBERTS

D-1 CARL MARLINGA,

D-2 RALPH R. ROBERTS, and

D-3 JAMES A. BARCIA,

Defendants.

ORDER AND OPINION: (1) GRANTING DEFENDANT ROBERTS' MOTION TO REFORMULATE COUNT ONE AS DUPLICITOUS; (2) GRANTING DEFENDANTS ROBERTS AND BARCIA'S MOTIONS FOR SEVERANCE PURSUANT TO F.R.Cr.P. 8(b); AND (3) DECLARING MOOT DEFENDANTS ROBERTS AND BARCIA'S MOTIONS FOR SEVERANCE AND SEPARATE TRIALS PURSUANT TO F.R.Cr.P. 14(a)

I. INTRODUCTION

This matter is before the Court on Defendant Roberts' Motions to Dismiss or Reformulate Count One as Duplicitous (Doc. No. 35), and Defendants Roberts and Barcia's Motions for Severance and Separate Trials pursuant to F.R.Cr.P. 8(b) and 14(a) (Doc. Nos. 34 and 31 respectively). Oral argument on the motions was conducted on February 16, 2005. For the reasons stated, the Court GRANTS Defendant Roberts Motion to Reformulate Count One as Duplicitous. If it desires to charge separate conspiracies, the Government must do so in two separate indictments. Further, the Court GRANTS

Defendants Roberts' and Barcia's Motions for Severance pursuant to F.R.Cr.P. 8(b). Roberts and Marlinga will be tried together; and, Barcia and Marlinga will be tried together in another trial. Because of this ruling on Rule 8(b), Defendants Roberts and Barcia's Motions for Severance and Separate Trials pursuant to F.R.Cr.P. 14(a) are moot.

II. BACKGROUND

Carl Marlinga, Ralph Roberts and James Barcia are charged in a nine-count Indictment issued by the Grand Jury on April 22, 2004. Roberts is charged in three counts (I,II, and VII). Barcia is charged in two counts (V and VIII). Marlinga is charged in all counts. The charges stem from Marlinga's unsuccessful bid for the United States House of Representatives. He is the former Macomb County Prosecutor. Roberts is a Macomb County, Michigan realtor and owner of Ralph Roberts Realty. Barcia is currently a member of the Michigan State Senate and a former member of the United States House of Representatives.

Count One charges Marlinga and Roberts with conspiracy to defraud and deprive citizens of their right to the honest services of Carl Marlinga as the Macomb County Prosecutor using the mails in violation of 18 U.S.C. §§ 1341, 1346, and 371. Count Two charges Marlinga and Roberts with the substantive offense of defrauding and depriving citizens of their right to the honest services of Carl Marlinga as the Macomb County Prosecutor using the mails in violation of 18 U.S.C. §§ 1341 and 1346. Counts Three and Four charge Marlinga with defrauding and depriving citizens of their right to his honest services as the Macomb County Prosecutor using wire communications in violation of 18 U.S.C. §§ 1341 and 1346. Count Five charges Marlinga and Barcia with making a false

statement to an agency of the United States, aiding, abetting, counseling, commanding, inducing and procuring in violation of 18 U.S.C. §§ 1001(a), 2(a). Count Six charges only Marlinga, and mirrors Count Five, except it alleges that the Michigan Democratic Party served as the conduit for unlawful campaign donations. Count Seven charges Marlinga and Roberts with procuring contributions to Carl Marlinga and Carl Marlinga for Congress which in the aggregate exceeded the $2,000 contribution limitations by concealing conduit contributions in violation of 21 U.S.C. §§ 441a(a)(1)(A), 441a(8), 437g(d), and 18 U.S.C. § 2. Count Eight charges Marlinga and Barcia with exceeding limits on contributions, procuring, commanding, and counseling in violation of 2 U.S.C. §§ 441a(a)(1)(A), 441a(8), 437g(d), and 18 U.S.C. § 2. Finally, Count Nine charges Marlinga with procuring contributions to Carl Marlinga and Carl Marlinga for Congress which in the aggregate exceeded the $2000 contribution limitations by concealing conduit contributions in violation of 441a(a)(1)(A), 441a(8), 437g(d), and 18 U.S.C. § 2.

