UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA PLAINTIFF,	:	
v.	:	No. 3:99cv85(EBB)
RUDOLFO SEGURA, ET AL. DEFENDANTS.	:	

Ruling on Defendants' Motions for Severance

Defendants Jose Orlando Pena and Joselito Rotger each move, pursuant to Fed. R. Crim. P. 8 and/or 14, for severance of their trials from their co-defendants. [Doc. Nos. 449 and 492]. Defendants William Lopez, James Williams, Angel Rodriguez, Jose Figueroa, Hector Barrientos, Jimmy Augusto Restrepo, and Norman Arrango Ramirez have adopted Pena's motion, and Defendant Evette Rodriguez has adopted Rotger's motion. For the reasons set forth below, Defendants' motions are DENIED as to the moving parties and as to all parties adopting such motions.

I. BACKGROUND

Defendants Pena and Rotger are two of thirty-six defendants indicted for an alleged drug conspiracy taking place in Fairfield, Connecticut, during 1998 and 1999. On June 3, 1999, a federal grand jury returned a twenty-one count superseding indictment charging, among others, Pena and Rotger with one count of Conspiracy to Possess with intent to Distribute Cocaine and Cocaine-Base, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Pena was also charged with Possession with Intent to Distribute a substance containing a detectable amount of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).

Defendant Pena claims first that the joinder of offenses in the indictment under Fed. R. Crim. P. 8(a) was improper because the offenses are dissimilar, not part of the same common scheme or plan, and constitute multiple conspiracies rather than a single conspiracy. Pena also claims that the joinder of defendants in the indictment under Fed. R. Crim. P. 8(b) was improper because they did not participate in the same series of acts or transactions. Finally, even if joinder is proper under Rule 8, Pena argues pursuant to Fed. R. Crim. P. 14, that the joinder is prejudicial due to the number of defendants, the "breadth" of the indictment, possible "Bruton" problems, and potentially inconsistent defenses.

Defendant Rotger claims that joinder is prejudicial under Rule 14 because he is one of thirty-six defendants charged with only one of the twenty-one counts in the indictment. Rotger argues that due to the size and complexity of the indictment, the disparity of evidence, his allegedly minor role in the conspiracy, and potentially conflicting defenses, the risk of prejudice is high.

II. DISCUSSION

A. Joinder

The propriety of joinder raises a question of law. See

United States v. Lane, 474 U.S. 438, 449 n.12, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986); United States v. Cervone, 907 F.2d 332, 341 (2d Cir. 1990). Although Pena moves for severance pursuant to both Rule 8(a) (joinder of offenses) and Rule 8(b) (joinder of defendants), where multiple defendants are charged in the same indictment, Rule 8(b) governs any motion for severance based on improper joinder. See United States v. Turoff, 853 F.2d 1037, 1043 (2d Cir. 1988); United States v. Gallo, No. 98cr338(JGK), 1999 WL 9848, at *2 (S.D.N.Y. Jan. 11, 1999); United States v. Reinhold, 994 F. Supp. 194, 197 (S.D.N.Y. 1998).[1] After noting that "Rule 8 does not explicitly provide a standard that governs when multiple offenses and multiple defendants are joined in one

[1] Even if Pena's claim under Rule 8(a) was meant to be construed as a limited request that the two offenses charged against him be severed, his claim is without merit. Under Rule 8(a), joinder of offenses against a single defendant is proper if they are of the same or similar character, they are based on the same act or transaction, or they are based on two or more acts or transactions constituting parts of a common scheme or plan. See Fed. R. Crim. P. 8(a). Each of the tests for when offenses may be tried together "reflects a policy determination that gains in trial efficiency outweigh the recognized prejudice that accrues to the accused." Turoff, 853 F.2d at 1042. For purposes of analysis under Rule 8(a) "no one characteristic is always sufficient to establish 'similarity' of offenses, and each case depends largely on its own facts." United States v. Blakney, 941 F.2d 114, 116 (2d Cir. 1991). Here, because both the conspiracy charge and Pena's possession charge relate to the possession, distribution, and sale of narcotics, the joined offenses are of "similar character." Furthermore, because Pena's possession charge involved two other co-defendants charged in the conspiracy and took place within the time period of the alleged drug conspiracy, the joined offenses are also based, at least in part, on the same transaction. Therefore, Defendant Pena's claim of misjoinder under Rule 8(a) is without merit.

indictment," Turoff, 853 F.2d at 1043, the Second Circuit concluded that "multiple defendants may be charged with multiple offenses only if the offenses are related pursuant to the test set forth in Rule 8(b), that is, only if the charged acts are part of a 'series of acts or transactions constituting . . . offenses.'" Id.

