UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:07-CR-342-T-27MAP**

YOUSSEF SAMIR MEGAHED
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MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 29, 2007, ORDER DENYING MOTION TO SEVER BASED UPON IMPROPER JOINDER IN VIOLATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 8(b)

COMES NOW the Defendant, YOUSSEF SAMIR MEGAHED, by and though undersigned counsel, and hereby respectfully moves this Honorable Court to reconsider the November 29, 2007, Order denying Youssef Megahed's (hereinafter "**Megahed**") Motion to Sever Based Upon Improper Joinder in Violation of Federal Rule of Criminal Procedure 8(b).

REASON FOR RECONSIDERATION

On November 29, 2007, this Court entered an Order denying Megahed's motion to sever. (Doc. 70). The only stated justification for denying the motion to sever is the Court's one sentence statement that "for the reasons, among others, advanced in the United States' response, the motion to sever is

denied." This Court must reconsider and reverse it's Order denying the motion to sever due to the fact that the reasons advanced by the Government in it's response (Doc 69) to the motion to sever are based on inapplicable law. The Government's response addresses a "prejudicial joinder"severance request pursuant to Fed.R.Crim.P. 14(a), as opposed to an "improper joinder" severance request pursuant to Fed.R.Crim. 8(b), as was requested by Megahed (Doc. 64),

FACTUAL AND PROCEDURAL HISTORY

On August 29, 2007, the grand jury returned a two-count Indictment in the instant case charging co-defendant, Ahmed Abdellatif Sherif Mohamed (hereinafter "**Mohamed**"), alone in Count One with a violation of 18 U.S.C. § 842(p)(2)(A). Factually, Count One is based upon Mohamed's alleged creation of a YouTube video in which he allegedly narrates and explains the process of creating a remote detonating device from a remote-controlled toy car. The Indictment further alleges that Mohamed created this YouTube video for the purpose of providing material support to terrorism. The Indictment fails to allege, and there is absolutely no evidence, that Megahed was involved in the creation, distribution, receipt, viewing or even had knowledge of the

YouTube video which is the subject of Count One.

Count Two of the Indictment alleges that both Mohamed and Megahed violated 18 U.S.C. §842(a)(3)(A) by allegedly transporting in interstate commerce explosive materials without a proper license. There is no allegation in the Indictment that Count Two is in anyway related to Count One, other than the fact that Mohamed is charged in both counts. Additionally, all of the evidence provided by the Government in discovery including, but not limited to Mohamed's admissions, reveals that Count One and Count Two are not part of a common scheme or plan involving both Mohamed and Megahed.

The evidence provided by the Government in discovery reveals that on August 4, 2007, a vehicle being driven by Mohamed with Megahed in the front passenger seat, was stopped in Goose Creek, South Carolina, for allegedly exceeding the 45-mph speed limit. The evidence further reveals that Mohamed had only arrived in the United States in January, 2007, approximately six months prior to the traffic stop. Mohamed, who is 26 years old, was present in the United States on a student visa and was working as a civil engineering instructor at the University of South Florida.

Megahed, a 21-year-old lawful resident of the United States for over ten

years, was a University of South Florida engineering student who had met Mohamed at school. Both boys developed a friendship based on their engineering interest and their mutual Egyptian heritage. Mohamed, who had only been in the United States for a short period of time, had an interest in seeing as much of the United States as possible. As such, Megahed and Mohamed planned a "road trip" in which they would drive up the Eastern coastal states and attempt to see as many beaches as they could over the August 4, 2007, weekend.

In order to save costs, the college students packed sleeping bags, food and drinks and planned on sleeping in the vehicle during the weekend trip. In order to get as far as possible over the short weekend trip, they left during the very early morning hours of Saturday, August 4, 2007. On their way northward from Tampa on I-75, the boys stopped in Ocala, Florida, and purchased a GPS device at Wal Mart. The GPS was purchased to help with directions and to assist them in locating the cheapest gas prices possible by identifying the nearest Wal Mart Stores with Murphy Gas Stations, which the boys had concluded were offering gas at the lowest prices. The plan was to see as much of the Eastern coastal states as possible and they randomly selected

Sunset Beach, North Carolina, which is located just over the South Carolina Border, as their ultimate destination.

Along the way, the boys stopped in Jacksonville, Florida, and visited a Wal Mart to get assistance in working the GPS device which they had purchased earlier in the day. While in Jacksonville, they also visited one of the Jacksonville beaches. They then headed north toward the Carolinas, stopping along the way to eat and see the Eastern coastal states, which neither Mohamed nor Megahed had ever previously visited.

