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

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

GOVERNMENT'S RESPONSE TO DEFENDANT ARMANDO MENDEZ'S MOTION FOR SEVERANCE

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, Document 241, filed June 1, 2011. Defendant seeks severance from his codefendants. Specifically, he claims that he will suffer prejudice due to his belief that his joinder was improper, his presumed inability to call certain witnesses, and a spillover of evidence. 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. FACTS

The Drug Enforcement Administration (DEA), in cooperation with the Kansas City Missouri Police Department Drug Enforcement Unit, initiated an investigation into a drug trafficking organization operating in the Kansas City area. In May 2009, a DEA confidential informant ("CI 1"), under DEA Special Agent Joseph Geraci's direction, infiltrated a drug dealer's cocaine distribution operation. The drug dealer, known as "Casper," was later identified

as Co-defendant Juan Marron. Over the course of several months, sufficient probable cause was obtained to begin a Title III wire interception on Co-defendant Marron's phone in November, 2009. This was continued in May and June of 2010, eventually implicating all the defendants as to having communication with Co-defendant Marron.

It was discovered that Co-defendant Marron was the main supplier of the ring, his main source being Co-defendant Montoya with a few smaller, as needed, suppliers. While Co-defendant Marron was mainly an ounce cocaine (crack and powder) supplier and pound marijuana supplier, he would try to accommodate whatever anyone wanted, with varying results.

On December 4, 2009, "CI 5", via telephone, ordered three ounces of cocaine from Co-defendant Marron. Police officers followed CI 5 from Co-defendant Marron's residence, stopped him, and seized the cocaine. On December 5 and 7, 2009, defendant Mendez, via telephone, had conversations with Co-defendant Marron regarding the police presence and storing drugs for Co-defendant Marron.

On May 12, 2010, ICE agents arrested Co-defendant Montoya's brother with 59 pounds of marijuana after he obtained 59 pounds of marijuana from Co-defendant Montoya's residence. Due to the seizure, Co-defendant Marron and his coconspirators, including defendant Mendez, hid drugs and then assisted Co-defendant Marron with the distribution of his marijuana and cocaine. On May 25, 2010, Co-defendant Marron gave defendant Mendez one half ounce of cocaine to give to CI 5.

From June 3, 2010 to June 21, 2010, telephone calls revealed that Co-defendant Mursia provided Co-defendant Marron with 40 pounds of marijuana. Co-defendant Marron distributed the marijuana and some of it was stored by defendant Mendez.

Defendant Mendez, along with 18 co-defendants, was indicted on November 18, 2010. He was charged with conspiracy to distribute five kilograms or more of cocaine, fifty grams or more of cocaine base, and one hundred 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).

II. ARGUMENTS AND AUTHORITIES

A. Joinder

Federal Rule of Criminal Procedure 8(b) permits the joinder of defendants in a single indictment where it is alleged that the defendants "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The propriety of joinder is to be determined from the face of the indictment, and the factual allegations in the indictment must be accepted as true. *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Defendants charged in a conspiracy or jointly indicted on similar evidence from the same or related events are presumptively to be tried together. *United States v. Mercer*, 853 F.2d 630, 632 (8th Cir.), *cert. denied*, 488 U.S. 996 (1988); *United States v. Brown*, 331 F.3d 591, 595-96 (8th Cir. 2003). Joinder of defendants is proper even if each defendant did not participate in each act of the conspiracy. *United States v. Warner*, 498 F.3d 666, 699 (7th Cir. 2007).

The face of the indictment clearly demonstrates that all of the counts are related and flow from the same series of events. Count One charges the defendants with the crime of conspiracy to distribute five kilograms or more of cocaine, fifty grams or more of cocaine base, and one hundred kilograms or more of marijuana. Count Two is a money laundering charge specifically

alleged to promote acts taken in furtherance of the charged conspiracy. Since the allegations on the face of the indictment show that both counts arise from related events involving much of the same evidence, it is beyond question that Mendez has been properly joined as a defendant in the indictment.

In recognition of society's need for speedy and efficient trials, courts generally, and this circuit particularly, have adopted a strong policy in favor of trying jointly indicted defendants together so as to promote judicial economy and avoid "the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 113 S.Ct. 933, 937 (1993); *United States v. DeLuna*, 763 F.2d 897, 919 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985). The basic evidence supporting the indictment is common to all defendants, so separate trials would be inconvenient and expensive. *United States v. Brown*, 331 F.3d 591, 595-96 (8th Cir. 2003). Failure to enforce this preference for a single trial of jointly indicted defendants would effectively nullify Federal Rule of Criminal Procedure 8 and eliminate all the benefits to be derived from conducting a single trial of all jointly indicted defendants.

