

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA            )  
  )  
  Plaintiff,    )  
  )  
  v.            ) No. 09-00296-CR-W-FJG  
  )  
ROBERT E. STEWART                    )  
  )  
  Defendant.    )

**DEFENDANT STEWART’S MOTION TO SEVER COUNT ONE  
FROM COUNT TWO PURSUANT TO RULE 8(a) FEDERAL RULES OF  
CRIMINAL PROCEDURE WITH SUGGESTIONS IN SUPPORT**

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Defendant is charged in count one of the indictment with conspiring with the other five defendants to distribute controlled substances in violation of 21 USC 841. Count two of the indictment charges only defendant John B. Angell with threatening Michael J. Hensley with bodily harm for having provided information to law enforcement officers about narcotics offenses committed by members of two identified motorcycle clubs.

There is nothing on the face of indictment that purports to tie the other five defendants charged with Mr. Angel in Count One of the Indictment to his alleged separate and distinct criminal conduct charged in Count Two. Mr. Hensley was a potential government witness in a prior indictment in United States v. William Eneff, et al, 07-cr-00200, a multi defendant case, indicted in June of 2007. It appears that the threat charged in Count II, if it indeed was made, was in connection with that case and not the

conspiracy charged in Count One of this indictment.

Two offenses may be joined in the indictment under Rule 8(a) "only if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." United States v. Smith, 795 F.2d 841, 850 (9th Cir. 1986)(quoting Fed.R.Crim.P. 8(a)), cert. denied, 481 U.S. 1032, 107 S.Ct. 1964, 95 L.Ed.2d 535 (1987); United States v. Robaina, 39 F.3d 858 (8<sup>th</sup> Cir. 1994). The term "transaction" is to be interpreted flexibly and "may comprehend a series of related occurrences." United States v. Kinslow, 860 F.2d 963, 966 (9th Cir. 1988), cert. denied, 110 S.Ct. 96 (1989).

Because Rule 8 is concerned with the propriety of joining offenses in the indictment, the validity of the joinder is determined solely by the allegations in the indictment. See Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960); United States v. Lane, 474 U.S. 438, 447, 106 S.Ct. 725, 731, 88 L.Ed.2d 814 (1986); United States v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988). In United States v. Davis, 882 F.2d 1334 (8<sup>th</sup> Cir. 1998) the court observed:

. . .[F]or joinder of counts not brought against each defendant to be proper it may be sufficient for the indictment to allege "other facts" that "at least suggest the existence of an overall scheme encompassing all the defendants and all the charged offenses." United States v. Bledsoe, 674 F.2d 647, 656-57 (8th Cir.), cert. denied, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982).

The indictment in this case clearly fails to allege any commonality between Counts One and Two even under the more relaxed standard of Davis, supra. The drug conspiracy referred to in Count I is wholly different from the threat charge in Count II as it involved a different conspiracy and different individuals. No effort is made in the indictment even to suggest that the offenses are of the same or similar character or that they are part of the same transaction or parts of a common scheme engaged in by the other five defendants charged in Court One.

In short, defendant submits there is real prejudice from subjecting him to a trial in which a goodly portion of the evidence at trial may focus on and deal with the alleged unconnected violent acts of a person alleged to be his coconspirator in a drug distribution conspiracy where there are no allegations of acts of violence in the latter Count.

WHEREFORE, defendant moves the court to sever Counts One and Two of the indictment and order separate trials.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on October 1, 2009.

/s/

JOHN R. OSGOOD

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