After being stopped by local law enforcement near a Wal Mart in Goose Creek, South Carolina, the stopping officer asked Mohamed if he could search the vehicle for drugs or firearms. Prior to searching the vehicle, the officer asked Mohamed "if there was anything in the vehicle he needed to know about?" Mohamed advised the officer that he would find some "fireworks" and fuses in the vehicle. Multiple officers searched the vehicle and located receipts in the interior of the vehicle which corroborated the trip from Florida and the stops in Ocala and Jacksonville. While searching the trunk of the vehicle, the officers located the "fireworks" and fuses previously disclosed by Mohamed.

The "fireworks" and fuses were not in plain view and were only discovered after the officers removed the clothing and other items which were packed in the trunk of the vehicle. The "fireworks" were not commercially manufactured but instead were home-made from 4- to 6-inch pieces of uncapped PVC pipe filled with stump remover, cat litter, and sugar.[1]

Mohamed and Megahed were both immediately detained and questioned. Megahed denied any knowledge of the "fireworks" or fuses and only first learned of the presence of the "fireworks" when Mohamed advised law enforcement prior to the search that they would be found in the vehicle.

Mohamed's post-arrest statements at the scene of the arrest and in two subsequent FBI interviews, reveal that Mohamed became interested in fireworks just prior to July 4, 2007, when he became aware of their wide availability as part of the United States' Fourth of July celebrations. Mohamed visited several firework stands and discovered the high-cost charged for fireworks and determined that he could make his own fireworks at a cheaper

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[1]To date the Government has provided no evidence in discovery that the "fireworks" would explode if ignited. In fact, the Government has made clear that the items in the trunk were not pipe bombs, explosive devices or destructive devices but instead simply explosive materials.

price. He located a YouTube video on the Internet on how to make what he refers to as "sugar rockets", or homemade fireworks. The receipts provided in discovery further reveal that Mohamed did, in fact, purchase stump remover, sugar, and cat litter in late June and early July 2007, which he then used to make home-made fireworks or "sugar rockets."[2] Mohamed further revealed to law enforcement that he had ignited these fireworks on previous occasions and that they did not explode but instead traveled a few feet into the air and would make smoke. He additionally advised law enforcement that he had made the "sugar rockets" or fireworks which were found in the trunk of the vehicle and that he had brought them on the trip with the hopes of locating an empty field where he could shoot off the "sugar rockets" or fireworks. Mohamed further advised that Megahed had no knowledge of the "sugar rockets" or fireworks which Mohamed had brought with them on the "road trip."

Subsequent to Mohamed and Megahed's arrest for possession of the

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[2]In contrast to the receipts from Mohamed, receipts related to purchases made by Megahed fail to reveal that he purchased any of the items used to make the "sugar rockets" or fireworks. Additionally, a subsequent search of Mohamed's residence revealed PVC pipes and other items consistent with the "sugar rockets" found in the vehicle. A search of Megahed's residence failed to discover any items consistent with the "sugar rockets" found in the trunk.

"sugar rockets," Mohamed's lap top computer, which was inside the vehicle, was searched and found to contain the YouTube video which is the subject of Count One. In his post-arrest admissions, Mohamed gave a full explanation of the purpose of the video, to whom he had sent the video, and his reasoning for making the video. Mohamed's explanation of the video was completely unrelated to the "sugar rockets" or fireworks found in the vehicle. Additionally, the video in question references how to convert a remote-controlled toy car into a detonator device and makes absolutely no reference to explosive materials, how to make explosives, or anything closely resembling the items found in the trunk of the vehicle. Finally, there was nothing found in the vehicle even remotely resembling the remote-controlled device described in the video and it would appear that the "sugar rockets" were going to be ignited by the fuse in the vehicle and not by some remote-controlled device.

A search of Megahed's and Mohamed's computer hard drives[3] would appear to confirm the fact that Megahed had absolutely no connection to the

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[3]Megahed's computers were seized in a subsequent search by the FBI of his parents' residence in Tampa, Florida, and the hard drives contained no evidence related to explosives, explosive materials, the YouTube Video in question, or detonators. In contrast, Mohamed's computer hard drive was found to contain information related to explosives and explosive materials.

YouTube video and the Indictment's failure to charge Megahed in Count One of the Indictment further confirms his complete lack of connection to the YouTube Video.[4]

Because the indictment fails to allege and there being absolutely no evidence connecting Megahed to the charge in Count One, Megahed filed a Motion to Sever Based Upon Improper Joinder in Violation of Federal Rule of Criminal Procedure 8(b) on November 9, 2007 (Doc. 64). In the motion to sever, Megahed moved this Court to sever his trial from a trial with Mohamed in which evidence related to the allegations in Count One of the Indictment is presented. On November 20, 2007, the Government filed it's Response and Memorandum of Law in Opposition to Defendant's Motion To Sever. (Doc. 69). On November 29, 2007, this Court adopted the Government's response as it's rationale for denying the improper joinder motion to sever. (Doc. 70).

