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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-03, 05-CR-W-FJG
	)	
TROY R. SOLOMON, and	)	
DELMON L. JOHNSON,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS TROY SOLOMON'S AND DELMON JOHNSON'S MOTIONS TO TRANSFER

COMES NOW the United States of America, by and through its undersigned counsel, and in response to defendants Troy R. Solomon's and Delmon L. Johnson's Motions to Transfer[1] under Fed.R.Crim.P. 21(b) states as follows:

I. BACKGROUND

On February 6, 2008, an indictment was returned charging all five named defendants with conspiring to distribute controlled substances. Count Two charges certain defendants, including Solomon and Johnson, with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Counts Three through Twelve charge certain defendants with substantive counts of illegal distribution. Count Thirteen charges Mary Lynn Rostie with use of a communications facility in the commission of a felony, in violation of 21 U.S.C. § 843(b). Count Fourteen charges co-defendant Rostie with concealment money laundering in violation of

[1] While their motions seek severance of their cases from that of their co-defendants pursuant to Federal rule of Criminal Procedure 14, their motions do not state explicitly a reason for such a severance. Defendants do not contest joinder under Federal Rule of Criminal Procedure 8.

18 U.S.C. § 1956. Counts Fifteen through Twenty charge co-defendant Rostie with money laundering under 18 U.S.C. § 1957. Counts Twenty-One through Twenty-Four charge co-defendant Cynthia Martin with money laundering in violation of 18 U.S.C. § 1956. The charges stem from the distribution of controlled substances by a pharmacy in Belton, Missouri to defendants Solomon and Johnson in Houston, Texas. In this conspiracy, each shipment was sent via private commercial carrier.

II. DISCUSSION

Defendants Solomon and Johnson move for transfer of venue from the Western District of Missouri to the Southern District of Texas, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. No good reasons exist for a discretionary transfer of trial venue to the Southern District of Texas and many good reasons why the Western District of Missouri is a superior trial venue.

"The question of transfer under Rule 21(b), for the convenience of parties and witnesses and in the interest of justice, is one involving [a] realistic approach, fair consideration and judgment of sound discretion on the part of the district court." *United States v. Phillips*, 433 F.2d 1364, 1368 (8th Cir. 1970). "Defendants bear the burden of justifying such a transfer." *United States v. Stein*, 429 F.Supp. 2d 633, 645 (S.D. N.Y. 2006). Defendants' request to transfer trial of this case to the Southern District of Texas is an appeal to the Court's discretion. *United States v. McGregor*, 503 F.2d 1167, 1169 (8th Cir. 1974)("the grant of transfer under [Fed.R.Crim.P. 21(b)] is a matter of the discretion of the district judge.").

It should be noted that venue is proper in the Western District of Missouri. 18 U.S.C. § 3237(a) states in pertinent part, as follows:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district and completed in another, or committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce . . . is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such commerce, [or] mail matter moves.

18 U.S.C. § 3237(a). "Further, although separate proof of an overt act is not a necessary element of a drug conspiracy under 21 U.S.C. § 846, venue is proper in a conspiracy case in any jurisdiction in which an overt act in furtherance of the conspiracy was committed by any of the conspirators." *United States v. Morales*, 445 F.3d 1081, 1084 (8th Cir. 2006) (citations omitted). Further, a money laundering conspiracy can be prosecuted in any district where the object of the conspiracy would have been carried out or where an overt act occurred. 18 U.S.C. § 1956(i)(2).

In this case, each charged conspiracy is a continuing offense and may be prosecuted in any district in which any portion of the offense occurs. 18 U.S.C. § 3237(a). Venue in conspiracy cases exists in every place where co-conspirators plan, agree, or commit an overt act in furtherance of the conspiracy, and the actions of any co-conspirator will establish the basis for venue over all others. *Hyde v. United States*, 225 U.S. 347, 363 (1912); *United States v. Overshon*, 494 F.2d 894, 900 (8th Cir. 1974). Thus, venue for prosecuting the conspiracies alleged in counts one and two is appropriate in the Western District of Missouri because both counts explicitly charge numerous overt acts in furtherance of the conspiracy that occurred within the Western District of Missouri. *See Cabrales v. United States*, 524 U.S. 1 (1998)(recognizing that district court properly denied pretrial motion to dismiss conspiracy charge based on improper venue, and further recognizing that counts subject to pretrial dismissal

for improper venue did not contain a conspiracy charge); *see also United States v. Overshon*, 494 F.2d 894 (8th Cir. 1974) (upholding assertion of venue for conspiracy count); *United States v. Kim*, 246 F.3d 186, 193, n.5 (2d Cir. 2000)(summarily rejecting challenge that venue was improper for conspiracy counts).

