UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 16-CR-64

RONALD D. VAN DEN HEUVEL,

Defendant.

RESPONSE OF THE UNITED STATES TO DEFENDANT RONALD VAN DEN HEUVEL'S MOTION FOR SEVERANCE OF COUNTS

The United States of America, by and through its attorneys, Gregory J. Haanstad, United States Attorney, and Mel S. Johnson and Matthew D. Krueger, Assistant United States Attorneys, hereby makes the following response to defendant Ronald Van Den Heuvel's motion for severance of counts (R.100).

Counts 1 through 13 of the Indictment in this case charge Ronald Van Den Heuvel, Paul Piikkila, and Kelly Van Den Heuvel with participating in a scheme to defraud Horicon Bank from January 1, 2008 through September 30, 2009. Counts 14 through 19 charge Ronald Van Den Heuvel only with participating in a scheme to defraud several other financial institutions from June 10, 2013 through July 2, 2013.

Now, Ronald Van Den Heuvel moves to sever Counts 14 through 19 from the first 13 counts and seeks separate trials on each of these two groups of counts. He bases his motion on two commonly coupled arguments; the counts were not properly joined under Rule 8(a), FRCrP, and, even if they were, they should be severed under Rule 14(a) to avoid prejudice to his defense.

This motion to sever counts should be denied as joinder was clearly proper and severance would not be a reasonable exercise of the Court's discretion.

I. JOINDER OF ALL COUNTS IN THIS INDICTMENT WAS PROPER SINCE ALL COUNTS CHARGED ARE OF THE SAME OR SIMILAR CHARACTER.

Rule 8(a), FRCrP, entitled "Joinder of Offenses" reads, in pertinent part, as follows:

> The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged – whether felonies or misdemeanors or both- are of the same or similar character…

Applying that language to the case at bar makes it clear that all 19 counts in this case against Mr. Van Den Heuvel were properly joined. They are all based on two schemes to defraud federally insured financial institutions in violation of 18 U.S.C. § 1344 and to obtain loans from those institutions by submitting false statements in violation of 18 U.S.C. § 1014. All of the counts charge substantive violations of Sections 1344 or 1014 or a conspiracy in violation of 18 U.S.C. § 371 to violate those statutes. There can be no question that all 19 counts charge offenses of the same or similar character, clearly satisfying Rule 8(a).

If any doubt remains about that, a number of applicable 7th Circuit cases have established fundamental principles that further support joinder in the case at bar. *See, e.g.*, *United States v. Berg*, 714 F.3d 490 (7th Cir. 2013); *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000); *United States v. Alexander*, 135 F.3d 470 (7th Cir. 1998); *United States v. Coleman*[1], 22 F.3d 126 (7th Cir. 1994); *United States v. Quintanilla*, 2 F.3d 1469 (7th Cir. 1993).

[1] Ironically, the defense memorandum in support of this motion to sever counts places heavy reliance on *Alexander* and *Coleman*, although those cases both affirm joinder based on principles which justify joinder in the case at bar.

Alexander, at 476, noted that charging crimes "of the same or similar character" was the broadest possible basis for joinder under Rule 8(a).

The case law has established a strong policy preference in favor of joinder of qualifying charges and the courts construe the rule broadly toward that end. *Jackson*, at 638; *Alexander*, at 476.

"[W]e hold that an error involving misjoinder affects substantial rights and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.' " *United States v. Ross*, 510 F.3d 702, 711 (7th Cir. 2007), quoting *United States v. Lane*, 474 U.S. 438, 449 (1986).

The determination as to whether joinder is proper is based on the face of the indictment not any analysis of evidence which might ultimately might be presented at trial. *Alexander*, at 475. Put another way, "the test of misjoinder is what the indictment charges, not what the proof at trial shows." *Quintanilla*, at 1482; quoted in *Coleman*, at 133.

Rule 8(a) provides a clear directive to compare the joined defenses for categorical similarities, regardless of evidentiary overlap. *Coleman*, at 133; quoted in *Alexander*, at 476. Along those lines, the defense argues that the offenses charged in this case are not properly joined because they occurred at separate times and would be proven by separate evidence. However, "…if offenses are of a like class, although not connected temporally or evidentiarily, the requisites of proper joinder should be satisfied so far as Rule 8(a) is concerned." *Coleman*, at 133. Accord, *Berg*, at 495; *Alexander*, at 476.