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[4]In it's response, the Government attempts to infer that Megahed is somehow connected to the YouTube video because he was seen disconnecting the lap top computer at the time of the vehicle stop and because a toy remote-controlled boat was found in his parent's residence. However, the Government has neither proffered nor provided any evidence that Megahed accessed the YouTube video on the lap top during the trip or at any other time. Additionally, the remote-controlled toy boat belonged to Megahed's young brother, who suffers from Down Syndrome and also resides in their parents' residence.

This request for reconsideration follows.

MEMORANDUM OF LAW

This Court must reconsider it's November 29, 2007, Order because it's holding is based upon the Government's Response in Opposition to Severance, which is based on inapplicable law. Specifically, in their Response to the Rule 8(b) motion to sever, the Government completely misconstrues the defenses' legal basis for severance and inappropriately argues inapplicable law in support of it's position that severance in the present case is not required by this Court. Although the Government acknowledges that Megahed is seeking severance pursuant to Fed.RuleCrim.P. 8(b), it argues that severance is not required by relying upon case law and authority related to Fed.Rule.CrimP. 14(a). *See Government's Response at pages 6-8* ("the rules permit severance of defendant and a separate trial for him as one possible remedy for ***improper joinder***. Fed. R. Crim. 14(a)") (***emphasis added***) .

The Government is incorrect in it's legal analysis that Rule 14(a) and it's related case law is applicable to the issue of "improper joinder" which is currently before this Court. Rule 14(a) addresses severance as a remedy for "prejudicial joinder" which occurs when counts or defendants *are properly*

joined under Rule 8, but the defendant is still able to point to "specific and compelling prejudice" to the defense, making severance warranted despite the fact that the charges and/or defendants are properly joined. *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 938 (1993); *United States v. Lane*, 474 U.S. 438, 447, 106 S.Ct. 725, 730 (1986) ("Once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14. . .").

Megahed is not seeking severance based upon "prejudicial joinder" pursuant to Rule 14(a), but instead is seeking severance based upon "improper joinder" pursuant to Rule 8(b). Rule 14(a) is designed to address possible prejudice which may occur to defendants ***who are properly joined*** in an indictment. *Id.* [5] Rule 14(a) grants a district court the discretion to sever defendants who, although properly joined in the indictment, require severance to avoid undue, compelling, prejudice to a defendant. *Id.* In contrast, Rule 8(b) does not address severance where joinder is proper but instead is a pleading

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[5]Rule 14(a) provides that "if the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials or counts, sever the defendants' trials, or provide any other relief that justice requires."

rule designed to ensure that joinder is proper in the first instance. *United States v. Wilson,* 849 F.2d 1245, 1252-1253 (11th Cir. 1990) ("In contrast to a Rule 14 claim, which accepts that initial joinder is proper but asserts that the joint trial is prejudicial, a Rule 8(b) claim 'questions the propriety of joining two or more defendants in a single indictment in the first instance' "); *United States v. Morales*, 865 F.2d 1526, 1567-68 (11th Cir. 1989) (same).

Contrary to Rule 14(a) severance, severance based upon improper joinder is not discretionary but mandatory. As the Eleventh Circuit has noted:

> Although the remedy for misjoinder under Rule 8(b) and prejudicial joinder under Rule 14 is the same - severance and separate trials - the two rules are analytically and procedurally distinct. A motion for severance based on misjoinder under Rule 8 alleges an error in the indictment, and severance *must* be granted if the defendants were improperly joined. Rule 14 comes into play only if joinder was initially proper under Rule 8 but a joint trial would prejudice one or more of the defendants. It is addressed to the discretion of the trial judge.

United States v. Bryan, 843 F.2d 1339, 1342 (11th Cir. 1988).

Additionally, unlike a Rule 14(a) severance, there is no requirement that a defendant show a "specific and compelling prejudice" to warrant a severance pursuant to Rule 8(b). Rule 8(b) is a pleading rule and the fact that the defendant will receive prejudice is presumed by Rule 8(b) because the drafters

of the rule have already taken into consideration the balance between the need for judicial economy and the need to ensure a fair trial for the defendant. *United States v. Liss*, 265 F.3d 1220, 1227 (11th Cir. 2001); *United States v. Weaver*, 905 F.2d 1466, 1477 (11th Cir. 1990); *Morales*, 868 F.2d at 1567-68. As such, contrary to the Government's arguments which were adopted by this Court in it's Order denying severance, it is not necessary for Megahed to establish "specific and compelling prejudice" to justify a Rule 8(b) severance. It is only necessary to show that joinder is improper.[6]