Under Rule 8(b), joinder of defendants is proper 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. See Fed. R. Crim. P. 8(b).[2] The Second Circuit has construed this rule to mean that "joinder is proper where two or more persons' criminal acts are 'unified by some substantial identity of facts or participants,' or 'arise out of a common plan or scheme.'" Cervone, 907 F.2d at 341 (quoting United States v. Attanasio, 870 F.2d 809, 815 (2d Cir. 1989)); see also United States v. Bernard, No. 3:97cr48(AHN), 1998 WL 241205, at *8 (D. Conn. Apr. 2, 1998); United States v. Giraldo, 859 F. Supp. 52, 54 (E.D.N.Y. 1994). As a general rule, Rule 8(b)

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[2] Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information 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. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8(b).

requirements are satisfied where the Government alleges the existence of an overall conspiracy linking the various substantive crimes charged in an indictment. "The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants named have engaged in the same series of acts or transactions constituting an offense." United States v. Friedman, 854 F.2d 535, 561 (2d Cir. 1988) (quoting United States v. Casrellano, 610 F. Supp. 1359, 1396 (S.D.N.Y. 1985)); see also United States v. Nerlinger, 862 F.2d 967, 973 (2d Cir. 1988) ("The established rule is that a non-frivolous conspiracy charge is sufficient to support joinder of defendants under [Rule] 8(b)."); United States v. Harris, No. 00cr105(RPP), 2000 WL 1229263, at *1 (S.D.N.Y. Aug. 29, 2000) (same); United States v. Henry, 861 F. Supp. 1190, 1200 n.5 (S.D.N.Y. 1994) (holding all defendants properly joined "because they are alleged to have participated in the underlying conspiracy").

Here, all indicted Defendants are charged with one overall conspiracy, while individual defendants are charged with various substantive crimes. Pena is alleged to have supplied Defendant Martin Torres with kilogram quantities of cocaine intended for Torres and Defendant Rudolfo Segura. Torres is alleged to have supplied quantities of cocaine to Segura. Segura is alleged to have continuously and routinely supplied kilogram quantities of cocaine to Defendants William Lopez and Carlos Davila who

"cooked" the cocaine into "crack" and distributed it to several other co-defendants for street level sale. Defendant Pena argues, however, that the indictment throws together a variety of disparate acts and actors, and that the conspiracy charged is a number of discrete conspiracies; not one multifaceted conspiracy.

Despite the ultimate finding of a single conspiracy at trial, Rule 8(b) joinder is satisfied by the allegations in the indictment; facial sufficiency is all that is required. See Schaffer v. United States, 362 U.S. 511, 513-14, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960); Gallo, 1999 WL 9848, at *2 (noting that while the Second Circuit has not yet ruled on whether a trial court may look beyond the indictment to the government's representations, "Rule 8(b) specifically turns on what is 'alleged' against the defendants"); United States v. Gallo, 668 F. Supp. 736, 748 (E.D.N.Y. 1987). "Whether the evidence in a case establishes single or multiple conspiracies is a question of fact to be resolved by a properly instructed jury." Nerlinger, 862 U.S. at 972 (quoting Friedman, 854 F.2d at 561). Furthermore, there is no requirement that the same people be involved throughout the entire period of the conspiracy, nor that each member of a conspiracy conspire directly with every other member of the conspiracy in order to find one conspiracy. See id. at 973.

Therefore, this Court finds that the defendants and the offenses are properly joined under Rule 8(b). The overall

conspiracy alleged in the indictment sufficiently unifies the defendants by "some substantial identity of facts or participants" which "arise out of a common scheme." Furthermore, the facts alleged provide a sufficient connection between the street level sellers and the various suppliers to constitute a series of transactions under Rule 8(b). Accordingly, Defendant Pena's request for severance based on improper joinder is DENIED.

B. Severance

Once the Rule 8 requirements are met by the allegations in the indictment, severance is controlled by Fed. R. Crim. P. 14, which addresses whether the joinder is prejudicial. See Lane, 474 U.S. at 447 (citing Schaffer, 362 U.S. at 515-16). Severance motions are committed to the sound discretion of the district court. See United States v. Harwood, 998 F.2d 91, 95 (2d Cir. 1993); United States v. Tutino, 883 F.2d 1125, 1130 (2d Cir. 1989). 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.

Fed. R. Crim. P. 14. Together, Rule 8 and Rule 14 are designed "to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." Zafiro v. United States, 506 U.S. 534, 540, 113 S. Ct.