Roberts contends that Count One actually alleges two separate conspiracies, only one of which he is alleged to be involved. Roberts asserts that Count One should be dismissed or reformulated to include only one of the two conspiracies. Additionally, Roberts and Barcia assert that they are misjoined with each other pursuant to F.R.Cr.P. 8(b), and should be severed. If the Court denies them relief under Rule 8(b), they request severance and separate trials under F.R.Cr.P. 14, arguing prejudice.

III. APPLICABLE LAW AND ANALYSIS

A. Duplicity

Defendant Roberts attacks Count One of the Indictment, arguing that the count is

duplicitous in that it alleges two separate and distinct conspiracies.

"Duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity." *United States v. Hood*, 210 F.3d 660, 662 (6th Cir. 2000). Impermissible duplicity occurs when a single count charges "separate and distinct" crimes. *United States v. Davis*, 306 F.3d 398, 415 (6th Cir. 2002). To avoid duplicity, the Government is required to not charge separate and distinct crimes in a single count. *See id.* "The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both." *United States v. Washington*, 127 F.3d 510, 513 (6th Cir. 1997); *see United States v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002).

1. Count One of the Indictment

In order to establish whether Count One alleges a single or multiple conspiracies, additional background is necessary. Count One charges Roberts and Marlinga with conspiracy to defraud and deprive citizens of their intangible right to the honest services of the Macomb County Prosecutor, using the mails in violation of 18 U.S.C. §§ 1341, 1346, and 371. According to the Government, "the conspiracy alleged is one between Roberts and Carl Marlinga regarding the Moldowan case." Gov. Br. Opp'n Mo. Dismiss or Reformulate at p. 3. The Government says the scheme was devised by Marlinga to obtain campaign contributions in exchange for agreeing to make decisions which involved his official position as Macomb County Prosecutor.

The Indictment alleges the conspiracy involved the position Marlinga's office would take in Michigan state courts regarding the fairness of the 1991 Jeffrey Moldowan trial. In

1991, Moldowan and Michael Cristini were convicted of Assault with Intent to Commit Murder, Criminal Sexual Conduct, and Kidnapping.[1]

Moldowan sought a new trial, arguing that unreliable bite-mark testimony should not have been admitted against him. The Indictment alleges that the Macomb County Prosecutor's office "vigorously and successfully opposed all efforts for a new trial for Moldowan" until December 2001. Indictment at pp. 2-3. According to the Indictment, Roberts offered, and Marlinga agreed to accept, contributions to Carl Marlinga for Congress in exchange for acts in his official capacity to support a new trial for Moldowan. This, according to the Indictment, constituted an unlawful *quid pro quo*.

Count One also asserts that during the same time period Marlinga conspired with Dennis Johnston, an unindicted co-conspirator who is the attorney for both James Hulet and Moldowan. In September 2001, the Macomb County Prosecutor's Office charged Hulet with numerous offenses, including Criminal Sexual Conduct in the First Degree; three counts of Delivery of a Controlled Substance to a Minor; Felony Firearms; Possession with Intent to Deliver a Controlled Substance; Possession of MDMA (Ecstacy); Maintaining a Drug House; and Contributing to the Delinquency of a Minor. Hulet also faced a civil suit by the victim of the sexual assault. The Indictment asserts that Hulet's attorney offered, and Marlinga agreed to accept, illegal campaign contributions to Carl Marlinga for Congress in exchange for acts in his official capacity as Macomb County Prosecutor regarding the Hulet case. This, according to the Indictment, also constituted an unlawful *quid pro quo*.

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[1] According to the indictment, Roberts' connection to Moldowan is through Moldowan's sister, who is employed by Ralph Roberts Realty. Indictment at p.3.