The Supreme Court has approved that the following ten factors may be considered in deciding whether a case should be transferred pursuant to Rule 21(b): "(1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer." *Platt v. Minnesota Mining and Manufacturing Co.*, 84 S.Ct. 769, 771 (1964); *see United States v. McGregor*, 503 F.2d 1167, 1170 (8th Cir. 1974)(holding that the factors enumerated in *Platt* may be considered in deciding a transfer motion under Fed. R. Crim. P. 21(b). "No one of these considerations is dispositive, and it remains for the court to try to strike a balance and determine which factors are of greatest importance." *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990)(brackets, citation, and internal quotations omitted). Generally, however, "a criminal prosecution should be retained in the original district in which it was filed." *United States v. Thomas*, 2006 WL 2283772, at *2 (S.D.N.Y. Aug. 9, 2006)(citation omitted).

Applying these factors to this case, transfer under Rule 21(b) should be denied. Concerning individual defendants, defendants Solomon, Johnson and Elder are residents of Houston, Texas; however, defendants Rostie and Martin reside in the Western District of

Missouri. Although the Houston area is "home" to defendants Solomon and Johnson, the Supreme Court has stated that the location of a defendant's "home" has no independent significance in determining whether transfer to such district would be "in the interest of justice." *See United States v. McGregor*, 503 F.2d 1167, 1170 (8th Cir. 1974)(citing *Platt*, 84 S.Ct. at 769). A move to Houston, Texas would be an inconvenience for co-defendants Rostie and Martin. None of the other three codefendants supports defendants Solomon's and Johnson's request to transfer the venue to Houston, Texas. Thus, the residence of defendants Solomon and Johnson is not a controlling factor.

Concerning the location of possible witnesses, the Western District of Missouri is more convenient for government witnesses. Many of the witnesses the government intend to call are located in the Western District of Missouri. Although defendants Solomon and Johnson assert that their witnesses are located in Harris County, Texas, the witnesses were not named or otherwise described and the nature of their expected testimony was not disclosed. *See Lindberg v. United States*, 363 F.2d 438, 438-39 (9th Cir. 1966)(finding no abuse of discretion in the denial of a Rule 21(b) motion for transfer where the defendant did not support his motion with a showing of specific circumstances). Thus, this factor weighs against transfer.

Concerning the location of events, defendants Solomon and Johnson are alleged to have used a private common carrier to deliver cash proceeds of the specified unlawful activity and invalid prescriptions into the Western District of Missouri. The invalid prescriptions were filled by defendant Rostie at her local pharmacy and shipped to defendants Solomon and Johnson. The illegal cash proceeds were sent to codefendant Martin, who in turn delivered cash payments to

codefendant Rostie. By their actions, defendants Solomon and Johnson chose this district for their evil wrongdoings.

Concerning the location of documents and records, defendants Solomon and Johnson do not identify the documentary evidence located in the Southern District of Texas. The bulk of the relevant documents are in the Western District of Missouri. For their part, defendants do not identify the records that would be unavailable to them because of Since there is a lack of evidence showing that *relevant* documents are located in Harris County, Texas, the location of the evidence does not favor transfer.

Concerning the disruption of business, this factor does not justify transfer. Whether the trial is held in the Southern District of Texas or the Western District of Missouri, defendants Solomon's and Johnson's employment at Ascensia Nutritional Pharmacy will be disrupted. However, "mere [business] inconvenience ... [does] not ipso facto make the necessary showing that a transfer is required in the interest of justice." *United States v. Culoso*, 461 F.Supp. 128, 136 (S.D.N.Y. 1978), *aff'd*, 607 F.2d 999 (2d Cir. 1979). Besides, neither Solomon nor Johnson is a licensed pharmacist or a pharmacist technician, so the pharmacy will continue to function on a normal basis. Codefendant Rostie, who is a licensed pharmacist and owns a pharmacy, will have her business just as, if not more, interrupted if the case were transferred to Houston, Texas. Most significantly, the trial is expected to last no more than seven business days. As a result, the short length of the trial weighs in favor of this district.

Concerning the expense to the parties, this factor is at best neutral. As mentioned previously, the length of the trial will be relatively short. Defendants Solomon and Johnson are jointly represented by the same defense counsel; thus, greatly reducing legal expenses.

Concerning the location of counsel, three defense attorneys and the government's counsel are located in the Kansas City, Missouri metropolitan area. Only one defense counsel is from Houston, Texas. None of the other defense counsel has joined defendants Solomon's and Johnson's motions to transfer. Except for defendants Solomon's and Johnson's counsel, this district is more convenient for all other counsel. They would have to travel to Houston. This factor weighs against transfer.

