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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendant.	)	

DEFENDANT ELDER'S MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER (DOC #199) DENYING DEFENDANT'S MOTION FOR SEVERANCE ON GROUNDS: 1) THAT THE INDICTMENT DOES NOT ON ITS FACE STATE A BASIS FOR JOINDER OF COUNTS ONE AND TWO AND THAT EVEN IF IT DOES JOINDER IS NONE THE LESS HIGHLY PREJUDICAL TO ELDER SUCH THAT SEVERANCE IS MANDATED

I. Technical Pleading Defect.

In his motion (Doc. #22) Elder asserted two grounds for improper joinder: 1) that Count 2, the money laundering Count does not charge Elder and there is no basis on the face of the indictment to allow for joinder of Counts 1 and 2; and 2) that joinder of Count 2 was improper because of its inherent prejudicial effect on Elder's defense because of its spillover effect and the "sinister" nature of the charge in Count 2. The Order (Doc. #199) does address the issue of prejudice and after some

discussion concludes denial is warranted. However, there is a total absence of any discussion on the first issue, that is, how from the face of the indictment there is justification for joinder of Counts 1 & 2. This is an argument that goes strictly to technical pleading requirements and is a threshold question that must be answered before the Court need address the second issue of factual prejudice. The Order states:

> Accepting as true the factual allegations in the indictment, it is clear that the charges in Count One (that all defendants conspired with each other and others to distribute controlled substances), Counts Three through Six (that defendants Elder and Solomon, aiding and abetting each other and others, distributed controlled substances) and Counts Seven through Ten (that defendants Elder, Solomon and Johnson, aiding and abetting each other and others, distributed controlled substances) satisfy the requirement that defendants are alleged to have participated in the same act or in the same series of acts constituting an offense. There is no misjoinder in this case.

Defendant readily concedes that the above quoted portions of the Order properly states the law with respect to pleading requirements insofar as Counts 1 and 3 through 10 are concerned in that they do charge common defendants in a common course of conduct. However, there is a total absence of any discussion of Count 2 in the R&R or any explanation as to how this money laundering count is from the face of the indictment related to Elder given that he not charged in the Count and there is a total absence of any allegation in the indictment anywhere else to support his

involvement in money laundering or a common scheme by him to participate in money laundering even though he is not named specifically in any count.

Granted, a defendant need not be charged in every count if there is sufficient clear pleading that links him to those charges he is not charge in (typically allows for joinder of individual substantive accounts for different individuals where there is a common conspiracy alleged against all). However, where there is no linkage and the counts are clearly unrelated on the face of the indictment such as here with respect to Counts 1 and 2, the pleading is legally and technically deficient and the counts must be severed without regard to any test for prejudice because prejudice is deemed legally inherent. *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982).

Under Rule 8(b) this court has no discretion to deny severance of misjoined defendants. *Haggard v. United States* 369 F.2nd 968 (8th Cir. 1966). Generally, the "same series of acts or transactions" means acts or transactions that are pursuant to a common plan or a common scheme. *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998). Count 2 alleges a series of acts and transactions involving a separate and distinct conspiracy between all other defendants except Elder to engage in money laundering. There is nothing on face of this indictment to legitimately connect him to Count 2. The money laundering conspiracy alleged in Count 2 of this indictment is not simply an extension of the conspiracy charged in Count 1. It is a separate and distinct crime with its own statutory elements. *United States v. Shoff*, 151 F.3d 899

(8th Cir. 1998). Counts 1 and 2 are improperly joined insofar as defendant Elder is concerned.

II. Prejudice in Fact:

The Order quotes from that portion of Elder's pleading where he addresses his concerns of being tried with others charged with money laundering and it need not be repeated here. The Order concludes that "[t]here is no reason to question that any possible prejudice to defendant Elder resulting from evidence presented against defendants Solomon and Johnson cannot be resolved through precautionary jury instructions." This quote is a virtual concession by this Court that defendant's arguments as to prejudice are based on sound logic but then suggests any prejudice can be wiped from jurors' minds by court instructions. The fiction that instructions are a cure all for prejudicial evidence is best illustrated by the Supreme Court's discussion of the inadequacy of curative instruction in *Bruton v. United States* 391 U.S. 123 (1968). In *United States v. Edwards*, 159 F.3d 1117 at 1124 (8th Cir. 1998), the court, quoting from *Bruton*, observed:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Defendant Elder believes he has made a persuasive argument as to why he should not be tried with Solomon and Johnson where much of the trial will revolve

around complicated and complex financial transactions of which he had absolutely noting to do with or connection to. After further consideration, he submits this Court should exercise its discretion in his favor and grant severance.

WHEREFORE, defendant moves the Court to reconsider that portion of its Order denying his request for severance for the reasons stated herein and in his original motion (Doc. 22).

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 Friday, April 03, 2009.

/s/
JOHN R. OSGOOD