The Indictment alleges that the connection between the two matters is an August 26, 2002 meeting between Marlinga and Johnston. At the meeting, Marlinga requested that Johnston proceed with the Moldowan trial prior to the November election, but that he postpone resolution of the Hulet case until after the election. Roberts asserts that this meeting is insufficient to establish a single conspiracy involving him, Barcia and Hulet. On the other hand, the Government asserts that Marlinga's request at the meeting sufficiently extended the scope of the Marlinga-Johnston conspiracy regarding the Hulet case, to the Moldowan case, in which Roberts was already a conspirator.

a. Single vs. Multiple Conspiracy

In determining whether there is a single conspiracy or multiple conspiracies, "we must bear in mind that the essence of the crime of conspiracy is agreement[; and that in] order to prove a single conspiracy the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Warner*, 690 F.2d 535 at 548-549 (6th Cir. 1982). "The principal considerations in determining the number of conspiracies are the existence of a common goal, the nature of the scheme, and the overlapping of the participants in various dealings." *United States v. Smith*, 320 F.3d 647, 652 (6th Cir. 2003). Importantly, "[a] defendant may be convicted for a single conspiracy if the evidence supports a finding that he had knowledge or foresight of the conspiracy's multiplicity of objectives." *Id.* at 653. Thus, "a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy."

Warner, 690 F.2d at 549.

In support of his assertion that Count One includes multiple conspiracies, only one of which he is allegedly a part of, Roberts argues: (1) there is a lack of an overarching agreement; and (2) the two schemes do not bear any indicia of commonality (e.g., they have different memberships, goals, overt acts, and no overlap). As for the discussion between Marlinga and Johnston, Roberts says that the Indictment does not assert he knew Johnston represented both Moldowan and Hulet; the discussion was unknown to him; and, the Indictment does not allege that Roberts knew of or in any way coordinated his Moldowan-related actions with Johnston, Hulet's attorney.

The Government responds that Marlinga conspired with Johnston regarding both the Hulet and Moldowan matters, and that, minimally, Marlinga considered the two cases linked since he discussed the timing of Johnston's actions in the Moldowan and Hulet cases. The Government says that Marlinga worked with Johnston to have the Moldowan matter tried before the November election for Marlinga's political benefit. Marlinga also sought to avoid a plea by Hulet until after the election. The Government contends that the Johnston and Marlinga connections to both Hulet and Moldowan are sufficient to establish a single conspiracy.

This case is very similar to *Kotteakos v. United States*, 328 U.S. 750 (1946). *Kotteakos* involved a scheme to defraud the federal government by fraudulently obtaining loans and advances offered by the Federal Housing Administration. There was one central figure in the entire scheme, Brown, who pled guilty. He was the mastermind and knew all of the individuals involved. The defendants each worked through Brown to obtain

the loans and advances. During the trial, the prosecution did not show that the various defendants knew of the existence of the others or, that they intended to profit from the plans of the other defendants.

The *Kotteakos* Court noted that rather than a single conspiracy, at least eight conspiracies existed because the defendants could be clustered into separate, wholly independent groups, none of which had any connection to the others except that they each acted through Brown. *Id.* at 754-755. "[T]he pattern was that of separate spokes meeting at a common center, though we may add[,] without the rim of the wheel to enclose the spokes" and connect each of the parties to a single conspiracy. *Id.* at 755.

Contrary to the Government's position, this Indictment does, indeed, allege two distinct conspiracies in Count One, though only one is pled. Two different means and methods to advance the conspiracy are articulated: one scheme involved the Hulet case; the other involved the Moldowan case. Roberts is only implicated in the scheme involving the Moldowan case. The Indictment attempts to link these two means and methods by the conversation between Johnston and Marlinga, and plead the count as a common scheme or plan. However, a single venture agreed upon by Roberts, Hulet, Barcia and Marlinga, with a common goal, is decidedly missing and not articulated in Count One.[2]

This Indictment neither alleges nor suggests that Roberts knew or had reason to know about any alleged coordination of the Moldowan and Hulet cases. *See Smith*, 320

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[2] That there are two distinct conspiracies is also evidenced by the headings of the indictment. Indictment at p. 4 ("FACTUAL ALLEGATIONS REGARDING THE MOLDOWAN CASE"); *Id.* at 12 ("FACTUAL ALLEGATIONS REGARDING THE HULET CASE")(emphasis supplied).

F.3d at 653-654 (finding conspiracy requires knowledge or foresight). Nor does the Indictment suggest that the Hulet and Moldowan conspiracies some how depended on or benefitted from the existence of the other. *See Warner*, 690 F.2d at 549. Indeed, the Indictment does not even suggest that Roberts knew or had reason to know that the alleged Hulet scheme existed.

