UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff, v. RON VAN DEN HEUVEL and KELLY VAN DEN HEUVEL, Defendants.	)	Case No. 16 CR 00064-WCG-DEJ Honorable William Griesbach Magistrate Judge David E. Jones

DEFENDANT KELLY VAN DEN HEUVEL'S MEMORANDUM IN SUPPORT OF MOTION FOR SEVERANCE

Kelly Van Den Heuvel is a bit player in a 19 count superseding indictment that charges her husband in two separate bank fraud schemes and in all 19 counts. Ms. Van Den Heuvel is charged in only three counts, and is implicated criminally in only one $25,000 loan (that was almost immediately repaid) from Horicon Bank. By contrast, her co-defendant and husband is charged in two separate bank fraud schemes implicating 12 separate loans. At the outset, improper joinder exists in adding Kelly Van Den Heuvel to a superseding indictment which involves fraud charges against her co-defendant in which she is not named as a defendant and implicates conduct years after the two loans in which she is purportedly involved. In addition, if tried with her husband and co-defendant, Ms. Van Den Heuvel will face extraordinary prejudice. The gross disparity in the evidence (which the government, as it must, concedes) and the "spillover" effect of the evidence against her husband will prejudice Ms. Van Den Heuvel – particularly given that they are married (which will cause the jury to make assumptions based solely on a marital relationship rather than the evidence presented). Ms. Van Den Heuvel will also suffer prejudice because her defenses will very likely be antagonistic to her husband's, and

she will not be able to call him as a witness to testify on her behalf at a joint trial. Potential *Bruton* issues also exist with regard to co-defendant statements which would violate Ms. Van Den Heuvel's Sixth Amendment rights. Finally, there is little judicial efficiency in a joint trial with Mr. Van Den Heuvel, where there is minimal overlapping evidence and a separate trial against Ms. Van Den Heuvel would be very short – as opposed to the two week plus trial contemplated if the defendants are tried jointly. For all of those reasons, Kelly Van Den Heuvel requests a severance pursuant to Federal Rules of Criminal Procedure 8 and 14.

I. Background

The superseding indictment charges two separate schemes – a Horicon Bank fraud scheme between January 1, 2008, and September 30, 2009 (Counts 1 through 13), and a separate bank fraud scheme that allegedly occurred in June and July, 2013 (Counts 14 through 19). Kelly Van Den Heuvel is named in only a few counts in the Horicon Bank fraud scheme.

The Horicon Bank scheme involves alleged fraud in connection with nine separate loans totaling $1,344,958, in which Ron Van Den Heuvel allegedly caused Horicon Bank loan officer Paul Piikkila to push through loans to "straw borrowers" with the resulting loan proceeds diverted to Mr. Van Den Heuvel and his business entities. According to the superseding indictment, Kelly Van Den Heuvel is allegedly connected to two loans – one for $250,000 (with an additional $70,000 line of credit) on November 7, 2008, and one for $25,000 on May 15, 2009.

From the facts that Ms. Van Den Heuvel has thus far unearthed (which appear uncontested based on the government's current discovery), it appears that no false statements exist related to the $250,000 loan. And, in fact, the grand jury has not alleged any, despite the fact that the grand jury itemized the $250,000 loan as one of the "overt acts" listed in the Count

One conspiracy charge involving Ms. Van Den Heuvel. Revealingly, Ms. Van Den Heuvel is not charged in a separate count surrounding the $250,000 loan – in fact, it is the only overt act charged in Count One that does not have a corresponding substantive charge. All of the proceeds of the $250,000 went to Evans Title and Horicon Bank. The payments to those two entities establish that the loan proceeds went for their intended purpose: to buy a home. Moreover, the undisputed facts demonstrate that the home was fully collateralized. When Horicon Bank ultimately foreclosed on the home because KYHKJG was behind in its mortgage payments, Horicon Bank got its money back through its sale of the property at a sheriff's sale.

The other loan allegedly connected to Kelly Van Den Heuvel is a $25,000 loan to the Van Den Heuvel's nanny in May 2009. The grand jury alleges that funds from the $25,000 loan were promptly paid to Ron Van Den Heuvel's business interests, paid to Ron Van Den Heuvel's business associates, and to KYHKJG, LLC. It is undisputed that the $25,000 was quickly paid off.