Concerning docket conditions, this factor factor does not support transfer. The trial is scheduled for the joint criminal docket, beginning September 29, 2008. This will ensure that defendants will receive ample attention regardless of docket conditions. *See Stein*, 429 F.Supp.2d at 645. Further, all of the defendants are assigned to the same district court judge. The interests of judicial efficiency clearly militate in favor of retaining venue for trial here in the Western District of Missouri where trial will be conducted by a judicial officer who will be well-versed in not only the relevant facts, but who will also be well-schooled in the relative culpability of and roles played by each defendant.

Concerning other special elements, the trial of the defendants is more appropriate in this district. The motion to transfer is made by only two of the five defendants in this case. "[W]hen a motion to transfer is made by fewer than all defendants, it is appropriate to consider the implications of that motion for the principles that govern the joinder and severance of defendants in a single charging instrument, as described in the precedent that arises under Rules 8 and 14, Fed.R.Crim.P., and the constitutional principles inherent in the application of those rules." *Thomas*, 2006 WL 2283772, at *2.

F.R.Crim.P. 8(b) provides:

> The indictment or information may charge 2 or more defendants 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. The defendants may be charged in or more counts together or separately. All defendants need not be charged in each count.

Federal Rule of Criminal Procedure 14 governs the severance of both defendants and offenses in a single indictment.[2] 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. 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.

To prevail on a severance motion, a defendant must show not simply prejudice but "clear" or "substantial" prejudice. *United States v. Mansaw*, 714 F.2d 785, 790 (8th Cir.1983). Severance will not be ordered by a mere showing that a particular defendant may have a better chance of acquittal if severed. *Zafiro*, 506 U.S. at 539; *United States v. Delpit*, 94 F.3d 1134,

---

[2] Rule 14 provides:

> 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 defendants which the government intends to introduce in evidence at the trial.

Fed.R.Crim.P. 14.

1143 (8th Cir. 1996). The reasoning for this requirement of "clear" or "substantial" prejudice is founded in the need of society for speedy and efficient trials. *United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985). Any lesser standard would undermine this consideration and effectively nullify Federal Rule of Criminal Procedure 8. *United States v. Werner*, 620 F.2d 922, 926-28 (2d Cir. 1980).

The Eighth Circuit has adopted a strong policy in favor of having jointly indicted defendants tried together so as to promote judicial economy. *Shivers*, 66 F.3d at 939. A joint trial "gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." *United States v. Darden*, 70 F.3d 1507, 1527-28 (8th Cir. 1995). Additionally, joint trials serve the interests of justice by avoiding "the scandal and inequity of inconsistent verdicts." *Zafiro*, 506 U.S. at 537.

In the present case, it has not been shown by defendants Solomon and Johnson that they will suffer "substantial prejudice" in the joint trial of this matter. Equally important, neither defendant has demonstrated that any specific trial right he possesses is compromised; and neither defendant has shown that a denial of their motions would prevent the jury from making a reliable judgment regarding his guilt. *See Zafiro*, 506 U.S. at 538. Having alleged prejudice in unsupported and conclusory terms and having failed to carry this "heavy" burden, severance in this matter would only result in forcing the government and the judicial system to expend limited resources presenting this case two or more times. *See United States v. Darden*, 70 F.3d at 1527.

Consequently, if this Court were to grant a severance to defendants Solomon and Johnson, multiple trials in multiple districts would cause great inconvenience to witnesses,

considerable additional expense to the government, duplication of court time and effort, and the risk of inconsistent results. *See Stein*, 429 F.Supp.2d at 646.

Therefore, having weighed the consideration of the *Platt* factors in light of the principles of joinder and severance, defendants Solomon and Johnson have not met their burden. Accordingly defendants' motions to transfer should be denied.

III. CONCLUSION

For the reasons previously stated, the United States respectfully asks the Court to deny defendants Solomon's and Johnson's motions seeking a change of venue pursuant to Rule 21(b), and grant such other and further relief in favor of the United States as the Court finds just and proper.

Respectfully submitted,

John F. Wood
United States Attorney

By: */s/ Rudolph R. Rhodes, IV*

Rudolph R. Rhodes IV #39310
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on April 28, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

Anthony L. Bannwart
7322 Southwest Frwy.
Suite 1510
Houston, Texas 77074

/s/ Rudolph R. Rhodes, IV

Rudolph R. Rhodes IV
Assistant United States Attorney