While knowledge of all of the components of the conspiracy is not required for a single conspiracy to exist, each of the alleged co-conspirators must foresee or "realize that he [was] participating in a joint enterprise." *Id.* at 549. The Indictment does not assert that Roberts had, or should have had, some knowledge or foresight that he was participating in a joint venture. Based on the allegations in the Indictment, the Hulet conspiracy could not have been part of a collective venture directed toward a common goal in which Roberts agreed to join. *See id.* at 548-549; *see also Smith*, 320 F.3d at 653-654. Indeed, at the hearing, the Government conceded that Roberts could not be found guilty of Count One based only on acts related to the Hulet conspiracy.

The Government's argument that Marlinga is the link fails for the same reason that the single conspiracy argument failed in *Kotteakos*. While Marlinga may be the center, the Indictment does not articulate a "rim" or an overarching goal that transforms Roberts into a "spoke" in a single conspiracy involving Hulet and Barcia.[3]

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[3] At the hearing, the Government asserted that the August 2002 conversation between Marlinga and Johnston regarding timing of the Moldowan trial and Hulet plea, was made to disguise the conspiracies. This contradicts the Government's brief which argues that the purpose of the meeting was to schedule the cases for "Defendant Marlinga's political benefit." Gov. Br. Opp'n Mo. Reformulate or Dismiss at p. 3. Nonetheless, Roberts' connection to the Hulet conspiracy is, at best, highly tenuous.

Based on the above, the Court finds that Count One of the Indictment includes two separate and distinct conspiracies, both involving Marlinga, but only one involving Roberts. Count One is duplicitous. *See United States v. Davis*, 306 F.3d 398 (6th Cir. 2002).

b. Count One Must Be Reformulated

Roberts suggests that the Court should dismiss Count One of the Indictment or require the Government to reformulate the count. The Government argues that if the count is found to be duplicitous, an appropriate remedy is a specific jury instruction.

To support its contention that the Count should be dismissed or reformulated, Roberts asserts that: (1) there is a risk that the jury could convict him on a less than unanimous basis; (2) the jury may be confused by the Count; (3) he may be convicted based in whole, or in part, on evidence alleged in the Hulet portion of the conspiracy; (4) he may face prejudice in evidentiary rulings; (5) the jury may have difficulty determining which co-conspirator statements may be considered against him; (6) he may be held liable for the aggregate amount of loss or gain from both conspiracies under the sentencing guidelines; and (6) he may face double jeopardy.

As noted, *supra*, "Duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity." *United States v. Hood*, 210 F.3d 660, 662 (6th Cir. 2000). "Duplicity can potentially prejudice the defendant in sentencing, obtaining appellate review, and protecting himself against double jeopardy." *United States v. Washington*, 127 F.3d 510, 513 (6th Cir. 1997).

If a court finds an indictment duplicitous, "Defendant's remedy is to move to require

the prosecution to elect either the count or the charge within the count upon which it will rely. Additionally, a duplicitous... indictment is remediable by the court's instruction to the jury particularizing the distinct offense charged in each count of the indictment." *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981) (internal citation omitted); *see also Hood*, 210 F.3d at 662-663.

The Government states that it "would not object to an instruction that in order to find Defendant Roberts guilty of the conspiracy charge in Count One of the Indictment, all of the jurors would have to unanimously agree that he was guilty of having conspired as to the Moldowan portion of the conspiracy." Gov. Br. Opp'n Roberts Mo. to Dismiss or Reformulate at p. 4. However, a jury instruction would be an unsatisfactory remedy when the problem and its potential for harm and prejudice is recognized so far in advance of trial.

More importantly, "[a] specific unanimity instruction is required only when one of three situations exists: 1) the nature of the evidence is exceptionally complex; 2) there is a variance between the indictment and proof at trial; or 3) there is a tangible indication of jury confusion, as when the jury has asked questions of the court." *Hood*, 210 F.3d at 663 (*citing United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992)). This case fits none of the *Hood* categories.

The first and third situations are clearly inapplicable. Roberts is not seeking relief because the *evidence* is complex. His concern is the duplicitous nature of Count One. Additionally, at this early juncture, there is no expressed jury confusion, only a prediction

that it will likely occur.