In April 2016, Ron Van Den Heuvel proffered with the United States. Ron Van Den Heuvel, throughout his proffer, was asked questions about his wife's alleged involvement in his schemes.[1] The government did not attempt to interview Kelly Van Den Heuvel prior to indictment. She has made no statements to government authorities.

II. Legal Argument

1. Joinder is Improper

Under Federal Rule of Criminal Procedure 8(b), joinder of defendants is appropriate in the following circumstances:

> The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or

[1] The government recorded its conversation with Mr. Van Den Heuvel and provided a draft transcript to the defendants. Kelly Van Den Heuvel will provide a copy of the transcript to the Court at its request.

transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

To determine whether joinder is proper, the Court looks solely to the face of the indictment. *United States. v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003); *United States v. Coleman*, 22 F.3d 126, 132 (7th Cir. 1994). Under Rule 8(b), some common activity must exist involving all defendants, which embraces all charged offenses, even though every defendant need not have participated in or be charged with each offense. *United States v. Bledsoe*, 674 F.2d 647, 656-57 (8th Cir. 1982). The Seventh Circuit, in analyzing Rule 8(b), imposes a stringent standard for joinder, requiring that the defendants "participated in the same act or transactions constituting an offense or offenses." *United States v. Velasquez*, 772 F.2d 1348, 1352 (7th Cir. 1985).

When multiple defendants are charged in a scheme, *Velasquez* teaches that the government cannot join charges against a single defendant that are unrelated to the scheme, even if all of the charges could have been joined if the single defendant had been indicted alone. *Id.* (finding that misjoinder occurred). Whether defendants' acts "are part of a series of transactions depends upon the existence of a common plan." *United States v. Cavale*, 688 F.2d 1098, 1106 (7th Cir. 1982). For defendants to be charged together the acts or transactions must have occurred "pursuant to a common plan or scheme." *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003). The mere similarity of offenses or the presence of a common defendant in all of the charges does not demonstrate that the offenses arose out of the same series of acts or transactions. *United States v. Tsanges*, 582 F. Supp. 237, 239 (S.D. Ohio 1984).

Here, Kelly Van Den Heuvel has no connection to the charged bank fraud that encompasses Counts 14 through 19 of the superseding indictment. That fraud scheme involves alleged conduct that occurred from June to July 2013. The fraud scheme in which Kelly Van Den Heuvel is charged involves conduct from January 2008 to September 2009. The schemes

themselves are different – involving as they do different banks and different theories of fraud. They do not involve a common plan or scheme, as required by Seventh Circuit precedent and Rule 8. The only overlap between the two alleged frauds is Ron Van Den Heuvel. That is not sufficient to join defendants. *See, e.g.*, *Velasquez*, 772 F.2d at 1352; *see also United States v. Nicely*, 922 F.2d 850 (D.C. Cir. 1991) (joinder of two unrelated conspiracies in a single indictment required reversal of the appellant's conviction where there was no common scheme connecting them); *United States v. Castro*, 829 F.2d 1038 (11th Cir. 1987) (conspiracy to defraud a bank was improperly joined with conspiracy to fraudulently obtain loans where prosecution failed to establish the defendant knew or should have known of the second conspiracy).

2. Kelly Van Den Heuvel would be Severely Prejudiced by Joinder and Severance is Proper under Rule 14.

> "[A] co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the mind of jurors who are ready to believe that birds of a feather flock together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing each other, they convict each other."

Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring)

Justice Jackson had it right. Kelly Van Den Heuvel is in a particularly uneasy seat in this case because she is a bit player in a much larger fraud scheme, she is the wife of the lead defendant, the evidence against her is slight, she has likely antagonistic defenses vis-à-vis her co-defendant / husband, potential *Bruton* issues exist with a joint trial, and potential exculpatory evidence exists that will be unavailable to her in a joint trial. Failure to sever her trial from that of her co-defendant will result in severe prejudice to Kelly Van Den Heuvel.

Severance of defendants in an indictment is appropriate where a defendant would otherwise be prejudiced by joinder of defendants or charges. Federal R. Crim. P. 14(a) provides:

> Relief from Prejudicial Joinder. 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 altogether, 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.

