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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 10-00320-10-CR-W-DGK
	)	
v.	)	
	)	
MARCO MURSIA,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT MARCO MURSIA'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 wherein defendant seeks severance from his co-defendants. Specifically, Mursia claims that joinder in this case will result in prejudice and an unfair trial because his presumed inability to call a co-defendant as a witness. He also argues that the jury will not be able to compartmentalize the evidence as it relates to separate defendants. These contentions are without merit under the applicable law and the facts of this case. The government strongly opposes defendant's request for severance, and offers the following suggestions:

I. FACTS

Mursia, along with eighteen co-defendants, has been indicted for: (1) conspiracy to distribute five kilograms or more of cocaine and fifty grams of more of cocaine base ("crack") and one hundred kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(A), and (B) and 846; and (2) knowingly conducting or attempting to conduct financial

transactions for the purpose of promoting unlawful activity, specifically drug sales in violation of 18 U.S.C. §§ 1956(a)(A)(i) and (h).

II. THE GENERAL LAW

Federal Rules of Criminal Procedure 8(b) permits the government to join 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." 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). In recognition of society's need for speedy and efficient trials, courts generally, and this Circuit in 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.

Federal Rules of Criminal Procedure Rule 14 governs the severance of defendants in a single indictment. Severance granted under Rule 14 should only occur in "rare" instances. *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 co-defendant, 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 profound 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,*\pard sa99 174 F.3d 950, 957 (8th Cir. 1999).

III. CO-DEFENDANT TESTIMONY

In the current case not only is joinder appropriate, but Mursia's request for severance on the ground that he wishes to call a co-defendant as a witness should be denied. A defendant is not entitled to severance on the weight of an "unsupported possibility" that a co-defendant's testimony might be forthcoming at a separate trial. *United States v. Graham*, supra, 548 F.2d at 1311 & n. 9. Mursia's speculative assertions about whether co-defendant Marron will or will not testify in his defense are insufficient to justify severance. He does not establish by affidavit or otherwise that his co-defendant will, in fact, testify and provide exculpatory evidence, but that such an opportunity will be lost because of a joint trial. *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. His pure speculation as to possible exculpatory testimony from a co-defendant 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 co-defendant at separate trial would be "substantially exculpatory").

IV. THE JURY'S ABILITY TO COMPARTMENTALIZE

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).

Here, while evidence against Mursia *might possibly* reveal that he was not as heavily involved in every stage of the conspiracy as other co-defendants, the evidence still demonstrates a strong showing of involvement in the activity charged. *Haldeman*, 559 F.2d at 72. Even if Mursia had a separate trial the United States would still be permitted to prove the entire scope of

the conspiracy, and would not be restricted to the alleged "limited involvement" of Mursia. *Id.* Additionally, any fear of evidence spillover can be easily remedied by clear jury instructions, and explanation when necessary during the process of the trial. *Miller*, 725 F.2d 462,468 (8th Cir. 1984).

III. 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 co-defendants. Accordingly, the defendant's Motion for Severance should be denied.

Respectfully submitted,

Beth Phillips
United States Attorney

By: */s/ Bruce Rhoades*
Bruce Rhoades, #88156 (AR)
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 this 14th day of April, 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.

Angela Hasty
601 Walnut Street, Suite 200 A
Kansas City, MO 64106

/s/ Bruce Rhoades

Bruce Rhoades
Assistant United States Attorney