933, 122 L. Ed. 2d 317 (1993) (quoting Bruton v. United States, 391 U.S. 123, 131 & n.6, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

The Supreme Court has recognized "a preference in the federal system for joint trials of defendants who are indicted together." Zafiro, 506 U.S. at 537. The rationale behind this preference was explained by the Court in an earlier decision:

> [I]t would impair both efficiency and fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience . . . of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability--advantages which sometimes operate to the defendant's benefit.

Richardson v. Marsh, 481 U.S. 200, 210, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); see also United States v. Jimenez, 824 F. Supp. 351, 366 (S.D.N.Y. 1993) ("The risks of prejudice attendant in a joint trial are presumptively outweighed by the conservation of time, money, and scarce judicial resources that a joint trial permits."). This preference and its underlying rationale creates a heavy burden for a defendant seeking severance. "[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 540. In fact, "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the

district court's sound discretion." Id. at 538-39. The defendant moving for severance must show that a joint trial would result in "substantial prejudice amounting to a miscarriage of justice," United States v. Gallo, 668 F. Supp. 736, 749 (E.D.N.Y. 1987), such that it 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, 506 U.S. at 539; see also United States v. Harwood, 998 F.2d 91, 95 (2d Cir. 1993); United States v. Chang An-Lo, 851 F.2d 547, 556 (2d Cir. 1988).

Factors to be considered in determining whether sufficient prejudice exists to justify severance include: the number of defendants, the number of counts, the complexity of the indictment, the estimated length of trial, disparities in the amount or type of proof offered against each defendant, disparities in the degrees of involvement or culpability of each defendant, conflicts between various defense theories, and prejudice from evidence admissible against co-defendants which is excluded as to a particular defendant. See United States v. Upton, 856 F. Supp. 727, 736 (E.D.N.Y. 1994); Gallo, 668 F. Supp. at 749. No one factor is itself dispositive; rather, the court must consider them together to decide the ultimate question of whether the jury will be reasonably able to keep the evidence separate and attribute it accurately to each defendant. See Upton, 856 F. Supp. at 736; United States v. Abrams, 539 F. Supp.

378, 381 (S.D.N.Y. 1982) (“The ultimate question for the district court is whether the jury will be able to 'compartmentalize' the evidence presented to it, and distinguish among the various defendants in a multi-defendant suit.”).

1. Number of Defendants and Complexity of Indictment

Here, both Defendants claim that the number of defendants and size and complexity of the indictment are cause for severance. In United States v. Casamento, 887 F.2d 1141, 1151-52 (2d Cir. 1989), although the Second Circuit upheld a district court's denial of severance of a joint trial of twenty-one defendants spanning more than seventeen months, the court cautioned that in a case where the trial is expected to last more that four months and involve more than ten defendants, the district court should scrutinize the advisability of proceeding with a single trial. More recently, however, in United States v. DiNome, 954 F.2d 839, 842 (2d Cir. 1993) (upholding the denial of severance in a multi-count RICO conspiracy joint trial of twenty-four defendants lasting sixteen months), the Second Circuit, while acknowledging its expressed “misgivings” about trials of the magnitude in Casamento, also recognized that “district judges must retain a considerable degree of discretion in determining whether, on balance, the fair administration of justice will be better served by one aggregate trial of all indicted defendants or by two or more trials of groups of defendants.” The court then clarified its earlier warnings regarding trials involving

more than ten defendants that will exceed four months: “There is no support in case law or in logic for the proposition that a lengthy trial, a large number and variety of charges, and numerous defendants violate due process without a showing that the issues were actually beyond the jury's competence.” Id. Therefore, a specific showing of how these factors will prejudice individual defendants is required--mere speculation is insufficient to support a motion for severance on these grounds.

Here, while approximately nineteen of the thirty-six defendants indicted may stand trial, the moving Defendants have failed to make a specific showing of prejudice. Defendants' arguments are based entirely on speculation due to the number of defendants originally indicted. They fail to identify, either generally or specifically, evidence that may give rise to prejudice.

2. Jury's Ability to Segregate the Evidence

Related is Defendant Pena's argument that the jury will not be able to segregate the evidence applicable to each defendant. This claim is unsupported and conclusory. First, “the fact that evidence may be admissible against one defendant but not another does not necessarily require a severance.” Chang An-Lo, 851 F.2d at 556; see also Jimenez, 824 F. Supp. at 367. Furthermore, the Second Circuit has held that “we cannot assume that a multi-defendant drug trial is beyond the ken of the average juror.” United States v. Villegas, 899 F.2d 1324, 1347 (2d Cir. 1990).