The Supreme Court has declared that due process and Fed.R.Cr.P. 14 mandate separate trials for defendants joined under Rule 8 if "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances could erroneously lead a jury to conclude that a defendant was guilty." *Id.* Circumstances justifying a severance include, but are not limited to: (1) when evidence that a jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant; (2) when defendants are tried in a complex case with different degrees of culpability; (3) if exculpatory evidence that would be available to a defendant if tried alone were unavailable in a joint trial; or (4) "gross disparity" in the weight of the evidence against the defendants. *Zafiro*, 506 U.S. at 539, *see also United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985).

The cornerstone to a fair trial is ensuring that the jury considers the evidence against each defendant "dispassionately and in isolation" and that its judgment is not "overwhelmed" by the amount or type of evidence relating to the other defendants. *United States v. Winter*, 663 F.2d 1120, 1139 (1st Cir. 1981) (reversal for denial of severance motion of defendant alleged to have

participated in one of 20 fixed horse races charged in RICO conspiracy). Courts "should vigilantly monitor for developing unfairness and should not hesitate to order severance at any point after indictment if the risk of real prejudice grows too large to justify whatever efficiencies a joint trial does provide." *United States v. Coleman*, 22 F.3d 126, 132 (7th Cir. 1994). This vigilance includes being "especially watchful for possible jury confusion, illegitimate accumulation of evidence or other sources of prejudice." *Id*. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. *Zafiro*, 506 U.S. at 539.

Also, when the risk of prejudice is too high, limiting jury instructions will not suffice. Although the fact "there is more evidence against certain co-defendants, or that it is highly more incriminating, is insufficient grounds in itself for severance," there are "instances where the evidentiary disparity is unquestionable," and there cannot be a presumption that "jury instructions will adequately cure potential prejudice." *United States v. Stoecker*, 920 F. Supp. 876 (N.D. Ill. 1996) (Judge Gettleman), citing *United States v. Andrews*, 754 F.Supp. 1161, 1178 (N.D. Ill. 1990). "A 'gross disparity' in the evidence presents a danger that some defendants will suffer 'spillover prejudice' due to accumulation of evidence against other defendants. When that occurs, a defendant may suffer a transference of guilt merely due to his association with a more culpable defendant." *Id.*, quoting *Andrews* at 1177-78, citing *U.S. v. Garner*, 837 F.2d 1404, 1413 (7th Cir. 1987) (*Stoecker* Court granting severance under Rule 14 for defendant charged in only 3 of 58 counts in fraud scheme, where there was a "gross disparity" of evidence, "both in quality and quantity," between the case against the defendant versus the case against the four codefendants); *See also United States v. Troutman*, 546 F.Supp.2d 610 (N.D.Ill. 2008) (Judge Castillo granting severance under Rule 14 of defendant

having only a "bare-bones connection" to overarching fraud scheme, where gross disparity of evidence between defendant and two co-defendants would likely prejudice defendant despite limiting instructions. "(I)t is too much to ask the jury in this case to ignore the vast quantity of evidence in this case that is not relevant to the one count in which (defendant) is charged.").

This case presents exactly the type of unjust situation contemplated by the U.S. Supreme Court in *Zafiro*. A joint trial with co-defendant Ron Van Den Heuvel would result in an avalanche of evidence that would not be admissible if Kelly Van Den Heuvel were tried alone. This also is a "complex case with different degrees of culpability" between the two remaining defendants to go to trial. The complexity of this case is evident in the indictment and the discovery provided thus far where there are allegations of straw borrowers, shell corporations, false representations, multiple loan agreements, and commingling of company assets. None of that evidence relates to Kelly Van Den Heuvel. She is a bit player in this entire case – as the government itself (to its credit) has conceded. The indictment alleges she was involved in only two loans – the $250,000 loan (where there has not yet been discovery showing criminality) and the $25,000 loan. Thus, the taint to Kelly Van Den Heuvel from having to sit through a comparatively lengthy trial about her husband's alleged crimes would prejudice her unfairly.

