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

UNITED STATES OF AMERICA, Plaintiff,	)
v.	) Case No. 10-00320-11-CR-DGK
ARMANDO MENDEZ Defendant.	)

DEFENDANT ARMANDO MENDEZ'S MOTION FOR SEVERANCE OF DEFENDANT

COMES NOW, Armando Mendez, by and through counsel, Lance Sandage, and respectfully moves this Court for an Order to sever Defendant Mendez from that of his codefendants. In support of this motion, Defendant Mendez states as follows:

I. Factual Background

The Kansas City District Office of the Drug Enforcement Administration (DEA) began investigating alleged drug trafficking activities in May of 2009 along with efforts from the Kansas City Missouri Police Department. Since that time, investigators have reportedly learned that the Juan Marron Drug Trafficking Organization (Marron DTO) has associates operating in the Kansas City Metropolitan area, and the government alleges Defendant Juan Marron and the other 18 defendants conspired to distribute marijuana, cocaine, and cocaine base, as well as conspired to launder money.

Defendant Juan Marron allegedly sold 18 ounces of cocaine during DEA controlled drug purchases to a confidential informant. Through the use of a Title III Wiretap, the government obtained information that allegedly establishes David Hernandez-Montoya, Defendant Juan Marron's brother-in-law, as Defendant Juan

Marron's supplier of narcotics. The wiretap further implicated all defendants as having some communication with Defendant Juan Marron.

Throughout December, much of April, May and June, law enforcement tapped Defendant Juan Marron's cellular telephone to obtain information regarding the Marron DTO. Each of the 19 defendants was recorded on the wiretap. Defendant David Hernandez-Montoya stated during his post-arrest interview that he positively identified himself on a recorded telephone communication discussing the delivery of 50 pounds of marijuana. Defendant Marco Antonio Murcia positively identified his own voice on a recorded telephone call with Defendant Juan Marron discussing the attempted delivery of six kilograms of cocaine. An alleged consensual search was conducted of Defendant Robert Olvera's residence upon arrest, and law enforcement recovered cocaine and marijuana. Law enforcement arrested Rafael Zamora and recovered marijuana in his possession. During the post-arrest interview, Defendant Joseph Michael Lopez admitted to selling marijuana and cocaine. Upon arrest of Defendant Margot Charlene Davison, law enforcement seized marijuana and paraphernalia from her residence. Defendants Deshawn Ceruti and Muhammad Rollie were arrested during a traffic stop in possession of crack cocaine and marijuana. The affidavit submitted by Special Agent Joseph Geraci dated April 29, 2010 in support of the wiretap indicated that Defendants Raul Marron, Mario Marron, John Gasca, Jason Richardson and Rual Marron, Sr. asked Defendant Juan Marron for narcotics on the December 2009 wiretap.

Mr. Armando Mendez is recorded on the wiretap in December of 2009. Mr. Mendez and Defendant Juan Marron discussed the whereabouts of a mutual acquaintance, known in the affidavit in support of the wiretap submitted by Special Agent

Joseph Geraci on April 29, 2010, as "CI 5." During these communications occurring between December 5, 2009 and December 12, 2009, Defendant Juan Marron and Mr. Mendez discussed the fact that CI 5 was arrested and discussed whether CI 5 would speak with authorities while detained. On December 12, 2009, Defendant Juan Marron asked Mr. Mendez if he could come by his house, and Mr. Mendez agreed. Defendant Juan Marron called Mr. Mendez to indicate that he was outside the residence. Although law enforcement asserts that Defendant Juan Marron was at Mr. Mendez's residence to store narcotics, no further surveillance or electronic recording support or confirm this proposition.

Mr. Mendez was implicated in one transaction involving one half ounce of cocaine, as reported by a confidential informant. On May 25, 2010, this confidential informant contacted law enforcement to report that Defendant Juan Marron owed the confidential informant one half ounce of cocaine. The confidential informant stated that Defendant Juan Marron allegedly gave the cocaine to two individuals to give to the confidential informant. One of the individuals was Mr. Mendez, and the other individual is unknown at this time. According to the report, the unknown individual personally delivered the cocaine to the confidential informant, not Mr. Mendez.

On November 18, 2010, Mr. Mendez along with 18 other co-defendants were indicted by a federal grand jury for charges of conspiracy to distribute five kilograms or more of cocaine, fifty grams or more of cocaine base, and 100 kilograms or more of marijuana in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A) and (B), and 826; and, of money laundering in violation of 18 U.S.C. §1956(a)(1)(A)(i) and (h), extending over a period of two (2) years.

II. Argument and Authority

Joinder Improper under Rule 8(b) F.R.C.P.

Defendants may be joined under 8(b) of the Federal Rules of Criminal Procedure 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." As a general proposition, the joinder of parties contributes considerably to the efficiency of judicial administration. United States v. Spitler, 800 F.2d 1267, 1271 (4th Cir. 1986). Although liberal joinder is to be allowed under Rule 8(b), mere similarities between some actors or crimes do not show a common scheme or plan. United States v. Garganese, 156 F.R.D. 263, 267 (D. Utah 1994) (citations omitted). Defendants, therefore, may not be indicted or tried together absent a common act or transaction.