The second situation is also inapplicable because the Indictment is duplicitous on its face. It must be remembered that the purpose of curing duplicitous indictments is to reduce or prevent prejudice to the defendant. Acknowledging that Count One of the Indictment is duplicitous prior to trial, but failing to cure the duplicity until the jury instruction stage, would leave this Defendant open to the very prejudices the Court can prevent. Hoping that a jury instruction will remedy a problem that can clearly be solved now, makes no sense. While there are situations in which a jury instruction of unanimity is an appropriate remedy for a duplicitous indictment (e.g., when the indictment *appropriately alleges* a single conspiracy, but the proofs at trial suggest multiple conspiracies), this is not one of them.

The Court requested the Government to present its proposed jury instruction regarding Count One, which it did at the hearing:

GOVERNMENT'S PROPOSED INSTRUCTION

(1) Count One of the Indictment charges that Defendants Marlinga and Roberts were both members of one single conspiracy to commit the crime of Conspiracy to Defraud the Citizens of the Honest Services of the Macomb County Prosecutor.

(2) Some of the defendants have argued that there were really two separate conspiracies– one between Defendant Marlinga and Defendant Roberts regarding the Moldowan case; and another between Defendants Marlinga and others regarding the Hulet case.

(3) To convict either one of Defendants Marlinga or Roberts of the conspiracy charge, the government must convince all twelve of you that a defendant was a member of at least one of the conspiracies. In other words, all twelve of you must agree that a defendant conspired regarding the Moldowan case, and all twelve of you must agree that a defendant conspired regarding the Hulet case. If the government fails to prove either of these, then you must find that defendant not guilty of the conspiracy charge.

Gov't Proposed Jury Instruction Presented at Motion Hearing. However, the Government conceded that this instruction would be confusing and that Roberts could not be convicted under Count One if the jury only believed a Hulet conspiracy occurred and not the Maldowan conspiracy. The Court agrees with the Government. And, this proposed instruction merely confirms the hopelessness of an instruction as a viable remedy for the duplicity of Count One.

Dismissal would also be inappropriate. "The rules about multiplicity and duplicity are pleading rules, the violation of which is not fatal to an indictment." *Robinson*, 651 F.2d at 1194. "This error would [ ] be harmless if the United States were required to elect upon which charge it would proceed. The entire count should not be dismissed when a less drastic ruling will suffice." *Reno v. United States*, 317 F.2d 499, 502 (5th Cir. 1963); *see Hood*, 210 F.3d at 662-663; *United States v. Hitchcock*, 273 F.3d 903, 915 (9th Cir. 2001).

The less drastic option available is reformulation. Electing the charge upon which it will rely does not prejudice the Government --- it only requires the Government to cure a pleading defect in the Indictment, and prevent the ills that arise from a duplicitous count in an Indictment. *See Hood*, 210 F.3d at 663.

The Government indicated that it would seek a superseding indictment if the Court orders action other than a curative jury instruction. Because of the Court's finding that misjoinder has occurred, discussed *infra*, a single superceding indictment charging two conspiracies is not appropriate. Separate indictments is the only solution.

The Court GRANTS Defendant Roberts' Motion to the extent that he seeks reformulation because of duplicity. The Court ORDERS the Government to reformulate Count One of the indictment.

B. F.R.Cr.P. 8(b): Misjoinder

In separate motions, Barcia and Roberts contend they are misjoined with each other.[4]

Pursuant to Federal Rule of Criminal Procedure 8(b):

> The indictment or information may charge 2 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. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

"While it is true that Rule 8(b) should be construed in favor of joinder, [ ] it is also true that failure to meet the requirements of this rule constitutes misjoinder as a matter of law." *United States v. Hatcher*, 680 F.2d 438, 440 (6th Cir. 1982)(internal citations omitted). The Sixth Circuit has held that "[u]nder Rule 8(b) multiple defendants may be joined *only* if a sufficient nexus exists between the defendants and the single or multiple acts or transactions charged as offenses." *United States v. Johnson*, 763 F.2d 773, 775 (6th Cir. 1985)(emphasis added). "A group of acts or transactions constitutes a 'series' if they are logically interrelated, and... a group of acts or transactions is logically interrelated, for

[4] While the motions and briefs appear to argue Barcia and Roberts are misjoined with Marlinga as well, counsel conceded at the February 16th hearing that they seek severance only of the Moldowan and Hulet allegations. If these allegations are severed, counsel concede their clients are properly joined in separate indictments with Marlinga on allegations common to each of them and Marlinga.

instance, if the acts or transactions are part of a common scheme or plan." *United States v. Beverly*, 369 F.3d 516, 533 (6th Cir. 2004)(*citing Johnson*, 763 F.2d at 776).