The danger of a "spillover" effect is particularly real here, given the relationship between Kelly Van Den Heuvel and her co-defendant. This is not a case involving two acquaintances, business associates, or friends. The defendants in this case are married. There is extraordinary danger, then, that if tried jointly the jury will have inappropriate and improper curiosity about whether Kelly Van Den Heuvel had any role in any of Ron Van Den Heuvel's alleged misdeeds. *See United States v. Emond*, 935 F.2d 1511, 1516-1517 (7th Cir. 1991). She did not – as the grand jury presumably found in not charging her in the 16 counts in which Ron Van Den Heuvel

is charged alone. In a joint trial, then, she will be a bystander for much of the presentation of the government's evidence – with the jury likely wondering impermissibly whether, for instance, she profited from her husband's alleged misdeeds. Limiting instructions to the jury are not the answer. As the Seventh Circuit noted in another husband / wife criminal case, limiting instructions in a joint husband / wife trial "may have lost their effect through sheer repetition, or may even have piqued the jury's curiosity as to [the wife]'s role in her husband's various misdeeds." *Emond*, 935 F.2d at 1517. In *Emond*, the Seventh Circuit concluded that "justice would have been better served by trying [the wife] on the tax counts (either alone or with her husband) in a separate proceeding," but nevertheless affirmed because it found harmless error. *Id.* As it must, the Seventh Circuit was looking at the case in *Emond* retrospectively, but this Court can and should follow the Seventh Circuit's admonition and sever Kelly Van Den Heuvel's case from her husband's – justice would be "better served" by trying them separately.

Ms. Van Den Heuvel will also suffer prejudice because her defenses will very likely be antagonistic to her husband's, and she will not be able to call him as a witness to testify on her behalf at a joint trial. The defense is prepared to explain to the Court *in camera* what those antagonistic defenses are – but in general terms it should be readily apparent what those antagonistic defenses are. As just one example, Paul Piikkila has identified Ron Van Den Heuvel (not Kelly) as the person who brought him the $250,000 loan for the property on Silver Maple Drive in DePere. If Kelly Van Den Heuvel's trial followed her husband's, she would be able to call him as a witness, where he would likely exonerate her.

Potential Bruton issues also exist with regard to co-defendant statements which would violate Ms. Van Den Heuvel's Sixth Amendment rights. The government proffered Ron Van Den Heuvel for multiple hours in the weeks prior to the grand jury indictment of Kelly Van Den

Heuvel. Many of the questions asked led to discussions of Kelly Van Den Heuvel. To the extent the government intends to offer any of those hearsay statements by Ron Van Den Heuvel at trial, Kelly Van Den Heuvel will be unconstitutionally prejudiced because of her inability to confront the testimony. The introduction of such evidence, then, would violate both the Confrontation Clause and the Supreme Court's teaching in *Bruton v. United States*, 391 U.S. 123, 124 (1968).

Little judicial efficiency exists in a joint trial with Mr. Van Den Heuvel, where there is minimal overlapping evidence and a separate trial against Ms. Van Den Heuvel would be very short – as opposed to the two week plus trial contemplated if the defendants are tried jointly. In cases such as this where "[s]eparate counts that for the most part depend on separate evidence," there are "fewer steps [saved] when tried together." *United States v. Coleman*, 22 F.3d at 132; *see also United States v. Creamer*, 370 F. Supp. 715, 731 (N.D. Ill. 2005) (lack of shared evidence "suggests that severance will not lead to wasted judicial resources"). A joint trial would also impose an unfair burden on Kelly Van Den Heuvel and her counsel in having to prepare for and endure a lengthy trial where Kelly Van Den Heuvel is a defendant in only three of the 19 counts charged. *See, e.g., United States v. Gaston*, 37 F.R.D. 476, 477 (D.D.C. 1965) (District court judge, who served on the Advisory Committee that drafted Rules 8 and 14, noted the "imposition and unnecessary burden" on defendant and counsel to sit through a trial of multiple counts in which defendant was not accused).

All of these reasons, or any of them standing alone, are cause for severing Kelly Van Den Heuvel's trial from that of her husband. The "judicial economy" of trying them jointly is far outweighed by the reasons for severance.

III. Conclusion

WHEREFORE, Defendant Kelly Van Den Heuvel, moves this Honorable Court to enter an order severing her case from that of her husband and co-defendant, Ron Van Den Heuvel so that her trial follows that of her husband's trial.

Respectfully submitted,

/s/ *Andrew Porter*

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CERTIFICATE OF SERVICE

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DEFENDANT KELLY VAN DEN HEUVEL'S MEMORANDUM IN SUPPORT OF MOTION FOR SEVERANCE

was served pursuant to the district court's ECF system.

/s/ Carrie E. DeLange