The government attempts to combine all of the defendants into one massive conspiracy when several of the defendants have little or no connection to one another, including Mr. Mendez. Simply put, the Government has attempted to join multiple alleged conspiracies into one single Indictment by merging nearly all of the defendants into Counts 1 and 2, and the law does not support such tactics. See, United States v. Butler, 494 F.2d 1246, 1255-1257 (10th Circ. 1974). Thus, the Government has improperly joined the defendants even under a liberal interpretation of Rule 8(b) F.R.C.P.

Severance Pursuant to Rule 14 F.R.C.P.

Rule 14, Federal Rules of Criminal Procedure, provides for discretionary severance as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials

> of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendant which the government intends to introduce as evidence at the trial.

When joinder of defendants for trial is ruled proper under Rule 8(b), Federal Rules of Criminal Procedure, a severance may be granted upon showing of prejudice under Rule 14, Federal Rules of Criminal Procedure, and a decision to sever lies in the discretion of the trial court. Opper v. U.S., 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101 (1954). Severance should be granted "only 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 v. U.S., 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993); see also, United States v. Kopelciw, 815 F.2d 1235, 1237-1238 (8th Cir 1987).

Privilege of Self-Incrimination:

Severance is appropriate in instances where a joint trial deprives the defendant of the right to call as a witness a co-defendant who would testify to exculpatory evidence. United States v. Starr, 584 F. 2d 235, 239 (8th Cir. 1978). Mr. Mendez intends to call Defendant Juan Marron as a witness in his case-in-chief to testify that Mr. Mendez was not involved in the Marron DTO alleged by the prosecution. Every defendant has the right against self-incrimination and can choose not to testify at his own trial. U.S.C.A. Const. Amend. 5. Defendant Marron cannot testify to Mr. Mendez's involvement or lack thereof without implicating his own involvement in the alleged conspiracy. As such, Defendant Marron refuses to testify for Mr. Mendez in the joint trial.

Marital Privilege:

Severance is appropriate where a joint trial deprives the witness of the right to call a witness who would testify that Mr. Mendez was not involved in the drug conspiracy when the witness would refuse to testify at the joint trial based on a marital privilege. See, United States v. Reyes, 362 F. 3d 536, 542 (8th Cir. 2004); see also, United States v. Smith, 742 F. 2d 398, 401 (8th Cir. 1984). Mr. Mendez intends to call Stephanie Alvarez-Marron, wife of Defendant Juan Marron, to testify at trial. Ms. Marron would testify that Mr. Mendez was simply a friend of the family and not involved in the Marron DTO alleged by the prosecution. However, Ms. Marron, if called to testify at the joint trial, would invoke her right not to testify against her husband based on marital privilege. Trammel v. United States, 445 U.S. 40, 52, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Because Mr. Mendez is aware of Ms. Marron's intention of invoking the marital privilege and refusing to testify, Mr. Mendez would not be allowed to call her as a witness at a joint trial. United States v. Reyes, 362 F. 3d at 542 ('trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege").

Compartmentalization:

Severance is appropriate in instances where the jury cannot reasonably be expected to compartmentalize the evidence as it relates to separate defendants. United States v. Massa, 740 F. 2d 629, 649 (8th Cir. 1994) cert. denied 471 U.S. 1115 (1995). The issue of compartmentalization is of grave concern in this case since the jury will hear evidence relating to the alleged criminal acts of 19 defendants through direct examination of government witnesses and cross examination by each of the 19 defendants' counsel.

The statement of facts of the case outlined above demonstrates the undeniable disparity between the significant evidence relating to Defendants Juan Marron, Hernandez-Montoya, and Murcia, for example, and the negligible evidence relating to Mr. Mendez. A large portion of the evidence to be presented by the Government at trial will neither directly implicate Mr. Mendez of any wrongdoing nor even mention Defendant Mendez's involvement in any criminal acts. Such overwhelmingly damning and irrelevant evidence presented to the jury would undoubtedly place Mr. Mendez in a position where he must attack evidence that in no way relates to his alleged conduct but to that of others, some of whom he does not even know. The spillover affect of this type of evidence will unquestionably prejudice Mr. Mendez's ability to have a fair trial.

Mr. Mendez is, at best, loosely connected to the Marron DTO based on his long-term friendship with Defendant Juan Marron. Mr. Mendez has little to no contact with many of the other named defendants, and several of the defendants are unknown to Mr. Mendez. To join his trial with the trial of the other defendants, and to force him to combat substantial evidence unrelated to his alleged criminal conduct would be unjust and a violation of her right to a fair trial. See, U.S.C.A. Const.Amend. 6.

As the Supreme Court suggested in Kotteakos v. United States, 328 U.S. 750, 77266 S.Ct. 1239, 90 L.Ed. 1557 (1946), the convenience and possible efficiency of joint trials do not automatically trump the constitutional and historic protections we afford individual defendants. In this case, the issue of Mr. Mendez's guilt or innocence should be judged based on testimony of all relevant witnesses available to the defense and without the concern that a jury might convict him simply because he is sitting at defense table with one or more of his co-defendants.

III. Conclusion

The Government's joinder is inappropriate under Rule 8(b), and the Court should sever for this reason. The prejudice is extremely high in this case for the reasons previously stated and severance is appropriate pursuant to Rule 14.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was electronically filed and sent via ECF this day of 1st day of June, 2011:

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