In sum, there is no merit to the argument that the 19 counts charged against Ronald Van Den Heuvel were not properly joined. Those counts are unequivocally of the same or similar

character, satisfying Rule 8(a)'s requirements for joinder of offenses. Applicable 7th Circuit principles further support joinder while undercutting defense arguments to the contrary.

II. THERE IS NO BASIS TO CONCLUDE THAT TRYING ALL COUNTS TOGETHER WILL RESULT IN PREJUDICE WHICH WOULD REQUIRE THE SEVERANCE OF COUNTS.

Mr. Van Den Heuvel argues that, even if joinder was proper, the two schemes should be severed under Rule 14(a), FRCrP, because trying all counts together would prejudice his defense. Before discussing the specific arguments made by the defense here, it is necessary to consider the overriding principles applicable to severance motions as revealed by 7th Circuit case law. See, e.g., *United States v. Smith*, 308 F.3d 726, 736 (7th Circuit, 2002); *United States v. Rollins*, 301 F.3d 511, 518 (7th Circuit 2002); *United States v. Peters*, 791 F.2d 1270 (7th Circuit 1986); *United States v. Moschiano*, 695 F.2d 236, 246 (7th Circuit 1982). Motions for severance under Rule 14 are committed to the sound discretion of the trial court. To be entitled to a severance, a defendant bears a difficult burden to show that he cannot obtain a fair trial without severance, not merely that he stands a better chance of acquittal in separate trials. When considering a severance motion, the court must give deference to the strong public interest in having counts indicted together tried together.

The defense memorandum in support of the motion to sever counts raises generic concerns over possible jury confusion, evidentiary overlap, and evidence admissible on some counts but not others. None of the defense arguments go beyond mere allegations to actually establish any reason to conclude that prejudice will necessarily result from one trial of all the counts in this indictment.

Without any analysis of the evidence, defendant Van Den Heuvel's memorandum simply states that evidence of one of the two schemes alleged would not be admissible to prove the other

scheme in separate trials. That may not necessarily be correct. On the face of the indictment, both schemes involve violations of the same statutes, allegations that Mr. Van Den Heuvel used others as straw borrowers to obtain loans for Mr. Van Den Heuvel and his business entities, and allegations that collateral controlled by Mr. Van Den Heuvel was used as security for the loans. With these points in mind, the United States does not concede that evidence of the one scheme could not be used to prove motive, intent, plan, absence of mistake, or lack of accident with regard to the other scheme. Cf., Rule 404(b), FRE.

The defense also asserts that the jury might be confused between schemes and convict the defendant in one scheme based on evidence of the other. That is theoretically possible but unlikely here because the charges are relatively simple (lying to get money) and they involve separate loans from separate financial institutions. When the evidence of separate counts is relatively short and simple and there is no reason established for concluding that the jury could not keep the evidence relevant to each count separate, there is no basis to sever counts under Rule 14(a). *Coleman*, 22 F.3d at 135; *United States v. Lotsch*, 102 F.2d 35, 36 (2nd Circuit 1939).

No prejudice will result from jointly trying more serious charges with less serious charges in this case. Such prejudice could arise if some counts charged crimes that were significantly more serious or heinous than other counts with which they were joined. However, that is certainly not the case here. All of the counts are similar and none raise the danger that the jury will conclude that the defendant is a bad person, who, therefore, must be guilty of the lesser charges as well.

Of course, the defense can protect itself by asking for cautionary instructions prohibiting the jury from using evidence of any counts for inappropriate purposes. The defense memo flatly asserts, without analysis, that no cautionary instructions would alleviate the prejudicial effect of

joint trials. That is easy to assert but, "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of the jury to follow instructions." *Opper v. United States*, 348 U.S. 84, 95 (1954). Accord, *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *United States v. Moya-Gomez*, 860 F.2d 706, 765 (7th Cir. 1988); *United States v. Zanin*, 831 F.2d 740, 744 (7th Cir. 1987); *United States v. Kendall*, 665 F.2d 126, 137 (7th Cir. 1981).

To summarize, principles long-established by the 7th Circuit emphasize the difficult standards the defendant must meet to overcome the strong public interest in having counts indicted together tried together. Defendant Ronald Van Den Heuvel's generic assertions of prejudice do not come close to satisfying those standards. There is no reasonable basis for the Court to exercise its discretion to sever counts 1 through 13 from Counts 14-19 under Rule 14(a).

III. CONCLUSION

For the reasons expressed in this response, the United States asks this court to deny defendant Ronald Van Den Heuvel's motion for severance of counts.

Dated at Milwaukee, Wisconsin, this 12th day of July, 2017.

Respectfully Submitted,

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