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

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

GOVERNMENT'S RESPONSE TO
DEFENDANT ELDER'S MOTION FOR SEVERANCE

COMES NOW the United States of America, by its undersigned counsel, and in response to Defendant Christopher L. Elder's motion for a severance states as follows:

A. Background

On February 6, 2008, a Twenty-Four Count Indictment was filed. Defendants Mary Lynn Rostie, Cynthia Martin, Troy Solomon, Christopher Elder, and Delmon Johnson were charged with crimes arising out of their participation in a conspiracy to distribute controlled substances. The Indictment alleges that defendant Elder wrote unlawful and invalid prescriptions for thousands of dosage units of Schedule III, IV and V controlled substances. Count One charges all five defendants with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Count Two charges all defendants, except Elder, with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Counts Three through Six charge defendants Elder, Rostie, and Solomon with the illegitimate distribution of Schedule III and IV controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Elder, Rostie, Solomon, and Johnson with the

illegitimate distribution of Schedule III, IV and V controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count Thirteen charges that Defendant Rostie had unlawfully used a communications facility in violation of § 843(b). Defendant Rostie is also charge with substantive money laundering and aiding and abetting in Counts Fourteen through Twenty, in violation of 18 U.S.C. §§ 1956, 1957 and 2. Counts Twenty-One through Twenty-Four charges Defendant Martin with money laundering and aiding and abetting, in violation of 18 U.S.C. §§ 1956(a) (1)(B)(I) and 2. Defendant Elder seeks severance pursuant to Rule 8(b) and Rule 14 of the Federal Rules of Criminal Procedure.

B. Argument and Authorities

1. Misjoinder is Determined Based on the Allegations in the Charging Document.

It is well-settled that the propriety of joinder must be determined from the face of the indictment, and that factual allegations in the indictment must be accepted as true. *Schaffer v. United States*, 362 U.S. 511, 513-14 (1960); *United States v. Andrade*, 788 F.2d 521, 529 (8th Cir. 1986). Therefore, the Court must reject any argument for misjoinder based on a claim that the Government's evidence is insufficient to connect a defendant to the broader conspiracy.[1] Pre-trial severance on evidentiary grounds is inappropriate and erroneous. *United States v. Sanders*, 563 F.2d 379, 383 (8th Cir. 1977) ("The Court did not at that time have sufficient information to conclude that the government must fail in its attempt to prove a single scheme.").

2. Rule 8(b) Joinder is Proper Because All Defendants are Charged with Conspiring to Distribute Controlled Substances Under 21 U.S.C. § 841.

[1] See, e.g., Elder's Motion for Severance (Doc. No. 22), at 3.

Defendant Elder alleges improper joinder under Rule 8(b). Rule 8(a) of the Federal Rules of Criminal Procedure addresses joinder of *counts*, while Rule 8(b) addresses joinder of *defendants*.

Rule 8(b) permits the joinder of 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. All defendants need not be charged in each count." Fed. R. Crim. P. 8(b). Nor is it necessary that every defendant have participated in each offense. *United States v. Darden*, 70 F.3d 1507, 1527 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149, 116 S. Ct. 1449 (1996). Rule 8 is interpreted liberally in favor of joining the trial of multiple defendants. *United States v. Warfield*, 97 F.3d 1014, 1018-19 (8th Cir. 1996); *Darden*, 70 F.3d at 1526.

