

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-00320-16-CR-W-DGK
)	
FRANK MICHAEL ALVAREZ,)	
)	
Defendant.)	

**GOVERNMENT’S RESPONSE TO
DEFENDANT FRANK MICHAEL ALVAREZ’S
MOTION FOR SEVERANCE**

Comes now the United States of America, by Beth Phillips, United States Attorney, and the undersigned Assistant United States Attorney, both for the Western District of Missouri, respectfully submits this response to defendant’s motion for severance, filed May 16, 2011. Defendant seeks severance from his co-defendants, claiming that he will suffer prejudice from a spillover of evidence, because of a disparity in the weight of evidence to be introduced against them, and because of the possibility of conflicting defenses. These contentions are without merit under the applicable law and the facts of this case. The government strongly opposes defendant’s request for severance.

I. THE GENERAL LAW

Rule 14, Federal Rules of Criminal Procedure, governs the severance of defendants in a single indictment. A motion for severance is addressed to the discretion of the trial court. *Zafiro v. United States*, 506 U.S. 534, 541 (1993); *United States v. Shivers*, 66 F.3d 938, 939 (8th Cir.), *cert. denied*, 516 U.S. 1016 (1995). The United States Supreme Court has held that severance

should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro*, 506 U.S. at 538.

Where the evidence in each set of counts is mutually admissible to show the defendant’s motive, intent, and pattern of criminal behavior, refusal to sever is proper. *United States v. Provost*, 237 F.3d 934, 938 (8th Cir. 2001); *Running Horse*, 175 F.3d 635, 637; *United States v. Brooks*, 174 F.3d 950, 957 (8th Cir. 1999). Since the evidence against Alvarez is not only mutually admissible but necessary, severance would be a tremendous waste of judicial resources.

II. SPILLOVER EVIDENCE

While Federal Rule of Criminal Procedure 14 does permit severance where joinder will result in unfair prejudice, "whether or not prejudice occurs depends primarily on whether the jury could compartmentalize the evidence against each defendant." *United States v. Nevils*, 897 F.2d 300 (8th Cir.), *cert. denied*, 498 U.S. 844 (1990). The roles played by the various defendants in this case, as described in the indictment, discovery, Title III recordings, various affidavits, and the summary provided to each defendant at the detention hearing, are sufficiently distinct to preclude prejudice from spillover. The standard instructions to the jury to compartmentalize the evidence against the defendants should be more than sufficient in this case. Rule 14 even countenances some prejudice to a defendant from a joint trial, and severance is not required simply because a defendant might have a better chance of acquittal in a severed proceeding. *United States v. McConnell*, 903 F. 2d 566, 571 (8th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991); *United States v. O'Meara*, 895 F. 2d 1216, 1218-1219 (8th Cir. 1990), *cert. denied*, 498 U.S. 943 (1990).

III. DISPARITY IN EVIDENCE

The test for severance in the case of disparity in evidence is whether the proof against an individual defendant's co-defendants is far more damaging, and thereby denies him a fair trial. Where the potential for a prejudicial “spillover” in evidence does exist, instructions to the jury to compartmentalize the evidence are generally sufficient to cure any conflicts in the weight of the proof. *United States v. Davis*, 882 F.2d 1334, 1340 (8th Cir. 1989). There is no requirement in joint trials that the evidence of each defendant's culpability be quantitatively or qualitatively equivalent.” *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989)(citing, *United States v. O'Connell*, 841 F.2d 1408, 1432 (8th Cir.), *cert. denied*, 487 U.S. 1210 (1988)).

Where defendants are joined in a conspiracy trial, even a gross disparity in evidence does not necessarily require a severance, since the government is entitled to prove the entire scope of a conspiracy even in a severed trial; the proof would not be restricted to establishing the limited involvement of the severed defendant. *United States v. Haldeman*, 559 F.2d 31, 72 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 1977; *accord*, *United States v. Gutberlet*, 939 F.2d 643 (8th Cir. 1991); *United States v. Kindle*, 925 F.2d 272, 277 (8th Cir. 1991); *United States v. Knife*, 592 F.2d 472, 480 (8th Cir. 1979).

IV. CONFLICTING DEFENSES

Not every hint of conflict between defenses offers a sufficient basis upon which a severance should be ordered; indeed, a high degree of conflict must be present to justify severance. *United States v. Wright*, 783 F.2d 1091, 1094-1095 (D.C. Cir. 1986); *United States v. Spitler*, 800 F.2d 1267, 1271 (4th Cir. 1986). Severance is justified only when the conflicting defense theories are so irreconcilable that there is a danger the jury will infer guilt from this conflict

alone. Where the jury can logically accept both defenses, or where the government's evidence against the defendant is substantial and independent of the conflict, severance is not required. *United States v. Gutberlet*, *supra*, 939 F.2d at 645-6; *United States v. Jones*, *supra*, 880 F.2d at 63; *United States v. Lara*, 891 F.2d 669 (8th Cir. 1989); *United States v. Robinson*, 774 F.2d 261, 267 (8th Cir. 1985). A defendant's naked assertion that a co-defendant's defense will conflict with his own is insufficient to merit relief. *United States v. Davis*, *supra*, 882 F.2d at 1341, *citing*, *United States v. Faul*, 748 F.2d 1204, 1217 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

V. CONCLUSION

Defendant's Motions for Severance are without a sound basis in either fact or law, and should be denied.

Respectfully submitted,

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By */s/ Bruce Rhoades*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on May 23, 2011, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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/s/ Bruce Rhoades

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