B. Severance

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). Severance granted under Rule 14 should be "rare." *United States v. Baker*, 98 F.3d 330, 335 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179, 117 S.Ct. 1456 (1997). This is true even where one defendant is accused of playing a small role in a co-defendant's much larger plan. *See, e.g.*, *United States v. Willis*, 940 F.2d 1136, 1138 (8th Cir.

1991) (rejecting contention that "evidence of the scope, magnitude, and duration of [co-defendant's] enterprise made it impossible for [appellant], as a minor participant in the drug scene, to receive a fair trial" in which codefendant, leader of a "far-flung" operation, was joined).

The presumption against Rule 14 severance for prejudice is so strong in the Eighth Circuit that few cases exist in this circuit where Rule 14 severance was found to be proper. *See, e.g.*, *United States v. Baker*, 98 F.3d 330 (8th Cir. 1996), *cert. denied*, 520 U.S. 1179, 117 S.Ct. 1456 (1997). The rule's requirement of prejudice has been defined by case law to require not simply a showing of prejudice but a more onerous showing of "clear" or "substantial" prejudice. *United States v. Singer*, 732 F.2d 631, 634 (8th Cir. 1984); *United States v. Mansaw*, 714 F.2d 785, 790 (8th Cir.), *cert. denied*, 464 U.S. 964 (1983). Even if a defendant demonstrates some prejudice from a joint trial, severance is not required. 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); *United States v. Brooks,* 174 F.3d 950, 957 (8th Cir. 1999). Since the evidence against Mendez is not only mutually admissible but necessary, severance would be a tremendous waste of judicial resources.

1. Privilege of Self-Incrimination

Severance requested on the ground that a defendant wants to call a codefendant as a witness should be denied, unless the defendant shows that the codefendant is likely to testify at a

separate trial and the testimony would exculpate him. See *United States v. Wofford*, 562 F.2d 582, 586 (8th Cir. 1977); *United States v. Graham*, supra, 548 F.2d at 1311 & n. 9. A defendant is not entitled to severance on the weight of an "unsupported possibility" that a codefendant's testimony might be forthcoming at a separate trial. *United States v. Graham*, supra, 548 F.2d at 1311 & n. 9. Mendez's speculative assertions about whether Co-defendant Juan Marron will or will not testify in his defense are insufficient to justify severance. He does not establish by affidavit or otherwise that his codefendant will, in fact, testify and provide exculpatory evidence, but that such an opportunity will be lost because of a joint trial. His pure speculation as to possible exculpatory testimony from a codefendant is insufficient to demonstrate the "clear" or "substantial" prejudice required for severance under Rule 14. *United States v. Blum*, 65 F.3d 1436, 1444 (8th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996)(defendant seeking separate trial must show testimony adduced from codefendant at separate trial would be "substantially exculpatory").

2. Marital Privilege

The Defendant argues that a possible witness, Stephanie Alvarez-Marron, wife of Defendant Juan Marron, would invoke the marital privilege due to the adversarial nature of her testimony, and would be unwilling to testify on behalf of the defendant. Again, this speculation is not enough to show "clear" or "substantial" prejudice required for severance under Rule 14. If she does desire to assert the marital privilege, she should be examined outside the presence of the jury to determine whether or not she claimed the privilege and whether or not her claim of privilege was valid, i.e., whether her testimony would in fact be adverse to the interests of her spouse. *United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984). No affidavits or records of

this nature have been filed. The privilege is not a general one; it must be asserted as to particular questions. *United States v. Smith*, 742 F.2d at 401. The privilege is not absolute and does not prevent testimony related to objective facts having no per se effect on Codefendant Marron. *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979).

3. Compartmentalization

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 and conceded in the defendant's motion, are sufficiently distinct to preclude prejudice from spillover. 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). 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).

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. 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).

V. CONCLUSION

"The presumption against severing properly joined cases is strong." *United States v. Delpit,* 94 F.3d 1134, 1143 (8th Cir. 1996). For the reasons set forth herein, the defendant has failed to overcome this strong presumption because he has failed to show that he will suffer "clear" or "substantial" prejudice in a joint trial with his codefendants. Accordingly, the defendant's Motion for Severance should be denied.

Respectfully submitted,

Beth Phillips
United States Attorney

By */s/ Bruce Rhoades*

Bruce Rhoades
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 E. 9th Street, Suite 5510
Kansas City, Missouri 64106
Telephone: 816- 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on June 8, 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.

Lance Sandage
117 West 20th Street
Suite 201
Kansas City, MO 64108

/s/ Bruce Rhoades

Bruce Rhoades
Assistant United States Attorney