"In general, persons charged in a conspiracy or jointly indicted on similar evidence from the same or related events should be tried together." *United States v. Ruiz*, 446 F.3d 762, 772 (8th Cir. 2006). Courts generally have defined a single conspiracy for the purposes of Rule 8 as "acts or transactions that are pursuant to a common plan or common scheme . . . " *United States v. Jones*, 880 F.2d 55, 61 (8th Cir. 1989) (quoting *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021, 106 S. Ct. 1211 (1986)). A "common scheme" may consist of subsidiary schemes bound together by one common goal. *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985). A single conspiracy does not become multiple conspiracies "simply because the ambitious scope of the scheme demand[s] subsidiary action." *Id.* at 637. Defendants can enter the conspiracy at different times and perform different functions. *United States v. Baker*, 855 F.2d 1353, 1357 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2072 (1989). Joinder is proper where the indictment reflects

a sequence of connected events, with the defendants involved "at various points in the continuum." *United States v. Rimell*, 21 F.3d 281, 289 (8th Cir. 1994). The criminal objective or "common goal" that makes a conspiracy *singular* can be general, such as selling large quantities of drugs, *Baker*, 855 F.2d at 1357, or defrauding the United States through the execution of a health care fraud scheme. *United States v. Liveoak*, 377 F.3d 859, 865 (8th Cir. 2004). In summary, the Eighth Circuit holds that minor players in big, complex, multi-tiered conspiracies can be joined at trial with co-conspirators, large and small, so long as they share a broad common goal, such as the sale of illegal drugs.

Furthermore, in the Eighth Circuit, a relatively low evidentiary threshold will establish the existence of a conspiracy, and the evidence required to bring minor players within the conspiratorial fold is no more substantial. A fraudulent scheme and conspiracy may be – and usually are – established by circumstantial evidence. *Miller v. United States*, 410 F.2d 1290, 1294 (8th Cir. 1969). Where a conspiracy has been established, a defendant can be connected to it by "but slight evidence." *Id.* (citing *Isaacs v. United States*, 301 F.2d 706, 725 (8th Cir. 1962), *cert. denied*, 371 U.S. 818, 83 S. Ct. 32). The Eighth Circuit has recognized that a conspiracy is not necessarily born full grown and often expands by successive stages. *Miller*, 410 F.2d at 1294.

In the present case, all defendants are charged with conspiracy to distribute controlled substances. Multiple defendants entered the conspiracy at different times and performed different functions relating to a larger scheme. The defendants participated in a scheme to distribute and dispense drugs. The scheme involved defendant Elder who wrote invalid prescriptions for his co-defendants. Defendant Rostie's role was to fill the invalid prescriptions

and then ship them to Defendant Solomon, who distributed the prescription drugs in Texas. Proceeds from the sales of these controlled substances were sent to Defendant Martin, who in turn provided a portion of the proceeds to Defendant Rostie. That is, defendants Solomon and Johnson functioned as financial links in the continuum of the broader conspiracy when they shipped the cash proceeds by a private common carrier to Defendant Martin, who in turn paid Defendant Rostie. As the coordinator of these various links, Defendant Solomon was involved at every point along the continuum of the conspiracy. The broader goal of the conspiracy was to achieve financial gain through a sprawling – but singular – scheme.

Defendant Elder argues that he is "not connected" to the money laundering conspiracy in Count Two. *Motion for Severance*, at 1. He states there is no connection between the drug distribution conspiracy charged in Count One and the money laundering conspiracy charged in Count Two. *Motion for Severance*, at 1-2. First, Count Two names defendants Rostie, Martin, Solomon, and Johnson, all of whom are named as co-conspirators in Count One along with defendant Elder, as members the conspiracy to commit money laundering. Defendant Elder completely overlooks and ignores that he is named in the indictment as a co-conspirator and that defendant Solomon acted as his agent. *See* Indictment, ¶¶10 and 11. Count Two specifically alleges that illegal proceeds were from the sale of hydrocodone, alprazolam, and promethazine with codeine, which are the prescription drugs written by defendant Elder. Although the indictment does not specifically incorporate by reference the allegations in Count One, the challenged count sets forth the drug conspiracy statute under which Defendant Elder is charged. – 21 U.S.C. § 846. Thus, the two counts are factually and logically connected.

In *Liveoak*, the Eighth Circuit held that a common purpose to defraud the United States is more than sufficient to bind co-defendants together for trial – even where the specific offenses charged were superficially unrelated. *Liveoak*, 377 F.3d at 865. The indictment in this case charges *all* defendants with conspiracy, only that the conspiracy in this case is to distribute and dispense controlled substances. This is the "glue" that binds the defendants together for the purposes of joinder in the instant case.