In a case of misjoinder "the trial judge has no discretion on the question of severance. Severance in such a case is mandatory." *Hatcher*, 680 F.2d at 441. Indeed, failure to sever when misjoinder has occurred is error. *Id.* at 442.

This case is analogous to *United States v. Hatcher*, 680 F.2d 438, 440 (6th Cir. 1982). In *Hatcher*, defendants Hatcher and Manetas were jointly indicted and jointly tried for federal narcotics crimes. Both defendants were charged with three counts relating to possession and distribution of heroin. Additionally, Hatcher alone was charged with three counts relating to possession and distribution of cocaine. The Sixth Circuit held the fact that all counts against both defendants were based on possession and distribution of narcotics was insufficient to justify joinder, even though the evidence showed that Manetas was Hatcher's source of heroin. The trial judge committed reversible error by not granting Manetas' motion for Rule 8(b) severance because "the indictment on its face alleges no connection between Manetas and the cocaine related charges against Hatcher. Neither does the record reveal any evidence of such connection." *Id.* at 441. The Sixth Circuit emphasized "[i]f multiple defendants are improperly joined under Rule 8(b) because they are charged with offenses that are unrelated, then they are considered as prejudiced by that fact and the trial judge has no discretion on the question of severance." *Id.*

1. Roberts and Barcia Are Misjoined; They Must Be Severed

Roberts asserts that there are two separate and distinct conspiracies alleged in the

Indictment. Barcia asserts that he is not alleged to have any connection to the only charged conspiracy, the Moldowan conspiracy. The Court agrees, as discussed *supra*. It is clear that the Roberts' charges are not related to the Hulet conspiracy. And, the offenses Barcia is charged with are not related to the Moldowan conspiracy. Indeed, the Indictment does not allege that Barcia has any connection to the Moldowan conspiracy, which encompasses many of the nine counts in the indictment.

As in *Hatcher*, the only connection between Roberts and many of the other counts in the Indictment is Marlinga, who is common to all defendants and all charges. Also, as in *Hatcher*, the only connection between Barcia and other counts in the Indictment is that Marlinga is common to all defendants and all charges. This alone is insufficient to establish joinder of charges related to the Hulet and Moldowan matters.

Thus, to the extent that Roberts is joined in a case involving the Hulet matter, misjoinder has occurred. And, to the extent that Barcia is joined in a case involving the Moldowan matter, misjoinder has occurred.

2. The Court Cannot Consider Efficiency in Rule 8(b) Motions

The Court recognizes the Government's interest in efficiency and conducting one trial. However, when addressing questions of Rule 8(b) joinder, the Court is not allowed to engage in "the balancing of judicial efficiency against the potential for prejudice." *Hatcher*, 680 F.2d at 442. As the Supreme Court noted in *United States v. Kotteakos*, 328 U.S. 750, 773 (1946):

> True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal

trials.

As noted, *supra*, "the trial judge has no discretion on the question of severance." *Hatcher*, 680 F.2d at 441.

C. F.R.Cr.P. 14: Prejudicial Joinder

At the hearing, counsel for Roberts and Barcia stated that their motions are limited to severance of counts related to the Hulet and Moldowan conspiracies. Given the Court's ruling on the Rule 8(b) motions, Roberts and Barcia's motions for severance and separate trials pursuant to F.R.Cr.P. 14(a) are moot.

IV. CONCLUSION

For the reasons stated, the Court GRANTS Defendant Roberts' Motion to Reformulate Count One as Duplicitous, and ORDERS the Government to reformulate Count One. If the Government chooses to charge separate conspiracies, it must do so in separate Indictments. The Court GRANTS Defendants Roberts and Barcia's Motions for Severance pursuant to F.R.Cr.P. 8(b) because the two of them and their alleged offenses are misjoined. Roberts and Marlinga will be tried together, and Marlinga and Barcia will be tried together in a separate trial. Defendants Roberts and Barcia's Motions for Severance and Separate Trial pursuant to F.R.Cr.P. 14(a) are moot.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
United States District Judge

DATED: 2/28/05