

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-00036 (PJB)

**MOTION OF DEFENDANT ANÍBAL ACEVEDO VILÁ FOR SEVERANCE
AND INCORPORATED MEMORANDUM OF LAW**

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Attorneys for Defendant Aníbal Acevedo Vilá

Pursuant to Rules 8(b) and 14(a) of the Federal Rules of Criminal Procedure, Defendant Aníbal Acevedo Vilá, by and through undersigned counsel, hereby moves this Court for severance of his trial on Counts 1-3 of the Superseding Indictment (the “Indictment”).

INTRODUCTION

Severance is warranted here for the most basic reason: fundamental fairness. Without severance, Mr. Acevedo Vilá will be impeded in putting on his defense. For if the case is permitted to proceed to trial – notwithstanding the numerous and basic legal defects in the Indictment, *see generally* Motion to Dismiss – Mr. Acevedo Vilá intends to put on directly exculpatory testimonial evidence. Whereas the prosecution’s case appears to be predicated upon mere innuendo and the vaguest circumstantial evidence, focused on what Mr. Acevedo Vilá ought to have known based on the conduct of others, Mr. Acevedo Vilá intends to defend himself with direct evidence to the contrary, including exculpatory testimony from a principal co-defendant.

If able to testify, Defendant Cándido Negrón Mella would testify that Mr. Acevedo Vilá lacked the knowledge the prosecution will seek to impute to him. However, if the trial of Mr. Acevedo Vilá is not severed from that of Mr. Negrón Mella, Mr. Acevedo Vilá will be deprived of the opportunity to call Mr. Negrón Mella as a witness for his defense, because Mr. Negrón Mella may invoke his right under the Fifth Amendment not to testify in his own trial. Depriving Mr. Acevedo Vilá of this exculpatory testimony would severely and undeniably prejudice him, and would deprive the jury of the best direct evidence that Mr. Acevedo Vilá did not commit the offense charged. Accordingly, because a joint trial “would compromise a specific trial right of one of the defendants,” this Court should grant the motion for severance. *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

BACKGROUND

Count 1 of the Indictment is actually an amalgam of three distinct conspiracies that have been fused – impermissibly – into one. *See* Mot. to Dismiss at 5-11. As we explain in the Motion to Dismiss, two of those conspiracies are time-barred, *see id.* 11-16; the third scheme, regarding conduct centered on Philadelphia-based defendants (the so-called “Philadelphia Contributions conspiracy”), is meritless. Mr. Negrón Mella is named only with regard to that third conspiracy.

The Philadelphia Conspiracy allegedly involves the solicitation and receipt of conduit contributions from businesses and individuals in the City of Philadelphia. *See* Indictment at 10. In particular, the Indictment alleges that Mr. Negrón Mella and Salvatore Avanzato “directed their employees, friends, and family members to give campaign contributions to [Acevedo Vilá’s Resident Commissioner Campaign] Committee.” *Id.* It further alleges that Mr. Acevedo Vilá acted in concert with Mr. Negrón Mella and others to further this conspiracy. *Id.* at 11.¹

At trial, Mr. Acevedo Vilá will demonstrate that he had no knowledge of any such unlawful contribution scheme, if one in fact existed. He will show that he did not supervise, coordinate, or know the details of fundraising that was focused in the Philadelphia area, coordinated by Philadelphia-area residents, and involved Philadelphia-area bank accounts. He was unaware of any unlawful contributions and, consequently, that any statement to the Federal Election Commission was false in any particular. This is a complete defense to Counts 1-3 of the Indictment.

¹ Relatedly, Counts 2 and 3, which name Mr. Acevedo Vilá and Mr. Negrón Mella, along with Jorge Velasco Mella, concern two statements to the Federal Election Commission that allegedly were knowingly false because of the supposed contributions scheme. In addition to Mr. Negrón Mella, Mr. Acevedo Vilá has reason to believe that other co-defendants named in Counts 1-3, including Mr. Velasco Mella, may be willing to provide exculpatory testimony.