The fact that Defendant Elder can be viewed as a minor player does not qualify him for severance, because all the defendants are charged with participating in a single overarching conspiracy to distribute a controlled substances. Defendants Rostie, Martin, Solomon, Elder, and Johnson all "enter[ed] the conspiracy at different times and perform[ed] different functions," *Baker*, 855 F.2d at 1357, but all functioned as part of a common scheme to distribute controlled substances. Defendant Elders created the means by which controlled substances could be transferred by writing invalid prescriptions. Defendant Solomon delivered the invalid prescriptions to defendant Rostie, who filled the prescriptions. Defendant Elder essentially argues that because he is not charged in the money laundering conspiracy, he did not participate in a joint conspiracy and cannot be tried with his co-defendants. But this is a misreading of Rule 8. Rule 8 allows for joint trials of complex conspiracies in which conspirators operate independently of co-conspirators, carrying out "subsidiary schemes" in furtherance of a broad overall goal. In just this way, the varying strands of the conspiracies charged in this case – delivery and use of illegal proceeds – are simply "subsidiary schemes," part of a conspiracy complex enough to require subsidiary action. The existence of such "subsidiary schemes" does not justify severance where a common scheme to distribute controlled substances is charged.

Where such an overarching conspiratorial purpose exists, the superficial attenuation between the co-defendants' specific offenses is not grounds for severance based on a claim of misjoinder. Based on firm Eighth Circuit precedent, Defendant Elder is not entitled to severance based on misjoinder.

Further, in each of the substantive charges against Defendant Elder, aiding and abetting under 18 U.S.C. § 2 is alleged. This is additional evidence that the scheme is common to all the defendants.

3. Severance is Inappropriate Where Joint Evidence Will be Presented at Trial.

Eighth Circuit precedent clearly establishes that where evidence common to multiple defendants will be used at trial, the co-defendants should be tried jointly. "If an indictment invites joint proof, the prima facie validity of joinder is shown." *United States v. O'Connell*, 841 F.2d 1408, 1432 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 799 (1989) (citing *Haggard v. United States*, 369 F.2d 968, 974 (8th Cir. 1966), *cert. denied*, 87 S. Ct. 1379 (1967)); *see also United States v. Rimell*, 21 F.3d 281, 289 (8th Cir. 1994). Such joint proof can also be characterized as "overlapping." *Rimell*, 21 F.3d at 289.

In this case, the financial link is evident upon a close reading of the indictment. Count Two charges that from on or about September 2, 2004 through October 31, 2005, Defendant Martin entered the business of Defendant Rostie, at Rostie Enterprises, LLC, d/b/a The Medicine Shoppe, and provided currency to Defendant Rostie for payment on the account of South Texas Wellness Center. This currency represents proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

In summary, the presence of joint evidence among all charged defendants merits one trial, not several.

4. No Prejudice Justifies Severance Under Rule 14.

Where joinder under Rule 8(b) is proper, as here, a defendant may still seek severance under Rule 14 where a joint trial would prejudice him. Fed. R. Crim. P. 14. But Defendant Elder has not presented one of the rare situations in which Rule 14 severance is proper.

The general rule is that persons charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts. *United States v. Lee*, 743 F.2d 1240, 1248 (8th Cir. 1984); *see also United States v. Krevsky*, 741 F.2d 1090, 1094 (8th Cir. 1984); *United States v. Jackson*, 549 F.2d 517, 523 (8th Cir. 1977). Severance granted under Rule 14 should be "rare." *United States v. Baker*, 98 F.3d 330, 335 (8th Cir. 1996). Even where evidence against a co-defendant is complex and pervasive, and much of it does not pertain to other co-defendants, joinder is proper where a common conspiracy is alleged. *Id.*