The Supreme Court recently stated that “less drastic measures [than severance], such as limiting jury instructions, often will suffice to cure any risk of prejudice,” Zafiro, 506 U.S. at 539, and that “juries are presumed to follow their instructions.” Id. at 540. Therefore, arguments for severance based on unsupported assumptions that a jury will be unable to segregate the evidence are insufficient to establish prejudice.

Here, Pena has made no showing of evidence that will be introduced at trial against his co-defendants that would not be admissible if he were tried separately, much less advance an argument for why a jury would be unable to segregate such evidence. “Evidence at the joint trial of alleged co-conspirators that, because of the alleged conspiratorial nature of the illegal activity, would have been admissible at a separate trial of the moving defendant is neither spillover nor prejudicial.” United States v. Rosa, 11 F.3d 315, 341 (2d Cir. 1993), cert. denied, 511 U.S. 1042 (1994). Defendant Pena's failure to identify specific evidence relevant to this ground makes it insufficient to establish prejudice.

3. Disparity of Evidence and Culpability

Defendant Rotger's argument regarding the disparity of evidence is also without merit. “It is well established that 'differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials.'” Chang An-Lo, 851 F.2d at 557

(quoting United States v. Carson, 702 F.2d 351, 366-67 (2d Cir.), cert. denied, 462 U.S. 1108 (1983)); see also United States v. Cardascia, 951 F.2d 474, 483 (2d Cir. 1991); cf. Jimenez, 824 F. Supp. at 368 (holding that "[a]lthough there may be differences in the degree of guilt and possibly notoriety of the defendants, that is not sufficient grounds for separate trials"). Furthermore, the fact that one defendant played a comparatively lesser role in the charged conspiracy does not mean that evidence showing the full scope of the enterprise cannot properly be admitted against that defendant. Where, as here, each defendant is alleged to be a member of a single drug conspiracy, "virtually all of the evidence admitted at a joint trial would be admissible against each separate defendant in a separate trial as acts of his co-conspirators in furtherance of the charged conspiracy." Jimenez, 824 F. Supp. at 368. Therefore, Defendant's arguments diminishing his role in the case and claiming that large portions of the evidence do not directly involve him are meritless.

4. Antagonistic Defenses

Defendants' claims of antagonistic defenses are equally unavailing. "Mutually antagonistic defenses are not prejudicial per se." Zafiro, 506 U.S. at 538. The mere existence of conflicting defenses or the fact that co-defendants seek to place blame on each other is not the type of antagonism requiring severance. See Villegas, 899 F.2d at 1346; United States v. Alvarado, 882 F.2d 645, 656 (2d Cir. 1989). If that were true,

"a virtual ban on multidefendant conspiracy trials would ensue since co-conspirators raise many different and conflicting defenses." Cardascia, 951 F.2d at 484-85. Rather, to obtain severance on the ground of antagonistic defenses, "the defenses must conflict to the point of being so irreconcilable as to be mutually exclusive before we find such prejudice as denies defendants a fair trial." Id. at 484; see also Tutino, 883 F.2d at 1130. The Cardascia court further explained that "[d]efenses are mutually exclusive or irreconcilable if, in order to accept the defense of one defendant, the jury must of necessity convict a second defendant." Cardascia, 951 F.2d at 484.

Here, Defendant Rotger simply asserts that "on information and belief," his defense "may conflict" with the defenses of "several co-defendants." Defendant Pena states that he "may put forth a psychiatric defense" which would be compromised at a joint trial. These bare assertions do not even approach the standards set forth above. Neither Pena nor Rotger make any effort to show how or why their defenses would conflict with the defense of any co-defendant. Defendants provide no support for their claims that antagonistic defenses will arise at trial, and mere speculation about potentially inconsistent defenses at trial is insufficient to warrant severance.

5. "Bruton" Prejudice

Finally, Defendant Pena's claim of potential Bruton prejudice is without merit. Pena fails to identify any

confession by a co-conspirator, implicating him, that the Government intends to introduce at trial. Furthermore, the Government represents that it is unaware of any such confession.

III. CONCLUSION

In sum, Defendants have failed to overcome the preference for joint trials because they made no specific showing of prejudice sufficient to compromise a specific trial right, to prevent a jury from making a reliable judgment, or to otherwise cause a miscarriage of justice. Accordingly, for the reasons set forth above, Defendants' Motions for Severance [Doc. Nos. 449 and 492] are denied as to Movants and as to all defendants adopting such motions.

So ordered.

Ellen Bree Burns,
Senior District Judge

Dated at New Haven, Connecticut, this ___ day of November, 2000.