The most critical witness for establishing this defense will be Mr. Negrón Mella. As the prosecution knows, Mr. Negrón Mella denied that Mr. Acevedo Vilá had any knowledge of unlawful campaign contributions when Mr. Negrón Mella was interviewed by the FBI. During the course of four separate interviews – which were memorialized in FBI Form 302 summaries (“302s”), excerpts of which were provided to defendants – Mr. Negrón Mella was absolutely clear that Mr. Acevedo Vilá knew nothing about the allegedly unlawful source and nature of any contributions from Philadelphia to his campaign. For example, the 302s indicate that, on October 27, 2006, Mr. Negrón Mella stated to federal investigators that he:

never told Acevedo Vila that he was giving Acevedo Vila straw contributions. Acevedo Vila never asked or discussed with Negrón how Negrón was able to get so many people in the Philadelphia, Pennsylvania, and New Jersey areas involved in the campaign of a Puerto Rico politician.

See FBI 302 Excerpt of Interview with Cándido Negrón Mella (“Negrón 302 Excerpt”) at 108 Ex. A (emphasis added); *see also id.* at 107 (“Acevedo Vila never asked Negrón any questions about the campaign contributors.”). Further, Negrón stated that he “had very little contact with any of Acevedo Vila’s campaigns in Puerto Rico.” *Id.* at 111. In short, the 302s demonstrate that Mr. Negrón Mella’s testimony will directly support Mr. Acevedo Vilá’s defense regarding the Philadelphia Contributions conspiracy.

ARGUMENT

I. SEVERANCE IS NECESSARY TO AVOID PREJUDICE TO MR. ACEVEDO VILÁ.

Under Federal Rule of Criminal Procedure 8(b), defendants may be tried jointly “if they are alleged to have participated in the same act or transaction in or in the same series of acts or transactions, constituting an offense or offenses.” *United States v. Sutherland*, 929 F.2d 765, 778 (1st Cir. 1991). Even if this threshold test for joinder is met, however, the Court has authority

under Rule 14 to sever the trials of co-defendants to avoid prejudice – i.e., 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.” *Zafiro*, 506 U.S. at 539; *see also United States v. DeLeon*, 187 F.3d 60, 63 (1st Cir. 1999) (severance warranted where there is “prejudice so pervasive that it would be likely to effect a miscarriage of justice”).

Such prejudice is particularly acute when, as here, a joint trial prevents one defendant from obtaining a co-defendant’s exculpatory testimony. The First Circuit has established a test for determining when severance is available under these circumstances. The defendant must first demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. *United States v. Drougas*, 748 F.2d 8, 19 (1st Cir. 1984). These are known as the “‘first-tier’ *Drougas* factors.” *United States v. Smith*, 46 F.3d 1223, 1231 (1st Cir. 1995). Upon such a showing, the district court should then consider the “‘second-tier’ *Drougas* factors”: (1) the significance of the testimony in relation to the defendant’s theory of defense; (2) whether the testimony would be subject to substantial, damaging impeachment; (3) the impact on judicial economy; and (4) the timeliness of the motion. *Id.* (citing *Drougas*, 748 F.2d at 19).

Mr. Acevedo Vilá satisfies the first-tier *Drougas* factors: the content of the exculpatory testimony is clear, and it goes to the heart of the Governor’s defense. For the prosecution to make its case on the Philadelphia Contributions conspiracy, it must prove beyond a reasonable doubt that “Acevedo Vila and others concealed and caused to be concealed the true form and nature” of the allegedly impermissible campaign contributions. Indictment at 12; *see also id.* at 26, 28 (alleging that Governor Acevedo Vilá “knowingly and willfully” caused the making of a false statement). But if Mr. Acevedo Vilá had *no* knowledge whatsoever that any contribution was

unlawful, then he cannot have committed any of these offenses. That will be his central defense to these charges at trial. Like nearly every candidate who runs for public office, Mr. Acevedo Vilá's role was to raise money for his campaign from donors, not to handle the back-office work of scrutinizing the checks, investigating donors, and ferreting out and returning any impermissible contributions. Given the nature of this defense, it is not subject to reasonable dispute that Governor Acevedo Vilá has a bona fide need to secure testimony that he was not informed of any illicit contributions.