In such cases, the evidence against a conspiracy's leader may overshadow the evidence against the minor participant, making it more difficult for the minor conspirator to defend himself. But such difficulty alone is not a reason to reject joinder. *Id.* at 1139. A defendant must show more than that his chances for acquittal would have been better had be been tried separately. *United States v. Lee*, 743 F.2d 1240, 1248 (8th Cir. 1984); *see also United States v. Love*, 692 F.2d 1147, 1152 (8th Cir. 1980). Rather, the prejudice must be "severe" and "compelling." *Rimell*, 21 F.3d at 289; *see also United States v. Mason*, 982 F.2d 325, 328 (8th Cir. 1993) . In short, 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).

Defendant Elder argues that there will be a disparity in evidence between him and the other defendants because he is not charged in the money laundering counts. First, a defendant is not entitled to severance simply because the evidence against a co-defendant is more weighty than the evidence against him or because evidence admissible against a co-defendant may make his case more difficult to defend. In *United States v. Willis*, 940 F.2d 1136 (8th Cir. 1991), the court found:

> There can be little doubt that the joint trial made it more difficult for Willis [a minor participant charged in only two of thirty-two counts] to defend himself. The evidence clearly revealed that [co-defendant] was a major drug dealer with a "far-flung" operation. But difficulty alone is not a reason to reject joinder. A showing of clear prejudice must be made.

Id. at 1139. *See also United States v. Pecina*, 956 F.2d 186, 188 (8th Cir. 1992). Likewise, in this case, even if defendant Elder were considered a minor participant – which is debatable, especially considering the fact that he is charged in nine of the twenty-four counts – in a co-defendant's much larger plan, severance is not warranted. Second, Defendant Elder provided the means by which the conspiracy was able to accomplish its objective of financial gain.

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). 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.

Well established case law holds that the risk of substantial evidence against one defendant unfairly prejudicing a codefendant – so called "spill over" prejudice -- can be cured by appropriate cautionary instructions. *United States v. Calvert*, 523 F.2d 895, 907 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Knife*, 592 F.2d 472, 480-81, n. 9 (8th Cir. 1979). Courts have traditionally found that measures less drastic than severance "such as limiting instructions, often will suffice to cure any risk of prejudice" when there is a disparity of evidence as between defendants joined for trial. *Zafiro v. United States*, 113 S. Ct. at 938. Where the roles of individual defendants are distinct, and where the court instructs the jury to consider the evidence as to each defendant separately, jurors will be deemed capable of compartmentalizing the evidence. *United States v. O'Meara*, 895 F.2d 1216, 1219 (8th Cir.), *cert. denied*, 498 U.S. 943 (1990); *United States v. O'Connell*, 841 F.2d 1408, 1432 (8th Cir.), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989). Courts presume that a jury will obey cautionary and limiting instructions, and this goes far to rebut any contention that defendants with lesser involvement in the money laundering conspiracy will be prejudiced by a joint trial with those whose involvement was more extensive. *United States v. Thornberg*, 844 F.2d 573, 579 (8th Cir.), *cert denied*, 487 U.S. 1240 (1988).

"The presumption against severing properly joined cases is strong." *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996). Given the Eighth Circuit's presumption against severance on Rule 14 prejudice grounds – even where one defendant is accused of playing a small role in a co-defendant's much larger plan (*see Willis*, 940 F.2d at 1138) – the facts

involving Elder, or any of the other moving defendants, simply do not risk the kind of "severe" and "compelling" prejudice the Eighth Circuit requires in order to invoke Rule 14 remedies. As in *Lee*, 374 F.3d 637 and, *Frank*, 354 F.3d 910, and nearly every other such case considered by the Eighth Circuit, the possible prejudice faced by defendant Elder – in a joint trial does not warrant deviating from the circuit's well-settled preference for joint trials.

II. CONCLUSION

Accordingly, for the foregoing reasons, defendant's motion for severance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on May 5, 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.

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