In the present case, joinder is clearly improper. Megahed and Mohamed can only be properly joined in a trial on Count One and Count Two if they both participated in the same acts or transaction or series of acts or transactions, as alleged in both counts. *See Megahed's Motion to Server Based Upon Improper Joinder in Violation of Federal Rule of Criminal Procedure 8(b) (Doc . 64)*

The Eleventh Circuit has made it clear that a trial court, in analyzing

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[6]Although it is not necessary for Megahed to establish a "specific and compelling prejudice" to justify a Rule 8(b) severance, it cannot realistically be disputed that Megahed will be unfairly prejudiced by a joint trial with Mohamed in which the Government presents evidence of Mohamed's alleged material support to terrorist activity, activity in which Megahed played absolutely no role or had knowledge thereof.

proper joinder under Rule 8(b), should look only to the Indictment to answer this question. *United States v. Liss*, 265 F.3d 1220, 1228 (11th Cir. 2001); *Weaver*, 905 F.2d at 1476; *Morales*, 868 F.2d at 1568. It is clear from the face of the Indictment that both Mohamed and Megahed did not participate in the same act or transaction or series of acts or transactions which constitute the conduct alleged in Count One of the Indictment and, thus, joinder is improper.

Although it is not required to look to the evidence to determine if joinder is improper pursuant to a Rule 8(b) severance request, looking to the evidence provided in discovery and from the Government's pleading in opposition to severance, it is clear that Megahed had no involvement in the allegations alleged in Count One and, thus, joinder is improper and severance must be granted. In it's pleading, the Government has failed to allege that a common scheme or plan exists as relates to Count One and Two of the Indictment or that Megahed was in anyway involved in the allegations in Count One. This is because Megahed was simply not part of any common scheme or plan with Mohamed, let alone one as it relates to the YouTube video charged in Count One. As such, joinder of Count One and Two, as it relates to Megahed, is improper pursuant to Rule 8(b) and severance is mandatory.

It is not disputed that Count One and Count Two are arguably appropriately joined offenses as they relate to Mohamed since they are similar offenses and Mohamed is alleged to have participated in both offenses. *See generally* Fed.R.Crim.P 8(a) **Joinder of Offenses**. Nor is it argued that Mohamed and Megahed are not properly joined together in Count Two since they both are alleged to have participated in the conduct alleged in Count Two. *See generally* Fed.R.Crim. P. 8(b) **Joinder of Defendants**. However, the fact remains that the Indictment fails to allege and the evidence fails to show that Megahed had any knowledge of the conduct giving rise to Count One or that he was involved in a common scheme or plan as it relates to the conduct in Count One. Additionally, there is no evidence nor is it alleged in the Indictment (as is required for proper joinder) that Count One and Count Two were connected together in some greater plan or scheme for which both Megahed and Mohamed knowingly participated.

In a weak attempt to justify joinder, the Government speculates that Count One and Count Two must be connected in a "logical relationship" because Count One deals with Mohamed's alleged making and distribution of a video to demonstrate the making of a remote detonator device to explode

explosives and Count Two deals with the transportation of explosive materials. *See Government's Response at page 8.* Despite the fact that the Government's alleged "logical relationship" is mere hypothesis unsupported by the evidence, which includes but is not limited to Mohamed's admissions, this alleged "logical relationship" only connects Mohamed to both Count One and Two and fails to connect Megahed in any way to the allegations in Count One. This type of speculation or hypothesizing on the Government's part, as to how the counts might be connected, without evidence to support such a relationship, is insufficient to justify joinder. *United States v. Mackins*, 315 F.3d 399, 413 (4th Cir. 2003) (Joinder improper where alleged connection between offenses is not alleged in the indictment or proved at trial but instead is based on nothing more than a mere "hypothesized" connection by the trial court).

As such, because this Court adopted the flawed legal reasoning of the Government, which was based on inapplicable legal authority, for justification of it's November 29, 2007, Order, this Court must reconsider it's Order and enter a new Order rejecting the Government's flawed argument that Megahed must show a "specific and compelling prejudice" to justify a severance pursuant to Rule 8(b). Additionally, this Court should further find that the

Indictment and the Government have failed to establish that Megahed participated in the same series of acts or transactions constituting the offense alleged in Count One justifying joinder pursuant to Rule 8(b). Thereafter, this Court should find that severance of Count One from Megahed's trial is mandatory and should so Order.

DATED this 30th day of November, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2007, a true and correct copy of the foregoing was furnished by the CM/ECF system with

the Clerk of the Court, which will send a notice of the electronic filing to Assistant United States Attorney Jay Hoffer, 400 North Tampa Street, Suite 3200, Tampa, Florida, 33602.

/s/ Adam B. Allen

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