That Mr. Negrón Mella's testimony would be exculpatory also is plain. The FBI Form 302s provided by the prosecution confirm that Mr. Negrón Mella would testify on the stand – as he explained to federal investigators – that Mr. Acevedo Vilá had no knowledge of any improper campaign contributions. *See* Negrón 302 Excerpt at 108 (Ex. A). Mr. Negrón Mella specifically stated that he “*never told Acevedo Vila that he was giving Acevedo Vila straw contributions.*” Acevedo Vila never asked or discussed with Negrón how Negrón was able to get so many people in the Philadelphia, Pennsylvania, and New Jersey areas involved in the campaign of a Puerto Rico politician.” *Id.* (emphasis added); *see also id.* at 107 (“Acevedo Vila never asked Negrón any questions about the campaign contributors.”). Further, Negrón stated that he “had very little contact with any of Acevedo Vila's campaigns in Puerto Rico.” *Id.* at 111.

The final element in the first-tier *Drougas* analysis involves consideration of whether Mr. Negrón Mella would testify during Mr. Acevedo Vilá's trial if severance is granted. This prong may be satisfied by an “affidavit or recorded testimony.” *United States v. Studley*, 892 F.2d 518, 525 (7th Cir. 1989); *see also United States v. Nason*, 9 F.3d 155, 159 (1st Cir. 1993) (the requirement can be satisfied by an affidavit from either the witness or his counsel). However, at this early stage in the litigation, seven months away from trial, mere weeks after the Government

produced its *Brady* disclosures, and a month before any dispositive motion based on discovery is due, Mr. Negrón Mella and his counsel are (not surprisingly) unable to firmly represent that Mr. Negrón Mella would testify in a separate trial of Governor Acevedo Vilá. Such a decision almost certainly cannot be made until such matters as the sequence of trials following severance are known. However, Mr. Negrón Mella's decision to submit to interviews by the FBI and his willingness to state previously that Mr. Acevedo Vilá is innocent of these charges strongly suggests that he will provide his truthful, exculpatory testimony to the jury if a joint trial does not prevent him from doing so.

The second-tier *Drougas* factors are also satisfied, and they militate against joinder. As noted above, Mr. Negrón Mella's exculpatory testimony that Governor Acevedo Vilá lacked knowledge of any impermissible contributions is self-evidently significant to the Governor's theory of defense. Second, there is no reason to believe that Mr. Negrón Mella's testimony would be subject to impeachment; indeed, his exculpatory testimony would be corroborated by his statements to federal investigators. *See United States v. Burns*, 898 F.2d 819, 821 (1st Cir. 1990) (noting that only an "exceptional" probability of damaging impeachment should constitute a basis for denying severance). Additionally, while judicial economy is an "important" factor, the First Circuit has held that it is ultimately not a "dispositive" factor in the *Drougas* analysis. *Smith*, 46 F.3d at 1231. Finally, this motion is plainly timely; it is submitted at the first motions deadline, seven months in advance of the scheduled trial date, and there is ample time to make appropriate arrangements.

CONCLUSION

For the foregoing reasons, Mr. Acevedo Vilá's motion for severance should be granted.

Dated: July 8, 2008

Respectfully submitted,

/s/ Thomas C. Green

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CERTIFICATE OF SERVICE

I, Bradford A. Berenson, hereby certify that on this 8th day of July, 2008, I caused the foregoing Motion of Defendant Aníbal Acevedo Vilá For Severance and Incorporated Memorandum of Law to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/Bradford A. Berenson _____

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